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AND

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The Rt. Hon. Lord Porter
(resigned Oct. 13, 1954)
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Citation

These reports are cited thus:

[1954] 3 All E. R.

CASES REPORTED IN VOLUME 3

	PAGE		PAGE
ADLER v. DICKSON [Q.B.D.]	21	COMPANIA NAVIERA MAROPAN S.A. v. BOWATERS	
—, [C.A.]	397	LLOYD PULP AND PAPER MILLS, LTD. [Q.B.D.]	563
ALVION STEAMSHIP CORPORATION PANAMA v.		COMPOSERS, AUTHORS AND PUBLISHERS ASSO-	
GALBAN LOBO TRADING COMPANY S.A. OF		CIATION OF CANADA, LTD., ASSOCIATED	
HAVANA [Q.B.D.]	324	BROADCASTING CO., LTD. v. [P.C.] ..	708
ANDERSON v. LAMBIE [H.L.]	157	CONSETT IRON CO., LTD., MARTELL v. [Ch.D.] ..	339
ASSOCIATED BROADCASTING CO., LTD. v. COM-		CONSOLIDATED PRESS, LTD., CAPE (JONATHAN),	
POSERS, AUTHORS AND PUBLISHERS ASSOCIA-		LTD. v. [Q.B.D.]	253
TION OF CANADA, LTD. [P.C.]	708	COOPER v. COOPER [Div.]	358
ATTORNEY-GENERAL FOR ONTARIO v. WINNER		COOPER v. COOPER [Div.]	415
[P.C.]	177	CORDING v. HALSE [Q.B.D. DIVL. CT.] ..	287
BAMBRIDGE v. INLAND REVENUE COMRS.		COX, <i>Ex parte</i> . R. v. NATIONAL INSURANCE	
[Ch.D.]	86	COMR. [Q.B.D. DIVL. CT.]	292
—, [C.A.]	682	CRAXFORDS (RAMSGATE), LTD. v. WILLIAMS &	
BAMBOSE v. DANIEL [P.C.]	263	STEER MANUFACTURING CO., LTD. [Q.B.D.] ..	17
BARCLAYS BANK, LTD., BUTE (MARQUESS) v.		CROSSLEY (A DEBTOR), Re [Ch.D.]	296
[Q.B.D.]	365	DADSWELL, INLAND REVENUE COMRS. v. [Ch.D.]	243
BARCLAYS BANK, LTD. v. ROBERTS [C.A.] ..	107	DADSWELL, SEVERNE (INSPECTOR OF TAXES) v.	
BARNETT v. BARNETT [Div.]	689	[Ch.D.]	243
BARTELS, PEARLMAN (VENEERS) S.A. (PTY.),		DANIEL, BAMBOSE v. [P.C.]	263
LTD. v. [C.A.]	659	DAVIES, R. v. [C.C.A.]	335
BATES v. STONE PARISH COUNCIL [C.A.] ..	38	DAVIES, TURNER & CO., LTD. v. BRODIE	
BENEWITH, SURTEES v. [Q.B.D. DIVL. CT.]	261	[Q.B.D. DIVL. CT.]	283
BERNETT, HERSON v. [Q.B.D.]	370	DAWSON, REID v. [C.A.]	498
BIRMINGHAM CORPN., PRESCOTT v. [Ch.D.]	299	DEBTOR (No. 20 of 1953), Re A. <i>Ex parte</i>	
—, [C.A.]	698	THE DEBTOR v. SCOTT [C.A.]	74
BITHELL v. BITHELL [MANCHESTER SUMMER		DEVERALL v. GRANT ADVERTISING, INCOR-	
ASSIZES]	171	PORATED [C.A.]	389
BOCOCH v. ENFIELD ROLLING MILLS, LTD. [C.A.]	94	DICKSON, ADLER v. [Q.B.D.]	21
BOUND, MONSON (LORD) v. [Q.B.D.]	228	—, [C.A.]	397
BOWATERS LLOYD PULP AND PAPER MILLS,		DIRECTOR OF PUBLIC PROSECUTIONS, LOVE-	
LTD., COMPANIA NAVIERA MAROPAN S.A. v.		LACE v. [Q.B.D. DIVL. CT.]	481
[Q.B.D.]	563	DRUMMOND v. BRITISH BUILDING CLEANERS,	
BOWLER v. MOWLEM (JOHN) & CO., LTD. [C.A.]	556	LTD. [C.A.]	507
BRAVERY v. BRAVERY [C.A.]	59	DUNNE v. SABAN (FORMERLY DUNNE) [Div.] ..	586
BRITISH & CONTINENTAL FUR CO., LTD.,		EAST YORKSHIRE GRAVEL CO., LTD.'S APPLICA-	
MAERKLE v. [C.A.]	50	TION, Re [Ch.D.]	631
BRITISH BUILDING CLEANERS, LTD., DRUM-		EASTAUGH v. MACPHERSON [C.A.]	214
MOND v. [C.A.]	507	EASTLAND v. EASTLAND [Div.]	159
BRITISH NYLON SPINNERS, LTD. v. IMPERIAL		ENFIELD ROLLING MILLS, LTD., BOCOCH v.	
CHEMICAL INDUSTRIES, LTD. [Ch.D.] ..	88	[C.A.]	94
BRITISH OVERSEAS AIRWAYS CORPN., WIMPEY		ETAM, LTD. v. FORTE [C.A.]	311
(GEORGE) & CO., LTD. v. [H.L.]	661	FOLLETT (<i>dec'd.</i>), Re [Ch.D.]	478
BRITISH TRADERS AND SHIPPERS, LTD., CHAO		FORBES v. FORBES [Div.]	461
(TRADING AS ZUNG FU CO.) v. (N.V. HANDELS-		FORSTER'S SETTLEMENT, Re [Ch.D.]	714
MAATSCHAPPIJ J. SMITS IMPORT-EXPORT THIRD		FORTE, ETAM, LTD. v. [C.A.]	311
PARTY) [Q.B.D.]	165	FOX v. FOX [Div.]	526
BRITTEN, STEVENS v. [C.A.]	385	GALBAN LOBO TRADING COMPANY S.A. OF	
BRIXHAM URBAN DISTRICT COUNCIL, Re		HAVANA, ALVION STEAMSHIP CORPORATION	
APPLICATIONS BY [Q.B.D. DIVL. CT.] ..	561	PANAMA v. [Q.B.D.]	324
BROADWAY COTTAGES TRUST, INLAND REVENUE		GRANT ADVERTISING, INCORPORATED, DEVERALL	
COMRS. v. [C.A.]	120	v. [C.A.]	389
BRODIE, DAVIES, TURNER & CO., LTD. v.		GREEN v. BURNETT [Q.B.D. DIVL. CT.] ..	273
[Q.B.D. DIVL. CT.]	283	GREENBAUM, ORMAN BROTHERS, LTD. v.	
BROWN v. TROY (F.) & CO., LTD. [Q.B.D.]	19	[Q.B.D.]	731
BULLOCK v. LLOYDS BANK, LTD. [Ch.D.] ..	726	HALL'S SETTLEMENT, Re [C.A.]	435
BURNETT, GREEN v. [Q.B.D. DIVL. CT.] ..	273	HALSE, CORDING v. [Q.B.D. DIVL. CT.] ..	287
BURTON'S SETTLEMENT, Re [Ch.D.]	193	HANDELSMAATSCHAPPIJ J. SMITS IMPORT-	
BURTON'S SETTLEMENT TRUSTS, Re [Ch.D.] ..	231	EXPORT, THIRD PARTY. CHAO (TRADING AS	
BUTE (MARQUESS) v. BARCLAYS BANK, LTD.		ZUNG FU CO.) v. BRITISH TRADERS AND	
[Q.B.D.]	365	SHIPPERS, LTD. [Q.B.D.]	165
BUTTERLEY CO., LTD., INLAND REVENUE		HARTLEY BAIRD, LTD., Re [Ch.D.]	695
COMRS. v. [Ch.D.]	69	HEALEY v. MINISTRY OF HEALTH [C.A.] ..	449
BYCROFT, UNITED DOMINIONS TRUST, LTD. v.		HEASMAN v. JORDAN (INSPECTOR OF TAXES)	
[C.A.]	455	[Ch.D.]	101
CAMERON (<i>dec'd.</i>), Re [Ch.D.]	329	HEELEX INVESTMENTS, LTD. v. INLAND REVENUE	
CAPE (JONATHAN), LTD. v. CONSOLIDATED PRESS,		COMRS. [Ch.D.]	379
LTD. [Q.B.D.]	253	HERSON v. BERNETT [Q.B.D.]	370
CARTWRIGHT, SHEPARD v. [H.L.]	649	HOOKE'S SETTLEMENT, Re [Ch.D.]	321
CHAO (TRADING AS ZUNG FU CO.) v. BRITISH		HUGHES AND VALE PROPRIETARY, LTD. v.	
TRADERS AND SHIPPERS, LTD. (N.V. HANDELS-		STATE OF NEW SOUTH WALES (THE COMMON-	
MAATSCHAPPIJ J. SMITS IMPORT-EXPORT		WEALTH OF AUSTRALIA, INTERVENER) [P.C.] ..	607
THIRD PARTY) [Q.B.D.]	165	HUYTON-WITH-ROBY URBAN DISTRICT COUNCIL,	
CHAPMAN v. CHAPMAN [Div.]	116	<i>Ex parte</i> . R. v. LANCASHIRE QUARTER SESSIONS	
CITY OF LONDON LICENSING JUSTICES, R. v.		APPEAL COMMITTEE [Q.B.D. DIVL. CT.] ..	225
<i>Ex parte</i> STEWART [Q.B.D. DIVL. CT.] ..	270		

	PAGE		PAGE
IMPERIAL CHEMICAL INDUSTRIES, LTD., BRITISH NYLON SPINNERS, LTD. v. [CH.D.]	88	PRACTICE DIRECTIONS (CHANCERY PROCEEDINGS) [CH.D.]	364
INDONESIA (GOVERNMENT OF THE REPUBLIC OF), JUAN YSMAEL & CO. INCORPORATED v. [P.C.]	236	PRESCOTT v. BIRMINGHAM CORPN. [CH.D.]	299
INLAND REVENUE COMRS., BAMBRIDGE v. [CH.D.]	86	—, [C.A.]	698
—, [C.A.]	682	PUBLIC PROSECUTOR, WONG POOH YIN, ALIAS KWANG SIN, ALIAS KAR SIN v. [P.C.]	31
INLAND REVENUE COMRS. v. BROADWAY COTTAGES TRUST [C.A.]	120	PYE v. MINISTER FOR LANDS FOR NEW SOUTH WALES [P.C.]	514
INLAND REVENUE COMRS. v. BUTTERLEY CO., LTD. [CH.D.]	69	R. v. CITY OF LONDON LICENSING JUSTICES, <i>Ex parte</i> STEWART [Q.B.D. DIVL. CT.]	270
INLAND REVENUE COMRS. v. DADSWELL [CH.D.]	243	R. v. DAVIES [C.C.A.]	335
INLAND REVENUE COMRS., HEELEX INVESTMENTS, LTD. v. [CH.D.]	379	R. v. LANCASHIRE QUARTER SESSIONS APPEAL COMMITTEE, <i>Ex parte</i> HUYTON-WITH-ROBY URBAN DISTRICT COUNCIL [Q.B.D. DIVL. CT.]	225
INLAND REVENUE COMRS. v. SUNNYLANDS TRUST [C.A.]	120	R. v. NATIONAL INSURANCE COMR. <i>Ex parte</i> COX [Q.B.D. DIVL. CT.]	292
IVENS v. IVENS [C.A.]	446	R. v. NATIONAL INSURANCE COMR. <i>Ex parte</i> JAMES [Q.B.D. DIVL. CT.]	292
JAMES, <i>Ex parte</i> . R. v. NATIONAL INSURANCE COMR. [Q.B.D. DIVL. CT.]	292	R. v. NATIONAL INSURANCE COMR. <i>Ex parte</i> TIMMIS [Q.B.D. DIVL. CT.]	292
JAMES & SON, LTD. v. SMEE [Q.B.D. DIVL. CT.]	273	R. v. NUNEATON JUSTICES, <i>Ex parte</i> PARKER [Q.B.D. DIVL. CT.]	251
JONES v. JONES [DIV.]	476	RANDS v. MCNEIL [C.A.]	593
JONES BROTHERS (HUNSTANTON), LTD. v. STEVENS [C.A.]	677	RAZZEL v. SNOWBALL [C.A.]	429
JORDAN (INSPECTOR OF TAXES), HEASMAN v. [CH.D.]	101	REID v. DAWSON [C.A.]	498
KEATS v. LONDON COUNTY COUNCIL [Q.B.D. DIVL. CT.]	303	RICHMOND v. MCGANN [Q.B.D.]	97
KESTEVEN COUNTY COUNCIL, WATT v. [Q.B.D.]	441	RIGBY, MOUSLEY v. [CH.D.]	553
KING v. TAYLOR [C.A.]	373	ROBERTS, BARCLAYS BANK, LTD. v. [C.A.]	107
LADD v. MARSHALL [C.A.]	745	ROBERTSON v. ROBERTSON [DIV.]	413
LAMBIE, ANDERSON v. [H.L.]	157	RYDON MARRIAGE SETTLEMENT, Re [C.A.]	1
LANCASHIRE QUARTER SESSIONS APPEAL COMMITTEE, R. v. <i>Ex parte</i> HUYTON-WITH-ROBY URBAN DISTRICT COUNCIL [Q.B.D. DIVL. CT.]	225	S. v. S. (OTHERWISE C.) [DIV.]	736
LANG v. LANG [P.C.]	571	S. M. T. (EASTERN), LTD., WINNER v. [P.C.]	177
LAPFORD, Re [CT. OF ARCHES]	484	SABAN (FORMERLY DUNNE), DUNNE v. [DIV.]	586
LASZCZYK v. NATIONAL COAL BOARD [MANCHESTER ASSIZES]	205	SECRETARY OF STATE FOR AIR, WATSON v. [C.A.]	582
LE ROY-LEWIS v. LE ROY-LEWIS [DIV.]	57	SEVERNE (INSPECTOR OF TAXES) v. DADSWELL [CH.D.]	243
LEES (J. W.) (BREWERS), LTD., SHAVE v. [C.A.]	249	SHARPE, PATRICK (JAMES) & CO. PROPRIETARY, LTD. v. [P.C.]	216
LEVEN (EARL) (decd.), Re [CH.D.]	81	SHAVE v. LEES (J. W.) (BREWERS), LTD. [C.A.]	249
LEWIS (decd.), Re [CH.D.]	257	SHEPARD v. CARTWRIGHT [H.L.]	649
LLOYDS BANK, LTD., BULLOCK v. [CH.D.]	726	SINASON-TEICHER INTER-AMERICAN GRAIN CORPN. v. OILCAKES AND OILSEEDS TRADING CO., LTD. [C.A.]	468
LONDON COUNTY COUNCIL, KEATS v. [Q.B.D. DIVL. CT.]	303	SMEE, JAMES & SON, LTD. v. [Q.B.D. DIVL. CT.]	273
LOVELACE v. DIRECTOR OF PUBLIC PROSECUTIONS [Q.B.D. DIVL. CT.]	481	SNOWBALL, RAZZEL v. [C.A.]	429
MCGANN, RICHMOND v. [Q.B.D.]	97	SPICER v. SPICER (RYAN INTERVENING) [DIV.]	208
MCNEIL, RANDS v. [C.A.]	593	STATE OF NEW SOUTH WALES, HUGHES AND VALE PROPRIETARY, LTD. v. (THE COMMONWEALTH OF AUSTRALIA, INTERVENER) [P.C.]	607
MCIPHERSON, EASTAUGH v. [C.A.]	214	STEVENS v. BRITTEN [C.A.]	385
MAERKLE v. BRITISH & CONTINENTAL FUR CO., LTD. [C.A.]	50	STEVENS, JONES BROTHERS (HUNSTANTON), LTD. v. [C.A.]	677
MARSHALL, LADD v. [C.A.]	745	STEWART, <i>Ex parte</i> . R. v. CITY OF LONDON LICENSING JUSTICES [Q.B.D. DIVL. CT.]	270
MARTELL v. CONSETT IRON CO., LTD. [CH.D.]	339	STONE PARISH COUNCIL, BATES v. [C.A.]	38
MINISTER FOR LANDS FOR NEW SOUTH WALES, PYE v. [P.C.]	514	STOW BARDOLPH GRAVEL CO., LTD. v. POOLE (INSPECTOR OF TAXES) [C.A.]	637
MINISTER OF AGRICULTURE AND FISHERIES, WOOLLETT v. [C.A.]	529	SUNNYLANDS TRUST, INLAND REVENUE COMRS. v. [C.A.]	120
MINISTRY OF HEALTH, HEALEY v. [C.A.]	449	SURTEES v. BENEWITH [Q.B.D. DIVL. CT.]	261
MINSTER TRUST, LTD. v. TRAPS TRACTORS, LTD. [Q.B.D.]	136	SWYMER v. SWYMER [DIV.]	114
MONSON (LORD) v. BOUND [Q.B.D.]	228	—, [C.A.]	502
MORLEY v. WOOLFSON [CH.D.]	378	TAYLOR, KING v. [C.A.]	373
MOUSLEY v. RIGBY [CH.D.]	553	TIMMIS, <i>Ex parte</i> . R. v. NATIONAL INSURANCE COMR. [Q.B.D. DIVL. CT.]	292
MOWLEM (JOHN) & CO., LTD., BOWLER v. [C.A.]	556	TOVEY v. TYACK [C.A.]	210
MURRAY (decd.), Re [C.A.]	129	TRAPS TRACTORS, LTD., MINSTER TRUST, LTD. v. [Q.B.D.]	136
NATIONAL COAL BOARD, LASZCZYK v. [MANCHESTER ASSIZES]	205	TROY (F.) & CO., LTD., BROWN v. [Q.B.D.]	19
NATIONAL INSURANCE COMR., R. v. <i>Ex parte</i> COX [Q.B.D. DIVL. CT.]	292	TYACK, TOVEY v. [C.A.]	210
NATIONAL INSURANCE COMR., R. v. <i>Ex parte</i> JAMES [Q.B.D. DIVL. CT.]	292	UNITED DOMINIONS TRUST, LTD. v. BYCROFT [C.A.]	455
NATIONAL INSURANCE COMR., R. v. <i>Ex parte</i> TIMMIS [Q.B.D. DIVL. CT.]	292	WATSON v. SECRETARY OF STATE FOR AIR [C.A.]	582
NUNEATON JUSTICES, R. v. <i>Ex parte</i> PARKER [Q.B.D. DIVL. CT.]	251	WATT v. KESTEVEN COUNTY COUNCIL [Q.B.D.]	441
OILCAKES AND OILSEEDS TRADING CO., LTD., SINASON-TEICHER INTER-AMERICAN GRAIN CORPN. v. [C.A.]	468	WEBER (decd.), Re [CH.D.]	712
ORMAN BROTHERS, LTD. v. GREENBAUM [Q.B.D.]	731	WELLS v. WELLS [C.A.]	491
OTTERWAY AND TRY, LTD., WINDSOR RURAL DISTRICT COUNCIL v. [Q.B.D.]	721	WILLIAMS & STEER MANUFACTURING CO., LTD., CRAXFORDS (RAMSGATE), LTD. v. [Q.B.D.]	17
OVERBURY (decd.), Re [CH.D.]	308	WIMPEY (GEORGE) & CO., LTD. v. BRITISH OVERSEAS AIRWAYS CORPN. [H.L.]	661
PALMER v. PALMER [C.A.]	494	WINDSOR RURAL DISTRICT COUNCIL v. OTTERWAY AND TRY, LTD. [Q.B.D.]	721
PARKER, <i>Ex parte</i> . R. v. NUNEATON JUSTICES [Q.B.D. DIVL. CT.]	251	WINNER, ATTORNEY-GENERAL FOR ONTARIO v. [P.C.]	177
PATRICK (JAMES) & CO., PROPRIETARY, LTD. v. SHARPE [P.C.]	216	WINNER v. S.M.T. (EASTERN), LTD. [P.C.]	177
PEARLMAN (VENEERS) S.A. (PTY.), LTD. v. BARTELS [C.A.]	659	WONG POOH YIN, ALIAS KWANG SIN, ALIAS KAR SIN v. PUBLIC PROSECUTOR [P.C.]	31
POOLE (INSPECTOR OF TAXES), STOW BARDOLPH GRAVEL CO., LTD. v. [C.A.]	637	WOOLFSON, MORLEY v. [CH.D.]	378
		WOOLLARD v. WOOLLARD [DIV.]	351
		WOOLLETT v. MINISTER OF AGRICULTURE AND FISHERIES [C.A.]	529
		YSMAEL (JUAN) & CO. INCORPORATED v. GOVERNMENT OF THE REPUBLIC OF INDONESIA [P.C.]	236

INDEX

	PAGE
ADVANCEMENT See GIFT.	
AFFIDAVIT Practice direction. See PRACTICE (Chancery proceedings).	
AGENT Liability as principal— <i>Undisclosed principal—Action for return of purchase money—Principal named in defence—Rejection of evidence as to identity of principal</i> [HERSON v. BERNETT] ..	370
AGRICULTURAL HOLDING See AGRICULTURE.	
AGRICULTURAL LAND Compulsory acquisition. See AGRICULTURE.	
AGRICULTURAL LAND TRIBUNAL Appointment of members— <i>Two members not appointed by Minister of Agriculture—Validity of proceedings—Agriculture Act, 1947 (c. 48), sched. IX, para. 15</i> [WOOLLETT v. MINISTER OF AGRICULTURE AND FISHERIES] ..	529
<i>Two nominated members appointed by civil servant in Ministry of Agriculture employed as secretary of tribunal—Validity of proceedings—Agriculture Act, 1947 (c. 48), sched. IX, para. 15, para. 20 (2)</i> [WOOLLETT v. MINISTER OF AGRICULTURE AND FISHERIES] ..	529
AGRICULTURE Agricultural holding— <i>Land leased for horticultural purposes—One-third of land cultivated but land used chiefly for the purposes of a retail shop—Agricultural Holdings Act, 1948 (c. 63), s. 1 (1)</i> [MONSON (LORD) v. BOUND] ..	228
<i>Letting for grazing for period of 264 days—Whether a "specified period of the year"—Agricultural Holdings Act, 1948 (c. 63), s. 2 (1), proviso</i> [REID v. DAWSON] ..	498
Compulsory acquisition of agricultural land— <i>Proposed certificate for retention of land in the interests of agricultural production—Reference to agricultural land tribunal—"Defect in the appointment" of tribunal—Minister's certificate issued—Application to court not within six weeks of notice of certificate—Acquisition of Land (Authorisation Procedure) Act, 1946 (c. 49), s. 1, sched. I, para. 16—Agriculture Act, 1947 (c. 48), s. 85, s. 92, sched. IX, para. 20 (2)</i> [WOOLLETT v. MINISTER OF AGRICULTURE AND FISHERIES] ..	529
AIDING AND ABETTING Carriage of goods for hire— <i>Failure to comply with conditions of A licence—Hirer making reasonable inquiries</i> [DAVIES, TURNER & CO., LTD. v. BRODIE] ..	283
ALLUREMENT Child. See CHILD.	
ANIMAL Domestic animal— <i>Bull of known fierce disposition—Attack on owner's employee—Duty of owner</i> [RANDS v. MCNEIL] ..	593
ANNUITY Rights as to property charged— <i>Continuing charge on income—Gift of share of income of trust fund to be made up to minimum sum</i> [Re CAMERON (decd.)] ..	329
APPEAL County court, from. See COUNTY COURT. Further evidence. See COURT OF APPEAL (Further evidence). Jurisdiction of court— <i>Appeal from Minister to whom determination referred by statute—No right of appeal unless conferred by statute</i> [HEALEY v. MINISTRY OF HEALTH] ..	449
Rent restriction— <i>Hardship—Change of circumstances pending appeal. See RENT RESTRICTION (Possession—Hardship).</i>	
APPOINTMENT Power of. See POWER OF APPOINTMENT.	
ARBITRATION Building contract. See BUILDING CONTRACT. Special case— <i>Duties of arbitrator—Arbitration Act, 1950 (c. 27), s. 21 (1) (a)</i> [WINDSOR RURAL DISTRICT COUNCIL v. OTTERWAY AND TRY, LTD.] ..	721
ARBITRATOR Duties of. See ARBITRATION (Special case).	
ARCHITECT Certificate. See BUILDING CONTRACT (Arbitration).	
ARTICLES OF ASSOCIATION See COMPANY.	
ASSIGNMENT Copyright, of. See COPYRIGHT.	
ASSISTED PERSON See LEGAL AID.	
AUMBRY Church ornament— <i>Legality. See ECCLESIASTICAL LAW.</i>	
AUSTRALIA See PRIVY COUNCIL.	
BANK <i>Crossed warrant for payment—Conversion—Order to "Pay A for B"—"True owner" of warrant—No estoppel—Duty of bank to make inquiry—Bills of Exchange Act, 1882 (c. 61), s. 82</i> [BUTE (MARQUESS) v. BARCLAYS BANK, LTD.] ..	365
Guarantee or letter of credit— <i>Payment for goods. See SALE OF GOODS (Payment).</i>	

	PAGE
BANKRUPTCY	
Costs. <i>See</i> COSTS.	
Debt—Judgment debt—Damages and costs—Costs not taxed and thus not a liquidated sum at date of act of bankruptcy—Petition based on aggregate of damages and costs—Costs not available as debt at date of act of bankruptcy—Common law of bankruptcy—Bankruptcy Act, 1914 (c. 50), s. 4 (1), s. 5 (2) [Re A DEBTOR (No. 20 of 1953), <i>Ex parte</i> THE DEBTOR v. SCOTT] ..	74
Transfer of proceedings—Transfer from county court to High Court to enable petitioning creditor to receive legal aid—Bankruptcy Rules, 1952 (S.I. 1952 No. 2113), r. 21 [Re CROSSLEY (A DEBTOR)] ..	206
BENEFIT TO COMMUNITY	
Charitable object. <i>See</i> CHARITY.	
BLIND PERSON	
Gift to blind children, whether charitable. <i>See</i> CHARITY (Benefit to community—Impotent person).	
BOY SCOUTS	
Charity. <i>See</i> CHARITY (Education—Gift for furthering the "Boy Scouts Movement").	
BUILDING	
Building regulations—Safe means of access to work—Injury to person crossing plank six inches from ground—Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948 No. 1145), reg. 5 [BROWN v. F. TROY & CO., LTD.] ..	19
BUILDING CONTRACT	
Attitutation—Architect's final certificate—Jurisdiction of arbitrator to review and revise—R.I.B.A. Standard Form of Contract No. 6, Conditions, cl. 24 (f), cl. 27 [WINDSOR RURAL DISTRICT COUNCIL v. OTTERWAY AND TRY, LTD.] ..	721
CANADA	
<i>See</i> PRIVY COUNCIL.	
CARRIAGE BY SEA	
<i>See</i> SHIPPING.	
CARRIAGE FOR HIRE	
<i>See</i> CARRIAGE OF GOODS.	
CARRIAGE OF GOODS	
Carriage for hire—Failure to comply with conditions of A licence—Aiding and abetting—Hiver making reasonable inquiries—Road and Road Traffic Act, 1933 (c. 53), s. 9 (c) [DAVIES, TURNER & CO., LTD. v. BROTH] ..	238
CERTIFICATE	
Condition or quality, of—Certificates "in rem" and "in personam." <i>See</i> SALE OF GOODS (Condition).	
CHARITY	
Benefit to community—Impotent person—Gifts to each of ten blind children—Charitable Uses Act, 1601 (43 Eliz. 1 c. 4), preamble [Re LEWIS (decd.)] ..	257
Education—Gift for furthering the "Boy Scouts Movement", by helping to purchase camping sites and outfits [Re WHERRIE (decd.)] ..	71
CHARTERPARTY	
<i>See</i> SHIPPING.	
CHILD	
Negligence—Allurement—Children's playground controlled by local authority and open to children of all ages—Chute with platform—Child of three years falling through gap between rails and floor of platform—Liability of local authority—Foreseeable danger—Similar accident in 1934—Damages—Injuries resulting in blindness [BATES v. STONE PARISH COUNCIL] ..	38
CHURCH	
Ornaments. <i>See</i> ECCLESIASTICAL LAW.	
COAL MINING	
Breach of statutory duty by employer—Breach by employee of statutory directions—Negligence of employer—Contributory negligence of employee—Exemption of liability—Coal Mines Act, 1911 (c. 50), s. 7—Coal Mines (Training) Orders, Regulations, 1943 (S.I. 1943 No. 1217), reg. 4 (1) (c) [HASCZYK v. NATIONAL COAL BOARD] ..	205
Nationalisation of industry—Colliery company—Interim income payments, revenue payments, further revenue payments pending satisfaction of compensation—Profits tax—Coal Industry Nationalisation Act, 1946 (c. 59), s. 22 (2), (3)—Coal Industry (No. 2) Act, 1949 (c. 79), s. 1 (2) [IRELAND REVENUE COMMISSION v. BUTTERLEY CO., LTD.] ..	69
COMPANY	
Foreign company—Service of writ on company—No place of business in Great Britain—Service of address alleged to be former place of business—Validity of service—Companies Act, 1948 (c. 58), s. 412 [DEFERALL v. GRANT ADVERTISING, INCORPORATED] ..	389
Fraud by officer of company going into liquidation. <i>See</i> CRIMINAL LAW (Fraud).	
Meeting—Quorum—Quorum present when meeting proceeded to business but not when vote taken [Re HARTLEY BAIRD, LTD.] ..	695
Shares—Valuation for estate duty. <i>See</i> ESTATE DUTY.	
COMPENSATION	
Compulsory purchase. <i>See</i> COMPULSORY PURCHASE.	
COMPULSORY PURCHASE	
Agricultural land, of. <i>See</i> AGRICULTURE.	
Compensation—Assessment—Agricultural holding—Yearly tenancy—Acquisition of Land (Assessment of Compensation) Act, 1919 (c. 57), s. 2, r. (2), r. (6) [WATSON v. SECRETARY OF STATE FOR AIR] ..	582
CONDITION	
Will, in. <i>See</i> WILL.	
CONDONATION	
<i>See</i> DIVORCE.	

CONFLICT OF LAWS	PAGE
Divorce. <i>See</i> DIVORCE.	
Foreign judgment—Recognition by English courts—Judgment of American court affecting rights of English company in regard to English patents—English company neither subject to jurisdiction of American court nor party to proceedings therein—Specific performance of agreement to grant patent licences [BRITISH NYLON SPINNERS, LTD. v. IMPERIAL CHEMICAL INDUSTRIES, LTD.]	88
Impleading foreign sovereign state—Shipping—Claim by foreign sovereign state to ownership of, or interest in, ship—Evidence of interest of foreign sovereign state needed before proceedings stayed [JUAN YSMAEL & CO. INCORPORATED v. GOVERNMENT OF THE REPUBLIC OF INDONESIA, SAME v. SAME]	236
CONSTRUCTIVE DESERTION	
<i>See</i> DIVORCE ; JUSTICES.	
CONTRACT	
Breach—Damages—Measure—Date for and method of assessment—Sale of goods c.i.f.—Shipmen after contract date—Forged date on bills of lading—Goods accepted by buyers with knowledge of late shipment—Fall in market price of goods—Discovery of forgery—Goods virtually unsaleable [CHAO v. BRITISH TRADERS AND SHIPPERS, LTD. (N.V. HANDELSMAATSCHAPPIJ J. SMITS IMPORT—EXPORT THIRD PARTY)]	165
Exception clause. <i>See</i> NEGLIGENCE (Exclusion of liability).	
Procurement of breach. <i>See</i> MASTER AND SERVANT (Loss of service).	
CONTRIBUTION	
Joint tortfeasors. <i>See</i> TORT.	
CONTRIBUTORY NEGLIGENCE	
<i>See</i> NEGLIGENCE.	
COPYRIGHT	
Assignment—Partial assignment—Author agreeing to grant to plaintiffs exclusive right to print and publish an original work in volume form—Publication by defendants of same work in weekly magazine—Infringement—Right of plaintiffs to sue alone—Copyright Act, 1911 (c. 46), s. 5 (2), (3) [JONATHAN CAPE, LTD. v. CONSOLIDATED PRESS, LTD.]	253
COSTS	
Bankruptcy—Petition based on judgment debt for damages and costs—Costs not taxed at date of act of bankruptcy—Costs not available as debt for purposes of bankruptcy petition [Re A DEBTOR (No. 20 of 1953), <i>Ex parte</i> THE DEBTOR v. SCOTT]	74
Legal aid. <i>See</i> LEGAL AID.	
COUNTY COURT	
Appeal—Damages—Personal injuries—Excessive damages—No right of appeal in absence of error of law [SHAVE v. J. W. LEES (BREWERS), LTD.]	212
Raising in Court of Appeal of point of law not argued in court below—Legality of promissory note [UNITED DOMINIONS TRUST, LTD. v. BYCROFT]	455
COURT	
Consent—Person cannot impose duty on court to give consent [Re HOOKER'S SETTLEMENT]	231
COURT OF APPEAL	
County court—Appeal from. <i>See</i> COUNTY COURT.	
Damages—Assessment by jury—Test for intervention by appellate court [DOCKREY v. ENFIELD ROLLING MILLS, LTD.]	84
Further evidence—Principle on which received—Evidence proffered by witness that her evidence at trial was not the truth—Whether fresh evidence presumably to be believed [LADD v. MARSHALL]	745
CRIMINAL LAW	
Fraud by officer of company going into liquidation—Fraudulent transfer by director—Attempted cancellation of indebtedness to company—Whether transfer of property—Companies Act, 1948 (c. 38), s. 330 (b) [R. v. DAVIES]	335
Fraudulent conversion—Director of "public company"—Company a private company within Companies Act, 1948 (c. 38)—Private company included in term "public company"—Larceny Act, 1916 (c. 50), s. 20 (1) (ii) [R. v. DAVIES]	335
Offence—Discretion of prosecutor over offence to be charged [R. v. NUNNATON JUSTICES, <i>Ex parte</i> PARKER]	281
CRUELTY	
Divorce proceedings, for. <i>See</i> DIVORCE.	
Persistent cruelty. <i>See</i> JUSTICES.	
CUSTODY	
Legal custody. <i>See</i> NATIONAL INSURANCE (Benefits).	
DAMAGES	
Assessment by jury, application for new trial. <i>See</i> COURT OF APPEAL.	
County court. <i>See</i> COUNTY COURT.	
Court of Appeal. <i>See</i> COURT OF APPEAL.	
Measure of damages—Breach of contract. <i>See</i> CONTRACT.	
Personal injuries. <i>See</i> CHILD (Negligence).	
DECLARATORY JUDGMENT	
Discretion of court—No cause of action vested in plaintiff [MAERKLE v. BRITISH & CONTINENTAL FUR CO., LTD.]	50
DESERTION	
<i>See</i> DIVORCE ; JUSTICES.	
DISCRETIONARY TRUST	
<i>See</i> SETTLEMENT.	
DISSOLUTION	
Partnership. <i>See</i> PARTNERSHIP.	

	PAGE
DIVORCE	
Condonation by husband—Adultery by wife—Several acts with one person— Resumption of sexual intercourse [WELLS v. WELLS]	491
Cruelty—Criminal conduct—Husband's convictions for crime—Justifiable remonstrances by wife—Unjust resentment by husband—Injury to wife's health [WOOLLARD v. WOOLLARD] ..	351
Indecent conduct towards step-daughter—Wife's health affected—No proof of intention to injure wife—Husband's presumed knowledge of likely effect [IVENS v. IVENS]	446
Meanness of the husband in money matters—Shiftlessness of the husband—Conduct not directed against, or aimed at, the wife—Matrimonial Causes Act, 1950 (c. 25), s. 1 (1) (c) [EASTLAND v. EASTLAND]	159
Respondent of unsound mind—Test of legal responsibility—The M'Naghten rules [PALMER v. PALMER]	494
Sexual offences by husband against third parties—Indecent assault by him on child of marriage [COOPER v. COOPER]	415
Sterilisation operation on husband—Consent of wife—Effect on wife's health—Matrimonial Causes Act, 1950 (c. 25), s. 1 (1) (c) [BRAVERY v. BRAVERY]	59
Wife's cruelty—Lesbianism alleged—Persistent friendship with other woman—Injury to husband's health [SPICER v. SPICER (RYAN INTERVENING)]	208
Desertion—Constructive desertion—Alleged belief in wife's adultery—Husband leaving matri- monial home after wife's request for his help—Desertion by husband [FORBES v. FORBES] ..	461
Continuance of desertion—Determination of deserted spouse not to take back deserting spouse— Effect [BARNETT v. BARNETT]	689
Foreign decree—Jurisdiction of foreign court based on separate domicile of wife and ninety days' residence by her—Decree not recognised by English court [DUNNE v. SABAN (FORMERLY DUNNE)]	586
Insanity—Incurable unsoundness of mind—Care and treatment for five years—Not "continuously" —Absence from institution to undergo treatment for fractured leg—Matrimonial Causes Act, 1950 (c. 25), s. 1 (1) (d), s. 1 (2) (d) [SWYMER v. SWYMER]	114, 502
Care and treatment for five years—Statement signed by visitors to the effect that it was proper that patient should continue to be detained—Detention under an order—Matri- monial Causes Act, 1950 (c. 25), s. 1 (1) (d), s. 1 (2) (a) (d)—Mental Treatment Act, 1930 (c. 23), s. 5 (10) [BITHELL v. BITHELL]	171
Urgency order—Matrimonial Causes Act, 1950 (c. 25), s. 1 (1) (d), s. 1 (2) (a) (d)— Lunacy Act, 1890 (c. 5), s. 11 (1) [CHAPMAN v. CHAPMAN]	116
Nullity. See NULLITY.	
Practice—Pleading—Answer—Amending answer by adding cross-petition alleging desertion— "Three years immediately preceding the presentation of the [cross]-petition"—Date of answer —Amendment by consent—Matrimonial Causes Act, 1950 (c. 25), s. 1 (1) (b) [ROBERTSON v. ROBERTSON]	413
Restitution of conjugal rights—Sincere wish for husband's return [WELLS v. WELLS]	491
DOMESTIC ANIMAL	
See ANIMAL.	
DOMESTIC PROCEEDINGS	
See JUSTICES.	
ECCLIASTICAL LAW	
Ornaments—Aumbry—Tabernacle—Reservation of the Sacrament—Reservation sanctioned by the bishop [Re LAFORCE]	484
EDUCATION	
Educational charity. See CHARITY.	
Local education authority—Grant towards tuition fees at school chosen by parents—Obligation to comply in accordance with the parents' wishes—Breach of statutory duty—No right of action— Education Act, 1944 (c. 31), s. 76 [WATT v. KESTIVEN COUNTY COUNCIL]	441
ENEMY	
Trading with. See TRADING WITH THE ENEMY.	
ENFORCEMENT NOTICE	
See TOWN AND COUNTRY PLANNING.	
EQUITABLE ASSIGNMENT	
Absence of consideration—Compliance with condition imposed on testamentary gift [Re BURTON'S SETTLEMENTS]	193
EQUITY	
Undue influence—Voluntary settlement—By unmarried girl shortly after coming of age—Parental influence—No independent advice—Laches [BULLOCK & LLOYDS BANK, LTD.]	726
ESTATE DUTY	
Debt—Full consideration—Disposition in favour of relatives—Disposition in favour of class including relatives and others—Date of ascertainment of objects—Exemption of liability of deceased—Finance Act, 1940 (c. 29), s. 44 (1) [Re LEVEN (EARL) (decd.)]	81
Gift inter vivos—Gift by way of settlement—Shares notionally passing on settlor's death—Valuation of shares—Finance Act, 1940 (c. 29), s. 55 (1) [Re HALL'S SETTLEMENT]	435
Valuation of shares in company—Gift inter vivos by way of settlement—Shares notionally passing on settlor's death—Finance Act, 1940 (c. 29), s. 55 (1) [Re HALL'S SETTLEMENT] ..	435
ESTOPPEL	
Res judicata. See RES JUDICATA.	
EVIDENCE	
Further evidence—Power of appellate court to receive. See COURT OF APPEAL (Further evidence).	
EXCESS PROFITS TAX	
Computation of profits—Discontinuance of trade—Payments for trading not finally settled— Subsequent gratuitous payments received—Re-opening of trading accounts [SEVERNE (INSPEC- TOR OF TAXES) v. DADSWELL, INLAND REVENUE COMRS. v. SAME]	243
EXECUTION	
Wrongful and irregular execution—Writ of possession—Judgment in respect of whole premises— Sub-tenant protected by Rent Restrictions Acts—Ejection of sub-tenant—Liability of landlord— R.S.C., Ord. 47, r. 1 [BARCLAYS BANK, LTD. v. ROBERTS]	107

FARM	
Animals, liabilities relating to. <i>See</i> ANIMAL.	
FATAL ACCIDENT	
Writ—Indorsement of claim—Claim by widow—Description as “administratrix” in title of writ—Letters of administration not granted when writ issued—No statement of representative capacity in indorsement—Validity of proceedings—Fatal Accidents Act, 1864 (c. 95), s. 1 [BOWLER v. JOHN MOWLEM & Co., LTD.]	356
FORECLOSURE	
<i>See</i> MORTGAGE.	
FOREIGN COMPANY	
<i>See</i> COMPANY.	
FOREIGN JUDGMENT	
Recognition by English courts. <i>See</i> CONFLICT OF LAWS.	
FOREIGN STATE	
Impleading. <i>See</i> CONFLICT OF LAWS.	
FRAUDULENT CONVERSION	
<i>See</i> CRIMINAL LAW.	
GIFT	
Acceptance—Advancement—Shares vested in children of donor—Children ignorant of transfers—Validity of gift [SHEPHARD v. CARTWRIGHT]	649
Inter vivos—Advancement—Father and children—Evidence to rebut presumption of advancement—Subsequent acts or events—Allotments of shares in names of children—Shares subsequently sold and proceeds treated by father as his own moneys—Other provision made for children [SHEPHARD v. CARTWRIGHT]	649
GUARANTEE	
Sale of goods—Payment—Bank guarantee—Time for issuing guarantee [SINASON-TEICHER INTER-AMERICAN GRAIN CORPN. v. OILCAKES AND OILSEEDS TRADING CO., LTD.]	468
HIRE-PURCHASE	
Agreement—Illegality—Promissory note as collateral security—Hire-Purchase Act, 1938 (c. 53), s. 5 (c) [UNITED DOMINIONS TRUST, LTD. v. BYCROFT]	455
HORTICULTURE	
Land leased for. <i>See</i> AGRICULTURE (Agricultural holding).	
HOUSE OF LORDS	
Legal aid—Costs—Respondent assisted person in court below—Unsuccessful in House of Lords [ANDERSON v. LAMBIE]	157
HUSBAND AND WIFE	
Cruelty. <i>See</i> DIVORCE.	
Maintenance—Application to High Court—“Reasonable maintenance”—Desertion of wife by husband—Wife under no duty to earn—Liability of husband—Matrimonial Causes Act, 1950 (c. 25), s. 23 (1) [LE ROY-LEWIS v. LE ROY-LEWIS]	57
Res judicata. <i>See</i> RES JUDICATA.	
INCOME TAX	
Annuity—Additional gift of amount of tax required to make up net income—Charge limited to income of a year [Re CAMERON (dec'd.)]	329
Assessment—Bonus salary—Years to which attributable—Income Tax Act, 1918 (c. 40), sched. E, r. 1, r. 5 [HEASMAN v. JORDAN (INSPECTOR OF TAXES)]	101
Avoidance—Transfer of assets to company in Canada—“Associated operations”—Whether in relation to any transfer of assets—Residuary bequest in will—Finance Act, 1936 (c. 34), s. 18 (1), (2) [BAMBRIDGE v. INLAND REVENUE COMRS.]	86, 682
Deduction in computing profits—Capital expenditure—Cost of acquiring deposits of sand and gravel—Gravel merchants' means of obtaining stock-in-trade—Income Tax Act, 1918 (c. 40), sched. D, Case I [STOW BARDOLPH GRAVEL CO., LTD. v. POOLE (INSPECTOR OF TAXES)]	637
Profits—Computation of profits—Discontinuance of trade—Payments for trading not finally settled—Subsequent gratuitous payments received—Re-opening of trading accounts—Income Tax Act, 1918 (c. 40), sched. D [SEVERNE (INSPECTOR OF TAXES) v. DADSWELL, INLAND REVENUE COMRS. v. SAME]	243
Settlement—Discretionary trust to pay income among unascertainable class—Certain members, including charities, ascertainable—Payments of income made to charities—Trust invalid but payments deemed to be authorised by settlor—Income not exempt from tax—Income Tax Act, 1918 (c. 40), s. 37 (b) [INLAND REVENUE COMRS. v. BROADWAY COTTAGES TRUST, SAME v. SUNNYLANDS TRUST]	120
INDEMNITY	
Partnership, of outgoing partner. <i>See</i> PARTNERSHIP (Dissolution).	
INSANITY	
Divorce on grounds of. <i>See</i> DIVORCE.	
<i>See also</i> DIVORCE (Cruelty).	
INSURANCE	
Motor insurance—Disqualification—“Special reasons” for refraining from disqualification—No “special reasons” found—Conditional discharge not applicable—Road Traffic Act, 1930 (c. 43), s. 35 (1), (2)—Criminal Justice Act, 1948 (c. 58), s. 7 (1) [SCUTEES v. BENEWITH]	261
INTOXICATING LIQUOR	
<i>See</i> LICENSING.	
JOINT TORTFEASORS	
<i>See</i> TORT.	
JUDGMENT	
Judicial decision as authority—Stare decisis—Conflict of judicial authorities—Appeal to Privy Council [HUGHES AND VALE PROPRIETARY, LTD. v. STATE OF NEW SOUTH WALES (THE COMMONWEALTH OF AUSTRALIA AND OTHERS, INTERVENERS)]	607
JUSTICES	
Desertion—Constructive desertion—Expulsive words—Previous cruelty charge dismissed—Repetition of evidence relating to expulsive words—Estoppel [COOPER v. COOPER]	358

JUSTICES—continued.	
Domestic proceedings— <i>Procedure—Party appearing in person and giving evidence—Unable effectually to cross-examine—Party's case not put to witnesses on other side—Duty of court—Magistrates' Courts Act, 1952 (c. 55), s. 61 [FOX v. FOX]</i>	526
Husband and wife— <i>Cruelty—Sexual offences by husband against third parties—Indecent assault by him on child of marriage [COOPER v. COOPER]</i>	415
Maintenance order— <i>Procedure. See Domestic proceedings, ante.</i>	
Wife's summons for maintenance— <i>Defence of reasonable belief in wife's adultery—Need for notice and particulars [JONES v. JONES]</i>	476
Summons— <i>Mandamus to issue—Discretion of prosecutor over offence charged [R. v. NUNEATON JUSTICES, Ex parte PARKER]</i>	251
LACHES	
<i>See EQUITY (Undue influence).</i>	
LANDLORD AND TENANT	
Agricultural land. <i>See AGRICULTURE (Agricultural holding).</i>	
New lease— <i>Application refused by tribunal and notice of appeal served by tenant before commencement of Landlord and Tenant Act, 1954—Proceedings . . . pending on an application . . . to the tribunal—Landlord and Tenant Act, 1954 (c. 56), sched. IX, para. 8 [ETAM, LTD. v. FORTE]</i>	311
Reasonableness of grant— <i>Covenant by tenant not to apply for new lease—Landlord and Tenant Act, 1927 (c. 36), s. 5 (2), s. 9 [ETAM, LTD. v. FORTE]</i>	311
Notice to quit— <i>Business premises—Notice given before operation of Landlord and Tenant Act, 1954—Notice expiring after Act in operation—Form of notice not that prescribed by Act—Validity of notice—Landlord and Tenant Act, 1954 (c. 56), s. 24 (1), (3) [ORMAN BROS., LTD. v. GREENBAUM]</i>	731
Construction— <i>Vacate office "by the date"—Ambiguity [EASTAUGH v. MACPHERSON]</i>	214
Recovery of possession, execution for. <i>See EXECUTION (Wrongful and irregular execution).</i>	
Repair— <i>Damages for failure to repair at end of tenancy—Allegation that tenancy of dwelling-house notionally continued by statute—Whether daughter residing in house "in right of the tenancy"—Leasehold Property (Temporary Provisions) Act, 1951 (c. 38), s. 2 (1) (a), s. 5 (1) (a) [RICHMOND v. MCGANN]</i>	97
Tenancy— <i>Long lease of dwelling-house—Alleged notional continuance by statute—Tenant not residing in dwelling-house—Tenant's daughter residing there and paying rent to tenant—Whether daughter residing "in right of the tenancy"—Leasehold Property (Temporary Provisions) Act, 1951 (c. 38), s. 2 (1) (a) [RICHMOND v. MCGANN]</i>	97
LASSECE v. TIERNEY, RULE IN	
<i>See SETTLEMENT; WILL.</i>	
LAY DAYS	
<i>See SHIPPING (Charterparty).</i>	
LEGAL AID	
Assisted person— <i>Trustee in bankruptcy—Proposed proceedings by petitioning creditor in name of trustee—Impropriety of joining petitioning creditor as co-applicant [Re CROSBY (A DEBTOR)]</i>	296
House of Lords— <i>Costs—Respondent assisted person in court below—Unsuccessful in House of Lords—Appearance in House of Lords not in forma pauperis [ANDERSON v. LAMBIE]</i>	157
LEGITIMACY	
Presumption of legitimacy— <i>Mother twice married—Child born within nine months of termination of first marriage by death of husband—Second marriage of mother before birth of child—Paternity of child [Re OVBURRY (decd.)]</i>	308
Succession, children's rights, polygamous unions. <i>See PRIVY COUNCIL (Nigeria—Legitimacy).</i>	
LESBIANISM	
<i>See DIVORCE (Cruelty).</i>	
LETTER OF CREDIT	
<i>See SALE OF GOODS (Payment).</i>	
LICENCE	
<i>See LICENSING.</i>	
LICENSING	
Licence— <i>Planning removal—Conditional confirmation of proposal by planning authority—Condition complied with—Duty to grant removal—Licensing Act, 1953 (c. 16), s. 38 (2) [R. v. CITY OF LONDON LICENSING JUSTICES, Ex parte STEWART]</i>	270
LIMITATION OF ACTION	
Public authority. <i>See PUBLIC AUTHORITY.</i>	
Trustee— <i>Father vesting shares in children—Subsequent dealing with shares and proceeds of sale of shares for his own benefit [SHEPHERD v. CARTWRIGHT]</i>	640
LOCAL AUTHORITY	
Negligence, liability for. <i>See CHILD.</i>	
LOCAL GOVERNMENT	
Benefits to old people— <i>Discrimination in favour of class—Transport undertaking—Free travel facilities for aged persons—Whether ultra vires [PRISCOOTT v. BIRMINGHAM CORPN.]</i>	299, 698
LOCAL VALUATION COURT	
<i>See RATES.</i>	
MAINTENANCE	
Wife. <i>See HUSBAND AND WIFE; JUSTICES (Husband and wife).</i>	
MAINTENANCE OF ACTION	
Common interest— <i>Pollution action—Action brought by riparian owner and owners of fishery—Deeds of indemnity executed by trustees of anglers' association to provide for plaintiffs' costs—Application by defendant to stay proceedings [MARTELL v. CONSETT IRON CO., LTD.]</i>	339
MAIAYA	
<i>See PRIVY COUNCIL.</i>	
MANDAMUS	
Justices— <i>To issue summons for careless driving—Discretion of prosecutor over offence to be charged—Road Traffic Act, 1930 (c. 43), s. 11, s. 12 [R. v. NUNEATON JUSTICES, Ex parte PARKER]</i>	251

MARRIAGE SETTLEMENT See SETTLEMENT.	PAGE
MASTER AND SERVANT Duty of master— <i>Farming—Fierce bull owned by master—Duty to take care not to subject employees to unnecessary risk—No order by master to servant not to enter stall—Servant entered stall and was injured by bull—Liability of master</i> [RANDS v. MCNEIL] Provision of safe system of working. See SAFE SYSTEM OF WORKING. Loss of service— <i>Harboursing of servant—Servant's departure in breach of contract—Employment by new master after notice of breach—Liability of new master—Need to prove damage</i> [JONES PROS. (HUNSTANTON), LTD. v. STEVENS]	593 677
MEDICAL PRACTITIONER Operation for sterilisation. See DIVORCE (Cruelty).	
MENTAL HEALTH OFFICER See NATIONAL HEALTH SERVICE (Superannuation).	
MINE Minerals— <i>Right to work—Gravel and sand quarries—Mining lease—Application by tenant a week before expiry of lease—Tenant having no proprietary interest in minerals when application heard—Mines (Working Facilities and Support) Act, 1923 (c. 20), s. 1 (1)</i> [RE EAST YORKSHIRE GRAVEL CO., LTD.'S APPLICATION]	631
MINERALS Right to work. See MINE.	
MORTGAGE Foreclosure— <i>Redemption—Orders nisi—Notice of intention to redeem—Place of redemption</i> [PRACTICE DIRECTION]	364
MOTOR INSURANCE See INSURANCE.	
MOTOR VEHICLE See STREET TRAFFIC.	
NATIONAL HEALTH SERVICE Duty of Minister to provide treatment— <i>Position of consultants and specialists—National Health Service Act, 1946 (c. 81), s. 3 (1) (c)</i> [RAZZEL v. SNOWBALL] Limitation of action. See PUBLIC AUTHORITY. Superannuation— <i>Determination of questions by Minister of Health—"Mental health officer"—Shoemaker employed in mental hospital—Periodically in charge of working patients—Finality of determination of status by Minister—National Health Service Act, 1946 (c. 81), s. 67 (1) (i)—National Health Service (Superannuation) Regulations, 1950 (S.I. 1950 No. 497), reg. 1 (3), reg. 60</i> [HEALEY v. MINISTRY OF HEALTH]	429 449
NATIONAL INSURANCE Benefits— <i>Entitlement—Convicted persons detained as of unsound mind and as mental defectives—"Detention in legal custody"—National Insurance Act, 1946 (c. 67), s. 29 (1) (b)—Criminal Justice Act, 1948 (c. 58), s. 66</i> [R. v. NATIONAL INSURANCE COMR., <i>Ex parte</i> TIMMIS, R. v. SAME, <i>Ex parte</i> COX, R. v. SAME, <i>Ex parte</i> JAMES]	292
NEGLIGENCE Child. See CHILD. Contributory negligence— <i>Apportionment of liability—Coal mining accident—Breach of statutory duty by employers and of statutory directions by employee—Law Reform (Contributory Negligence) Act, 1945 (c. 28), s. 1 (1)</i> [LASZCZYK v. NATIONAL COAL BOARD] Exclusion of liability— <i>Shipping—Passenger carriage—Passenger injured by fall of gangway—Action against captain and boatswain—Right of company's servants to claim exemption from personal liability</i> [ADLER v. DICKSON] Master, of— <i>Liability to servant.</i> See MASTER AND SERVANT.	205 21, 397
NEW BRUNSWICK See PRIVY COUNCIL (Canada).	
NEW LEASE See LANDLORD AND TENANT.	
NEW SOUTH WALES See PRIVY COUNCIL.	
NIGERIA See PRIVY COUNCIL.	
NOTICE TO QUIT See LANDLORD AND TENANT.	
NULLITY Incapacity of wife— <i>Practical impossibility of consummation—Date for ascertaining—Remediable by minor operation without danger</i> [S. v. S. (OTHERWISE C.)] Wilful refusal to consummate marriage— <i>Indecision not refusal—Refusal distinguished from neglect</i> [S. v. S. (OTHERWISE C.)]	736 736
ONTARIO See PRIVY COUNCIL (Canada).	
ORNAMENT Church. See ECCLESIASTICAL LAW.	
PARTNERSHIP Dissolution— <i>Indemnity of outgoing partner—"Partnership debts and liabilities"—Income tax—Income Tax Act, 1952 (c. 10), s. 144 (1)</i> [STEVENS v. BRITTEN]	385
PATENT Licence— <i>Specific performance of agreement to grant—Judgment of American court affecting rights of English company in regard to English patents—Conflict of laws</i> [BRITISH NYLON SPINNERS, LTD. v. IMPERIAL CHEMICAL INDUSTRIES, LTD.]	88
PLEADING Divorce. See DIVORCE (Practice).	
POLLUTION See MAINTENANCE OF ACTION.	

	PAGE
POLYGAMOUS MARRIAGE Children's rights of succession <i>See</i> PRIVY COUNCIL (Nigeria— <i>Legitimacy</i>).	
POSSESSION Demised premises, of. <i>See</i> RENT RESTRICTION.	
POWER OF APPOINTMENT Exercise— <i>Fraudulent exercise—Genuine intention to benefit objects—Conditional gift of appointor's residue—Condition for appointees settling shares of appointed fund—Whether excessive exercise</i> [Re BURTON'S SETTLEMENTS]	193
Special power to appoint— <i>Creation by will—Omission of words by inadvertence—Appropriate words supplied by implication</i> [Re FOLLETT (decd.)]	478
PRACTICE Amendment— <i>Judgment—Defendant wrongly described in writ, proceedings and judgment—Court's power to amend after judgment entered—R.S.C., Ord. 28, r. 12</i> [PEARLMAN (VENEERS) S.A. (PTY.), LTD. v. BARTELS]	659
Chancery proceedings— <i>Affidavits—Office copies—Ex parte applications without summons—Mortgages—Orders nisi for foreclosure or redemption</i> [PRACTICE DIRECTION]	364
<i>Witness action in witness list—Interlocutory applications to master</i> [MORLEY v. WOOLFSON]	378
Declaratory judgment. <i>See</i> DECLARATORY JUDGMENT.	
Divorce. <i>See</i> DIVORCE.	
Representative capacity. <i>See</i> WRIT (Representative capacity of plaintiff).	
Service— <i>Service on foreign company—No place of business in Great Britain—Service at address alleged to be former place of business—Validity of service—Companies Act, 1948 (c. 38), s. 412</i> [DEVERALL v. GRANT ADVERTISING, INCORPORATED]	389
Striking out pleading— <i>Statement of claim—No cause of action—Rights vested in Custodian of Enemy Property—Custodian not a party</i> [MAERKLE v. BRITISH & CONTINENTAL FUR CO., LTD.]	50
PRESUMPTION Legitimacy. <i>See</i> LEGITIMACY.	
PRIVY COUNCIL Australia— <i>Divorce—Desertion—Constructive desertion—Conduct equivalent to expulsion of other spouse—Inference of intention to end consortium—Husband's persistent cruelty to wife—Persistence despite wife's threats to leave matrimonial home—Marriage Act, 1928 (Victoria) (No. 3726 of 1928), s. 75 (b), (d)</i> [LANG v. LANG]	571
<i>Workmen's compensation—"Injury by accident arising out of or in the course of the employment"—Death of worker on way to work due to auricular fibrillation—Whether need for external event—Workers' Compensation Act, 1928 (Victoria) (No. 3806 of 1928), s. 5 (1), as amended by Workers' Compensation Act, 1946 (Victoria) (No. 5128 of 1946), s. 3</i> [JAMES PATRICK & CO. PROPRIETARY, LTD. v. SHARPE]	216
Canada— <i>Dominion and provincial legislation—Province of New Brunswick not empowered to limit inter-provincial, etc., connecting undertakings—Omnibus undertaking—British North America Act, 1867 (c. 3), s. 92 (10) (a)</i> [A.-G. FOR ONTARIO v. WINNER, WINNER v. S.M.T. (EASTERN), LTD.]	177
Ontario— <i>Copyright—Infringement—Music—"Public performance by means of . . . gramophone"—Copyright Amendment Act, 1931 (c. 8 of the Statutes of Canada, 1931), s. 10B, as amended by the Copyright Amendment Act, 1936 (c. 28 of the Statutes of Canada, 1936), s. 1, and the Copyright Amendment Act, 1938 (c. 27 of the Statutes of Canada, 1938), s. 4</i> [ASSOCIATED BROADCASTING CO., LTD. v. COMPOSERS, AUTHORS AND PUBLISHERS ASSN. OF CANADA, LTD.]	703
Malaya— <i>Criminal law—Emergency legislation—Charge of unlawfully carrying a fire-arm—Intention to surrender to authorities—"Lawful excuse"—"Lawful authority"—Malaya Emergency Regulations, 1951, reg. 4 (1), as amended by Emergency (Amendment) No. 11 Regulations, 1952, reg. 2</i> [WONG POOH YIN, ALIAS KWANG SIN, ALIAS KAR SIN v. PUBLIC PROSECUTOR]	31
New South Wales— <i>Compulsory resumption of land—Compensation—Assessment—Resumption for settlement of ex-servicemen—Date for valuation of land—Closer Settlement (Amendment) Act, 1907 (No. 12 of 1907), s. 4 (4) (b), proviso (as amended)</i> [PYE v. MINISTER FOR LANDS FOR NEW SOUTH WALES]	514
<i>Transport—Freedom of inter-State trade—Licensing of public motor vehicles—Validity of licensing provisions of New South Wales State Transport (Co-ordination) Act, 1931-1952 (No. 32 of 1931—No. 24 of 1952)—Commonwealth of Australia Constitution Act, 1900 (c. 12), s. 92</i> [HUGHES AND VALE PROPRIETARY, LTD. v. STATE OF NEW SOUTH WALES (THE COMMONWEALTH OF AUSTRALIA AND OTHERS, INTERVENERS)]	607
Nigeria— <i>Legitimacy—Children of polygamous marriage legitimate according to law of domicile—Succession to intestate's estate—Whether English laws of succession apply only to children of monogamous marriage—Marriage Ordinance of the Colony of Lagos (No. 14 of 1884), s. 41</i> [BAMBOSE v. DANIEL]	263
PROFITS TAX Computation of profits— <i>Income received from investments or other property—Nationalisation of colliery undertaking—Interim income payments, revenue payments, further revenue payments pending satisfaction of compensation—Finance Act, 1937 (c. 54), sched. IV, para. 7, as amended by Finance Act, 1947 (c. 35), s. 32 (1)—Coal Industry Nationalisation Act, 1946 (c. 59), s. 22 (2), (3)—Coal Industry (No. 2) Act, 1949 (c. 79), s. 1 (2)</i> [INLAND REVENUE COMRS. v. BUTTERLEY CO., LTD.]	69
Exemption— <i>Principal company subject to surtax direction—Notice requiring profits of subsidiary to be treated as profits of principal company—Exemption of subsidiary company—Finance Act, 1937 (c. 54), s. 22 (1) (2)</i> [HEELEX INVESTMENTS, LTD. v. INLAND REVENUE COMRS.]	379
PUBLIC AUTHORITY Limitation of action— <i>Action for negligence against specialist at hospital administered under the National Health Service—Limitation Act, 1939 (c. 21), s. 21 (1)</i> [KAZZEL v. SNOWBALL]	429
PUBLIC HEALTH Appeal to quarter sessions— <i>"Person aggrieved"—Costs not given to successful party before magistrates—Certiorari to quarter sessions refused—Public Health Act, 1936 (c. 49), s. 301</i> [R. v. LANCASHIRE QUARTER SESSIONS APPEAL COMMITTEE, <i>Ex parte</i> HUYTON-WITH-ROBY URBAN DISTRICT COUNCIL]	
QUARRY <i>See</i> MINE.	

QUARTER SESSIONS	
Appeal to—By "person aggrieved" under Public Health Act, 1936. See PUBLIC HEALTH.	
RATES	
Local valuation court—Appeal—Withdrawal by appellant valuation officer—Rating authority intending to appear in support—Withdrawal valid—Local Government Act, 1948 (c. 26), s. 48 (4) [Re APPLICATIONS BY BRIXHAM URBAN DISTRICT COUNCIL] ..	561
RENT RESTRICTION	
Possession—Hardship—Comparative hardship—Finality of decision of county court judge—Change of circumstances pending appeal—Whether taken into consideration—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 3 (1), sched. 1, para. (h), proviso [KING v. TAYLOR] ..	373
Shared accommodation—Kitchen shared by two tenants, one being landlord's son—Son becoming landlord—Right to possession against other tenant—Landlord and Tenant (Rent Control) Act, 1949 (c. 40) [TOVEY v. TYACK] ..	210
REPAIR	
Liability of tenant. See LANDLORD AND TENANT.	
RES JUDICATA	
Husband and wife—Persistent cruelty—Dismissal of summons—Fresh summons on ground of constructive desertion—Evidence of expulsive words repeated at hearing of fresh summons [COOPER v. COOPER] ..	358
RESERVATION	
Of sacrament—Legality. See ECCLESIASTICAL LAW (Ornaments).	
RESTITUTION OF CONJUGAL RIGHTS	
See DIVORCE.	
REVOCATION	
Settlement. See SETTLEMENT.	
SACRAMENT	
Reservation—Legality. See ECCLESIASTICAL LAW (Ornaments).	
SAFE SYSTEM OF WORKING	
Building work. See BUILDING.	
Window cleaning—Duty of employer to provide [DRUMMOND v. BRITISH BUILDING CLEANERS, LTD.] ..	507
SALE OF GOODS	
Condition—Re-conditioned machines—Sellers to supply certificate by third party that machines fully re-conditioned to third party's satisfaction—Meaning of "fully re-conditioned"—"Certificates in rem"—"Certificates in personam"—Whether implied warranty [MINSTER TRUST, LTD. v. TRAPS TRACTORS, LTD.] ..	136
Damage for breach of contract. See CONTRACT.	
Note or memorandum in writing. See STATUTE (Retrospective operation—Repeal).	
Payment—Bank guarantee or letter of credit—Time for issuing [SINASON-TEICHER INTER-AMERICAN GRAIN CORPN. v. OILCAKES AND OILSEEDS TRADING CO., LTD.] ..	468
SERVICE	
Writ. See PRACTICE.	
SETTLEMENT	
After-acquired property—Whether accreted property coalesced with wife's trust fund—Appointment by will of wife's trust fund [Re RYDON MARRIAGE SETTLEMENT] ..	1
Construction—Marriage settlement—Covenant to settle after-acquired property—Hotchpot clause—Appointment of the "wife's trust fund"—Whether accretion to original fund caught by appointment [Re RYDON MARRIAGE SETTLEMENT] ..	1
Revocation—Power to revoke with consent of a judge of the Chancery Division—Validity [Re HOOKER'S SETTLEMENT] ..	321
Rule in <i>Lassence v. Tierney</i> —Trustees directed to divide the trust fund or without actual division to treat the same as divided into two equal parts and to appropriate one of such parts as the share of each of settlor's two daughters—Daughter's share not to vest absolutely in her—Life interest to daughter with remainder to issue—Accruer clause—Both daughters dying without issue—Destination of trust fund [Re BURTON'S SETTLEMENT TRUSTS] ..	231
Trust—Discretionary trust—Uncertainty—Unascertainable class of beneficiaries—Certain members of class ascertainable—Invalidity of trust [INLAND REVENUE COMRS. v. BROADWAY COTTAGES TRUST, SAME v. SUNNYLANDS TRUST] ..	120
Variation of trusts—Jurisdiction of court to authorise transaction not authorised by settlement—Administrative purpose—Special circumstances—Trustee Act, 1925 (c. 19), s. 57 (1) [Re FORSTER'S SETTLEMENT] ..	714
Voluntary settlement—Validity—Undue influence—Settlement by unmarried girl shortly after coming of age—No independent advice—Laches—Costs of trustee [BULLOCK v. LLOYDS BANK, LTD.] ..	726
SHARE	
Valuation for estate duty. See ESTATE DUTY.	
SHIPPING	
Carriage by sea—Negligence—Exclusion of liability in contract of carriage—Protection of independent contractors and others not parties to the contract—Distinction between carriage of goods and carriage of passengers [ADLER v. DICKSON] ..	21, 397
Charterparty—Contract—Application of general law of contract [COMPANIA NAVIERA MAROPAN S.A. v. BOWATERS LLOYD PULP AND PAPER MILLS, LTD.] ..	563
Lay days—Loading—"Weather working days"—Regard to be had to working hours [ALYON STEAMSHIP CORPN. PANAMA v. GALBAN LOBO TRADING CO. S.A. OF HAVANA] ..	324
Safe port—"Approved loading place"—Warranty of safety of berth—Right of charterers to order loading at two safe loading places—Ship grounded at unsafe loading place—Liability of charterers— <i>Valenti non fit injuria</i> [COMPANIA NAVIERA MAROPAN S.A. v. BOWATERS LLOYD PULP AND PAPER MILLS, LTD.] ..	563
SINCERITY	
Restitution of conjugal rights. See DIVORCE.	
SPECIAL REASONS	
See INSURANCE (Motor insurance).	

SPECIFIC PERFORMANCE

Patent licence, contract for. *See* PATENT (Licence).

STATUTE

- Construction—Temporal connotation—Use of historic present—Where any such resumption "is" made—Words descriptive of purpose—Not stipulating that resumption should have been made—*New South Wales (Cesser Settlement (Amendment) Act, 1907 (No. 12 of 1907), s. 4 (4) (b), proviso (as amended) [PYE v. MINISTER FOR LANDS FOR NEW SOUTH WALES]* 514
- Words not calculated to fit events—Interpreted so as to effect least alteration of law [*GEORGE WIMPEY & CO., LTD. v. BRITISH OVERSEAS AIRWAYS CORPN.*] 661
- Retrospective operation—Repeal—Defence of no sufficient memorandum of sale of goods—Writ issued and defence delivered before repeal—Sale of Goods Act, 1893 (c. 71), s. 4—Law Reform (Enforcement of Contracts) Act, 1954 (c. 34), s. 2 [*CRAFORDS (RAMSGATE), LTD. v. WILLIAMS & STEER MANUFACTURING CO., LTD.*] 17

STATUTORY DUTY

Breach. *See* COAL MINING.

STERILISATION

Operation. *See* DIVORCE (Cruelty).

STREET TRAFFIC

- Careless driving—Mandamus to issue summons charging [*R. v. NUNEATON JUSTICES, Ex parte PARKER*] 251
- Motor vehicle—"Person uses or causes or permits to be used"—Limited company—"Permits to be used"—Trailer used with defective brake—No evidence of permitting—Motor Vehicles (Construction and Use) Regulations, 1951 (S.I. 1951 No. 2101), reg. 75, reg. 101 [*JAMES & SON, LTD. v. SMEE, GREEN v. BURNETT*] 273
- Limited company—"Uses"—Motor van driven with defective brake—Absolute offence—Motor Vehicles (Construction and Use) Regulations, 1951 (S.I. 1951 No. 2101), reg. 75, reg. 101 [*JAMES & SON, LTD. v. SMEE, GREEN v. BURNETT*] 278
- Unladen weight—Wooden container attached to base of lorry—Whether "alternative body"—Road Traffic Act, 1930 (c. 43), s. 26—Motor Vehicles (Construction and Use) Regulations 1951 (S.I. 1951 No. 2101), reg. 61, reg. 63 (2), reg. 101 [*CORDING v. HAISE*] 287

SUPERANNUATION

See NATIONAL HEALTH SERVICE.

SURTAX

Avoidance. *See* INCOME TAX (Avoidance).

TABERNACLE

Church ornament—Legality. *See* ECCLESIASTICAL LAW.

TENANCY

Agricultural. *See* AGRICULTURE (Agricultural holding).

THEATRE

Stage play—"Cause" unlicensed part of play to be presented—Disobedience to stage directions by actor, contrary to orders of licensee of theatre—Liability of licensee—Theatres Act, 1843 (c. 68), s. 15 [*LOVELACE v. DIRECTOR OF PUBLIC PROSECUTIONS*] 481

TORT

Joint tortfeasors—Contribution—Action against two defendants—Action against second defendant not commenced within statutory period—First defendant's right to contribution from second defendant—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 6 (1) (c) [*GEORGE WIMPEY & CO., LTD. v. BRITISH OVERSEAS AIRWAYS CORPN.*] 661

TOWN AND COUNTRY PLANNING

Enforcement notice—Appeal against notice—Description of development—Sufficiency of description—Grounds on which court can quash notice—Town and Country Planning Act, 1947 (c. 51), s. 23 (4) [*KEATS v. LONDON COUNTY COUNCIL, SAME v. SAME, SAME v. SAME*] 308

TRADING WITH THE ENEMY

Custodian of Enemy Property—Property vested in custodian—Rights of action not vested in plaintiff, former enemy subject—No cause of action is plaintiff—Statement of claim—R.S.C., Ord. 25, r. 4—Trading with the Enemy (Custodian) Order, 1951 (S.I. 1951 No. 153), art. 1 (a) [*MAERKLE v. BRITISH & CONTINENTAL FUR CO., LTD.*] 50

TRANSPORT

See LOCAL GOVERNMENT (Benefits to old people).

TRUST AND TRUSTEE

Discretionary trust. *See* SETTLEMENT.

Variation of trusts by the court. *See* SETTLEMENT (Variation of trusts).

UNDUE INFLUENCE

See EQUITY.

UNSOUNDNESS OF MIND

See DIVORCE (Insanity).

VOLUNTARY SETTLEMENT

See SETTLEMENT.

WARRANT

Crossed warrant—Conversion. *See* BANK (Crossed warrant).

WILL

Condition—Certainty—Condition subsequent—Name and arms clause—Tenant for life to "assume" testator's surname "either alone or in substitution of his . . . usual surname" and to "apply for proper authority to bear and use" testator's family arms—Interest to be determined on refusal or neglect to assume surname or arms within one year of becoming entitled [*Re MURRAY (dec'd.)*] 129

"Such period as my trustees shall think reasonable" [*Re BURTON'S SETTLEMENTS*] 193

Gift to issue—Substitutional or original gift—Gift to children living at death of life tenant and issue of any then dead—Whether issue must survive life tenant [*MOUSLEY v. RIGBY*] 553

Omission—Words of will clearly showing accidental omission—Language connoting use of recognised precedent—Words of appropriate precedent supplied—Clause accordingly construed as creating special power [*Re FOLLETT (dec'd.)*] 478

Rule in *Lassence v. Tierney*. *See* SETTLEMENT.

Words—Adding words or re-modelling clause—Unjustified for purpose of assisting forfeiture [*Re MURRAY (dec'd.)*] 129

WINDOW CLEANER	PAGE
safe system of work— <i>Duty of employer to provide</i> [DRUMMOND v. BRITISH BUILDING CLEANERS, LTD.]	507
WORKMEN'S COMPENSATION	
“Arising out of or in the course of the employment”. See PRIVY COUNCIL (Australia).	
WRIT	
Fatal accidents, in action under. See FATAL ACCIDENT.	
Representative capacity of plaintiff— <i>Stated in title of writ—Effect—Representative capacity should be stated in indorsement</i> [BOWLER v. JOHN MOWLEM & Co., LTD.]	556
Service. See PRACTICE.	

STATUTES, ETC., REFERRED TO

PUBLIC GENERAL STATUTES

	PAGE
Acquisition of Land (Assessment of Compensation) Act, 1919 (c. 57), s. 2, rr. (2), (6) ..	582
Acquisition of Land (Authorisation Procedure) Act, 1946 (c. 49), s. 1, <i>sched. I, para. 16</i> ..	529
Agricultural Holdings Act, 1948 (c. 63)—	
s. 1 (1) ..	228
s. 2 (1) <i>proviso</i> ..	498
Agriculture Act, 1947 (c. 48), s. 85, s. 92, <i>sched. IX, paras. 15, 20 (2)</i> ..	529
Arbitration Act, 1950 (c. 27), s. 21 (1) (a) ..	721
Bankruptcy Act, 1914 (c. 59), ss. 4 (1), 5 (2) ..	74
Bills of Exchange Act, 1882 (c. 61), s. 82 ..	365
Charitable Uses Act, 1601 (c. 4), <i>preamble</i> ..	257
Coal Industry (No. 2) Act, 1949 (c. 79), s. 1 (2) ..	69
Coal Industry Nationalisation Act, 1946 (c. 59), s. 22 (2), (3) ..	69
Coal Mines Act, 1911 (c. 50), s. 74 ..	205
Companies Act, 1948 (c. 38)—	
s. 330 (b) ..	335
s. 412 ..	389
Copyright Act, 1911 (c. 46), s. 5 (2), (3) ..	253
Criminal Justice Act, 1948 (c. 58)—	
s. 7 (1) ..	261
s. 66 ..	292
Education Act, 1944 (c. 31), s. 76 ..	441
Fatal Accidents Act, 1864 (c. 95), s. 1 ..	556
Finance Act, 1936 (c. 34), s. 18 (1), (2) ..	86, 682
Finance Act, 1937 (c. 54)—	
s. 22 (1) (2) ..	379
<i>sched. IV, para. 7, as amended by Finance Act, 1947 (c. 35), s. 32 (1)</i> ..	69
Finance Act, 1940 (c. 29)—	
s. 44 (1) ..	81
s. 55 (1) ..	435
Hire-Purchase Act, 1938 (c. 53), s. 5 (c) ..	455
Income Tax Act, 1918 (c. 40)—	
s. 37 (b) ..	120
<i>sched. D</i> ..	243
<i>Case I</i> ..	637
<i>sched. E, rr. 1, 5</i> ..	101
Income Tax Act, 1952 (c. 10), s. 144 (1) ..	385
Landlord and Tenant Act, 1927 (c. 36), ss. 5 (2), 9 ..	311
Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 8 (1) (b) ..	210
Landlord and Tenant Act, 1954 (c. 56)—	
s. 24 (1), (3) ..	731
<i>sched. IX, para. 8</i> ..	311
Larceny Act, 1916 (c. 50), s. 20 (1) (ii) ..	335
Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 6 (1) (c) ..	661
Law Reform (Contributory Negligence) Act, 1945 (c. 28), s. 1 (1) ..	205
Law Reform (Enforcement of Contracts) Act, 1954 (c. 34), s. 2 ..	17
Leasehold Property (Temporary Provisions) Act, 1951 (c. 38), ss. 2 (1) (a), 5 (1) (a) ..	97
Licensing Act, 1953 (c. 46), s. 58 (2) ..	270
Limitation Act, 1939 (c. 21), s. 21 (1) ..	429
Local Government Act, 1948 (c. 26), s. 43 (4) ..	561
Lunacy Act, 1890 (c. 5), s. 11 (1) ..	116
Magistrates' Courts Act, 1952 (c. 55), s. 61 ..	526
Matrimonial Causes Act, 1950 (c. 25)—	
s. 1 (1) (b) ..	413
(c) ..	59, 159
(d) ..	114, 116, 171, 502
(2) (a) ..	116, 171
(d) ..	114, 116, 171, 502
s. 23 (1) ..	57
Mental Treatment Act, 1930 (c. 23), s. 5 (10) ..	171
Mines (Working Facilities and Support) Act, 1923 (c. 20), s. 1 (1) ..	631
National Health Service Act, 1946 (c. 81)—	
s. 3 (1) (c) ..	429
s. 67 (1) (i) ..	449
National Insurance Act, 1946 (c. 67), s. 29 (1) (b) ..	292
Public Health Act, 1936 (c. 49), s. 301 ..	225
Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 3 (1), <i>sched. I, para. (h), proviso</i> ..	373
Road and Rail Traffic Act, 1933 (c. 53), s. 9 (1) ..	283
Road Traffic Act, 1930 (c. 43)—	
ss. 11, 12 ..	251
s. 26 ..	287
s. 35 (1), (2) ..	261
Sale of Goods Act, 1893 (c. 71), s. 4 ..	17
Theatres Act, 1843 (c. 68), s. 15 ..	481
Town and Country Planning Act, 1947 (c. 51), s. 23 (4) ..	303
Trustee Act, 1925 (c. 19), s. 57 (1) ..	714

COMMONWEALTH AND DEPENDENCIES

British North America Act, 1867 (c. 3), s. 92 (10) (a) ..	177
Closer Settlement (Amendment) Act, 1907 (No. 12 of 1907), s. 4 (4) (b), <i>proviso (as amended)</i> ..	514
Commonwealth of Australia Constitution Act, 1900 (c. 12), s. 92 ..	607
Copyright Amendment Act, 1931 (c. 8 of the Statutes of Canada 1931), s. 10B, as amended by the Copyright Amendment Act, 1936 (c. 28 of the Statutes of Canada, 1936), s. 1, and the Copyright Amendment Act, 1938 (c. 27 of the Statutes of Canada, 1938), s. 4 ..	708
Malaya Emergency Regulations, 1951, reg. 4 (1), as amended by Emergency (Amendment No. 11) Regulations, 1952, reg. 2 ..	31
Marriage Act, 1928 (Victoria) (No. 3726 of 1928), s. 75 (b), (d) ..	571
Marriage Ordinance of the Colony of Lagos (No. 14 of 1884), s. 41 ..	263
New South Wales State Transport (Co-ordination) Act, 1931-1952 (No. 32 of 1931—No. 24 of 1952) ..	607
Workers' Compensation Act, 1928 (Victoria) (No. 3806 of 1928), s. 5 (1), as amended by Workers' Compensation Act, 1946 (Victoria) (No. 5128 of 1946), s. 3 ..	216

RULES		PAGE
Bankruptcy Rules, 1952 (S.I. 1952 No. 2113), r. 21	296
R.S.C., Ord. 25, r. 4	50
Ord. 28, r. 12	659
Ord. 47, r. 1	107

REGULATIONS		PAGE
Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948 No. 1145), reg. 5	19
Coal Mines (Training) General Regulations, 1945 (S.R. & O. 1945 No. 1217), reg. 4 (1) (c)	205
Motor Vehicles (Construction and Use) Regulations, 1951 (S.I. 1951 No. 2101)	287
regs. 61, 63 (2)	273
reg. 75	273, 287
reg. 101	449
National Health Service (Superannuation) Regulations, 1950 (S.I. 1950 No. 497)	449
regs. 1 (3), 60	

ORDER		PAGE
Trading with the Enemy (Custodian) Order, 1951 (S.I. 1951 No. 153), art. 1 (a)	50

MISCELLANEOUS		PAGE
R.I.B.A. Standard Form of Contract No. 6, Conditions, cl. 24 (f), cl. 27	721

WORDS AND PHRASES		PAGE
Administratrix	556
Alternative body	287
Approved loading place	563
Associated operations	86, 682
Boy Scouts Movement	712
By the date	214
Cause	481
Cause or permit	273
Certificates in personam	136
Certificates in rem	136
Continuously	114, 502
Defect in the appointment	529
Detention in legal custody	292
Fully re-conditioned	136
In right of the tenancy	97
Injury by accident arising out of or in the course of the employment	216
Is	514
Lawful authority	31
Lawful excuse	31
Legal custody	292
Mental health officer	449
Partnership debts and liabilities	385
Pay A for B	365
Permits to be used	273
Person aggrieved	225
Proceedings . . . pending on an application . . . to the tribunal	311
Public company	335
Public performance by means of . . . gramophone	708
Reasonable maintenance	57
Special reasons	261
Specified period of the year	498
Such period as my trustees shall think reasonable	193
Three years immediately preceding the presentation of the [cross]-petition	413
True owner	365
Used	273
Volume form, in	253
Weather working days	324
Wife's trust fund	1

CORRIGENDA	
[1941] 2 All E.R.	p. 339. BENSON v. BENSON. Line B.3: for "Lancaster" read "Chester". Page 340, line D.4: for "voluntary" read "temporary".
[1954] 2 All E.R.	p. 780. WOOLLETT v. MINISTER OF AGRICULTURE AND FISHERIES. First line: for "Mr. Marsh (one of the applicants before the tribunal)" read "The Reverend Eric Marsh (Chairman of the Farmers and Smallholders Association)".
[1954] 3 All E.R.	p. 484. Re LAFORD. Counsel: read "Sir Andrew Clark, Q.C., and E. Garth Moore for the appellants (the petitioners)" instead of as printed.
p. 597.	DRUMMOND v. BRITISH BUILDING CLEANERS, LTD. Line F.5: for "APPEAL by the defendants" read "APPEAL by the plaintiff".
p. 662.	GEORGE WIMPEY & CO., LTD. v. B.O.A.C. Counsel for the respondents: for "I. G. Searman" read "Wilfrid Bourne".

THE ALL ENGLAND LAW REPORTS

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LAW JOURNAL REPORTS

Re RYDON MARRIAGE SETTLEMENT. BARCLAYS BANK,
LTD. v. EVERITT AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.JJ.),
July 14, 15, 1954.]

Settlement—Construction—Marriage settlement—Covenant to settle after-acquired property—Hotchpot clause—Appointment of the “wife’s trust fund”—Whether accretion to original fund caught by appointment.

By a marriage settlement made in 1890 a sum of £3,000 was settled on behalf of the wife and was directed to be held on trusts for investment, with power to vary investments, and it was declared that the trustees should “stand possessed of the said sum of £3,000 and the investments for the time being representing the same (which sum and investments are hereinafter referred to as ‘the wife’s trust fund’) and also of the income of the wife’s trust fund from time to time” until a certain date called “the ‘testator’s time of division’ [i.e., a time when the reversionary interests forming part of a fund called ‘the husband’s trust fund’ would fall into possession] shall arrive to pay the premiums on [a policy of insurance] and subject to such payment upon trust to pay the income of the wife’s trust fund” to the wife during her life and after her death on protective trusts for the husband for his life. From and after the death of the survivor of the husband and the wife, the “capital and income of the wife’s trust fund” was to be held in trust for the children or remoter issue of the wife as she, or, in default, as the husband, should by deed or will or codicil appoint, with a trust in default for all the children of the marriage who attained the age of twenty-one years or being daughters married. There followed a hotchpot clause, in the usual form, relating to both the husband’s trust fund and the wife’s trust fund. The settlement further provided for the raising every six months, out of the securities for the time being representing the said sum of £3,000, of £150 to be paid to the husband if living, and, if not, to the wife, so long as the husband and the wife or one of them should be living and the “testator’s time of division” should not have arrived. At the “testator’s time of division” the amount expended by way of these “half-yearly sales” was to be recouped out of the husband’s fund. The settlement contained an after-acquired property clause whereby the wife covenanted that if she should become entitled in any manner to any real or personal property of the value of £300 or upwards she would convey it to the trustees on trust for sale and to dispose of the income thereof “in like manner as the income of the wife’s trust fund” and it was thereby agreed that the trustees

should stand possessed of such property (and the proceeds of sale and the investments representing them) "upon the trusts and subject to the powers and provisions hereinbefore declared concerning money forming part of the wife's trust fund (except the special provisions . . . as to half-yearly sales and application of the proceeds thereof) . . ." By her will the wife, after reciting the settlement of 1890 and that thereby divers trust funds and property therein and hereinafter shortly referred to as "the wife's trust fund" were settled in trust after the death of herself and the husband for their issue as she should appoint, appointed that the trustees of the settlement should "after my death stand possessed of the wife's trust fund in trust for" a grand-daughter. On the question whether the testamentary appointment extended to property caught by the after-acquired property clause in the settlement,

HELD: (i) on the true construction of the settlement the expression "the wife's trust fund" included the after-acquired property, the hotchpot clause in particular leading to this conclusion because otherwise the clause would become unworkable, and the distinction (in relation to half-yearly sales) between the trusts applicable to the £3,000 and those relating to the after-acquired property not preventing the coalescence of the after-acquired property with the wife's trust fund.

Dictum of SIR HERBERT COZENS-HARDY, M.R., in *Re Wood* ([1913] 2 Ch. 583, 584), explained.

Dictum of SARGANT, J., in *Re Fraser* ([1913] 2 Ch. 235), approved.

Re Cavendish's Settlement ([1912] 1 Ch. 794), distinguished and criticised.

(ii) even if the term "the wife's trust fund" in the settlement did not include the after-acquired property, nevertheless, on the true construction of the will, the testamentary appointment passed both the original wife's trust fund and the property accruing under the after-acquired property clause.

Appeal allowed.

Cases referred to:

- (1) *Re Wood*, [1913] 2 Ch. 574; 83 L.J.Ch. 59; 109 L.T. 347; 40 Digest 567, 1052.
- (2) *Re Fraser*, [1913] 2 Ch. 224; 82 L.J.Ch. 406; 108 L.T. 960; 40 Digest 568, 1053.
- (3) *Re Cavendish's Settlement*, [1912] 1 Ch. 794; 81 L.J.Ch. 400; 106 L.T. 510; 40 Digest 567, 1051.

APPEAL by the fourth defendant, Cordelia Somers, an infant, from an order of ROXBURGH, J., dated Mar. 11, 1954, made on an originating summons issued for the determination of the question whether, on the true construction of a marriage settlement dated Jan. 21, 1890, and of the will of Jane Rydon, deceased, and in the events which had happened, the appointment in exercise of the special power given to her by the said settlement by the said Jane Rydon contained in her said will of "the wife's trust fund" on trusts for the benefit of the third defendant, Elizabeth Susan Somers, and her children (a) operated as an appointment exclusively of the investments and property representing the £3,000 originally brought into the said settlement on behalf of the said Jane Rydon and in the said settlement referred to as "the wife's trust fund", or (b) operated as an appointment also of property which became subject to a covenant on the part of the said Jane Rydon contained in the said settlement to settle after-acquired property. The said Elizabeth Susan Somers had one child only, viz., the infant defendant, Cordelia Somers. ROXBURGH, J., decided that the true construction of the documents was in accordance with alternative (a).

Cross, Q.C., and Tonge for the infant defendant.

Denys B. Buckley for the first defendant, one of the persons interested in default of appointment.

H. A. Rose for the plaintiffs, the trustees of the settlement.

The second and third defendants were not represented.

SIR RAYMOND EVERSHED, M.R.: I will ask JENKINS, L.J., to deliver the first judgment.

JENKINS, L.J.: In this case Mrs. Jane or Jennie Rydon, by her will dated Nov. 28, 1938, exercised a power of appointment among issue conferred on her by a settlement dated Jan. 21, 1890, and made in contemplation of the marriage shortly afterwards solemnised between Mrs. Rydon and Arthur Hope Rydon. The testatrix, Mrs. Rydon, died on Jan. 13, 1941, and at that date the funds brought into the settlement by or on behalf of Mrs. Rydon comprise £3,000 or the investments for the time being representing the same, which had been settled on her behalf by her uncle, Palles, C.B., and also a reversionary interest which had been caught by an after-acquired property clause in the settlement. That reversion had accrued in point of title on Jan. 22, 1925, but it did not fall into possession until 1953. On that event happening, it became necessary to determine a question to which the appointment gave rise, viz., whether the appointment contained in Mrs. Rydon's will on its true construction, was limited to the £3,000, or the investments from time to time representing the same, originally settled on her behalf, or also included the reversionary interest caught by the after-acquired property clause.

In these circumstances, Barclays Bank, Ltd., as sole trustee at this date of the marriage settlement, applied to the court by originating summons to obtain a decision of that question. There were two children of Mrs. Rydon's marriage to Arthur Hope Rydon, viz., a daughter, Eleanor Mary Rydon, who married Stuart Oswald Everitt, the first defendant in these proceedings. She died intestate on Aug. 21, 1933, and her estate is represented by Mr. Everitt as her administrator. The other child was a son, Harold Edwin Rydon, who is the second defendant in these proceedings. Those two children (or, rather, the surviving child and the legal personal representative of the deceased child) would be entitled between them in default of appointment, i.e., entitled to any part of the property subject to the power to which, on its true construction, the appointment did not extend. Mrs. Everitt had two children, and the appointment was made in favour of one of those children, Elizabeth Susan Somers, the third defendant, a grandchild of Mrs. Rydon, and also in favour of the children of Mrs. Somers, who has one child, the infant defendant, Cordelia Somers. The matter came before ROXBURGH, J., and he, by his judgment dated Mar. 11, 1954, declared in effect that the appointment was limited in its operation to the original fund of £3,000. From that decision of ROXBURGH, J., the infant defendant now appeals to this court.

In order to appreciate the question, it is necessary first to consider the terms of the marriage settlement of Jan. 21, 1890. That is a lengthy document, but it is, I think, necessary to refer to some parts of it in detail. It was made between Arthur Hope Rydon (the husband), Mrs. Rydon, who was then Jane or Jennie Palles (the niece of Palles, C.B.) of the second part, Palles, C.B., of the third part, and a Mr. Charles Robbins, as trustee, of the fourth part. The husband brought into the settlement certain reversionary interests to which he was entitled under his father's will. These comprised a reversionary interest in certain real property specifically devised and also comprised reversionary interests in the residuary real and personal estate of the testator. The reversionary interests in freehold and leasehold property specifically devised or forming part of the residuary estate were, in accordance with the conveyancing practice of those days, conveyed by a separate instrument to the trustees on trust for sale and to hold the proceeds on the trusts of the settlement. The remaining reversionary interests were assigned to the trustees by the settlement itself. The husband had various income interests under his father's will pending the falling into possession of his reversionary interests, but these income interests

were expressly excluded from the operation of the settlement. The reversions were to fall in at whichever of the two following times should last happen, i.e., the time of the death of the testator's wife and the time when the payment off or satisfaction of all mortgages and incumbrances affecting his residuary estate or any part thereof should be completed. That date was referred to in the settlement as the "testator's time of division". In addition to these reversionary interests, the husband settled a policy of £1,000. The settlement recited that his reversionary interests in the residuary estate were subject to a mortgage of £5,000. He was given power to create further charges up to an additional £10,000. I do not think anything turns on that. On the wife's behalf there was brought into settlement only the £3,000 to which I have already referred and which was provided by her uncle, the chief baron. It will, therefore, be observed that, apart from the income of the £3,000, part of which was liable to be applied in keeping up the policy, the settlement was one under which no income could be expected to arise until the "testator's time of division."

I should next refer to the trusts in the operative part of the settlement. The property brought in by Mr. Rydon (referred to as "the husband's trust fund") and the income thereof was to be held on trust to pay the income to Mr. Rydon for life and after his death to Mrs. Rydon for life without power of anticipation. The £3,000 was to be held on trust with the consent in writing of Mrs. Rydon during her life and after her death, in case Mr. Rydon should survive her, with his consent in writing, and after the death of the survivor at the discretion of the trustees, to invest the said sum of £3,000 in some or one of the modes of investment authorised by the Trust Investment Act, 1889, with power to vary investments; and it was thereby agreed and declared that the trustees should

"stand possessed of the said sum of £3,000 and the investments for the time being representing the same (which sum and investments are hereinafter referred to as 'the wife's trust fund') and also of the income of the wife's trust fund on trust in the first place out of the income of the wife's trust fund from time to time until the 'testator's time of division' shall arrive to pay the premiums on the said policy hereby assigned and subject to such payment upon trust to pay the income of the wife's trust fund"

to Mrs. Rydon during her life without power of anticipation and after her death, to put it shortly, on protective trusts for Mr. Rydon for his life.

Then follow the trusts of capital which were to the effect that after the death of the survivor of Mr. and Mrs. Rydon the capital and income of the husband's trust fund should be held, to put it shortly, in trust for all or any of the issue of the intended marriage, whether children or remoter issue, such remoter issue to be born in the lifetime of Mr. and Mrs. Rydon or one of them, at such ages, and so forth, as Mr. Rydon should by deed revocable or irrevocable or by will or codicil appoint, and in default of and subject to such appointment as Mrs. Rydon, if she should survive Mr. Rydon, should after his death by deed revocable or irrevocable or by will or codicil appoint. Then there was a trust in default for all or any of the children of the marriage who being sons should attain the age of twenty-one years or being daughters should attain that age or marry and if more than one in equal shares.

Next comes the power which Mrs. Rydon exercised by her will:

"And it is hereby agreed and declared that (subject as aforesaid) from and after the death of the survivor of [Mr. and Mrs. Rydon] the capital and income of the wife's trust fund shall be held in trust . . ."

Then, to put it shortly, there is a trust for the children or remoter issue of Mrs. Rydon at such ages or times and, if more than one, in such shares and so forth as Mrs. Rydon should by deed or will or codicil appoint and in default of any appointment by her, as Mr. Rydon, if he should survive Mrs. Rydon, should after her death by deed or will or codicil appoint, with a trust in default for all

or any of the children or child of the marriage who being sons should attain twenty-one or being daughters should attain that age or marry and if more than one in equal shares. That is followed by a hotchpot provision in a usual form:

A "Provided always that any child who or whose issue takes any part of the husband's trust fund or of the wife's trust fund under any appointment in pursuance of any of the powers of appointment hereinbefore contained shall not in the absence of any appointment to the contrary take any share in the unappointed part of either of those funds without bringing the share or shares appointed to him or her or to his or her issue into hotchpot and accounting for the same accordingly."

B Then there is an advancement clause, empowering the trustees at any time after the death of the spouses or in the lifetime of them or either of them with their, his or her consent in writing, to raise any part or parts not exceeding one half of the presumptive or vested share of any child or other issue of the intended marriage under the settlement and pay or apply it for his or her advancement or benefit as the trustees or trustee think fit. There are ultimate trusts to take effect in the event of failure of issue of the marriage, on which I think nothing turns. There is next an unusual provision relating to what are referred to in C various parts of the settlement as "the half-yearly sales":

D "Provided always and it is hereby agreed and declared that notwithstanding anything hereinbefore contained in case the said intended marriage shall be solemnised the trustees or trustee shall at the expiration of six calendar months from the date of the said marriage if [Mr. Rydon and Mrs. Rydon] shall be either of them then living sell so much of the securities for the time being representing the said sum of £3,000 now in the hands of the above named trustee as will raise as nearly as may be to the sum of £150 and shall pay the money so raised to [Mr. Rydon] if he be then living or if he be then dead to [Mrs. Rydon] and at the expiration of every subsequent period of six calendar months the trustees or trustee shall so long as [Mr. Rydon or Mrs. Rydon] or one of them shall be living and the 'testator's time of division' shall not have arrived make a similar sale and payment until by means of such half-yearly sales and payments the whole of the capital originally constituting or representing the said sum of £3,000 shall have been exhausted."

E So that is a provision for raising out of the capital of the £3,000 a sum of £150 each six calendar months, or £300 a year, to be paid to Mr. Rydon if living or, F if dead, to Mrs. Rydon.

Then there is a provision about keeping up the policy out of capital, which I do not think need be gone into in detail, and the settlement proceeds:

G "Provided nevertheless and it is hereby declared that in case before such capital shall have been so exhausted either the longer living of them the said [Mr. Rydon and Mrs. Rydon] shall die or the testator's time for division shall arrive then upon and as from such date or the arrival of the testator's time of division (whichever shall first happen) the foregoing provisions as to half-yearly sales of capital and payment of the proceeds thereof shall cease to be operative and shall no longer be acted upon in any way."

H Then it was provided that out of the first money which the trustees should receive in respect of the premises assigned by the first witnessing part thereof or in respect of the net sale money to arise from any sale to be made pursuant to the trusts for sale contained in the indenture of even date (those being the reversionary interests brought in by Mr. Rydon) they should

"set apart a sum of the following amount, that is to say, in case the whole of the investments originally representing the said sum of £3,000 shall have been exhausted by means of the half-yearly sales hereinbefore directed then the full sum of £3,000 or in case a portion only of the said investments shall

have been so exhausted then a sum equal to the difference between the market value at the time of the said setting apart of the unexhausted portion of the said investments and £3,000 sterling and the trustees or trustee shall hold the sum so set apart upon the trusts and with and subject to the powers and provisions hereinbefore declared and contained concerning the said sum of £3,000 now in the hands of the above named trustees (other than and except the foregoing special provisions as to half-yearly sales and payments of and out of capital) or such of the said trusts powers and provisions (other than and except as last aforesaid) as shall for the time being be subsisting or capable of taking effect to the intent that by means of such setting apart and holding the capital withdrawn from the wife's trust fund by the said half-yearly sales of and payments out of capital may be replaced for the benefit of the persons interested hereunder in the wife's trust fund and the income thereof."

I think the only other provision to which I need refer is the after-acquired property clause. There are provisions of a usual character enabling the spouses partially to revoke the provisions of the settlement for the purpose of making provision for children of any subsequent marriage, but I do not think any argument was founded on those provisions. The after-acquired property clause is in these terms:

"And it is hereby agreed and the said Jennie Palles hereby covenants with the above named trustees that if she should at the time of the now intended marriage be or if at any time or times during her now intended coverture she should become entitled in any manner and for any estate or interest to any real or personal property of the value of £300 or upwards at one time and from one and the same source [with an exception of jewels, trinkets, and so on] then and in every such case she and all other necessary parties will at the cost of the trust estate as soon as may be and to the satisfaction of the trustees or trustee convey such real and personal property to the trustees or trustee upon trust to sell or call in or convert into money such part or parts thereof as shall not consist of money or of any annuity or other real or personal property limited to or held in trust for her for her life only or for a term of years determinable on her death but with power for the trustees or trustee to postpone such sale calling in and conversion so long as they or he may think fit and to retain investments transferred under the covenant and dispose of the income thereof in like manner as the income of the wife's trust fund and so that any reversionary interest be not sold before it falls into possession unless the trustees or trustee see special reason for sale and it is hereby agreed that the trustees or trustee shall stand possessed of the money to arise from such sale calling in or conversion and of any part of the said property received in money upon the trusts and subject to the powers and provisions hereinbefore declared concerning money forming part of the wife's trust fund (except the special provisions hereinbefore contained as to half-yearly sales and application of the proceeds thereof) or as near thereto as circumstances will permit and upon trust to pay any annuity or the income of any other real or personal property limited to or held in trust for the said Jennie Palles for her life or for any term of years determinable at her death to her without power of anticipation during any coverture but with power for the trustees or trustee with her consent in writing at any time to sell the same so that the money to arise from such sale be held and applied upon the trusts and subject to the powers and provisions hereinbefore declared concerning money forming part of the wife's trust fund (except as aforesaid) or as near thereto as circumstances will permit."

Then there is an indemnity to the trustees in respect of the after-acquired property clause, on which nothing turns, and a clause making provision as to the investment of the husband's trust fund.

I should next refer to the will of Mrs. Rydon. The material clause of it is cl. 3, and that is in these terms:

"Whereas under or by virtue of the settlement (hereinafter called 'the said settlement') made on my marriage with my late husband dated Jan. 21, 1890, and made between Arthur Hope Rydon of the first part myself (then and therein called Jane otherwise Jennie Palles spinster) of the second part the Right Honourable Christopher Palles Lord Chief Baron of the Court of Exchequer in Ireland of the third part and Charles Robbins of the fourth part divers trust funds and property therein and hereinafter shortly referred to as 'the wife's trust fund' are settled in trust after the death of the survivor of myself and my husband the said Arthur Hope Rydon for all or such one or more exclusively of the other or others of the issue of the marriage of my said husband and myself whether children or remoter issue at such age or time or respective ages or times and if more than one in such shares and manner as I may by deed revocable or irrevocable or by will or codicil appoint now in exercise of the power for this purpose given to me by the said settlement and of all other powers (if any) enabling me in this behalf I hereby direct and appoint that the trustees or trustee for the time being of the said settlement shall from and after my death stand possessed of the wife's trust fund in trust for my grand-daughter Elizabeth Susan Everitt if she shall be living at my death and shall then have attained or shall thereafter attain the age of twenty-one years or shall at my death have been married or shall thereafter, marry under that age."

Then there is a settlement of whatever, on the true construction of this clause, is appointed to Elizabeth Susan Everitt (now Mrs. Somers) which gives her a protective life interest with remainder for her (Mrs. Somers') children born in the lifetime of Mrs. Rydon and attaining the age of twenty-one years, or in the case of daughters marrying under that age, and also for Mrs. Somers' children born within twenty-one years after Mrs. Rydon's death and if more than one in equal shares, with a provision for accruer restricted in its operation to the aforesaid period of twenty-one years.

Those being the documents, I return to the question whether the appointment contained in cl. 3 of the will operated on the interest caught by the after-acquired property clause or was confined to the £3,000 originally brought into settlement on the wife's behalf. I think that question may be conveniently divided into two: first, whether on the true construction of the settlement the expression "the wife's trust fund" should be treated as describing and comprehending not merely the original £3,000 but also any additions to the settlement brought about by the operation of the after-acquired property clause, and, secondly, whether, even if the expression "the wife's trust fund" is not a strictly accurate description, according to the terms of the settlement, of the whole fund consisting of the £3,000 and any additions thereto under the after-acquired property clause, nevertheless on the true construction of the will, Mrs. Rydon did effectively exercise her power both over the original fund and the fund representing the after-acquired property, although she did so by perhaps not wholly accurate language.

I propose to deal first with the former of those questions, i.e., whether, on the true construction of the settlement, the expression "the wife's trust fund" can be properly held to include the after-acquired property. As to that, counsel for the first defendant, on behalf of those interested in default of appointment, places great reliance on the passage in the settlement which in so many words described the wife's trust fund as

"the said sum of £3,000 and the investments for the time being representing the same (which sum and investments are hereinafter referred to as 'the wife's trust fund')."

He says with force that this passage provides a clear and unequivocal meaning for the expression "the wife's trust fund" and makes it denote the £3,000 and the investments representing that sum and nothing more. On the other hand, counsel for the infant defendant, the appellant, while not disputing—indeed, it would be impossible for him to dispute—the clear meaning of the passage which I have just read, says that nevertheless if this settlement is looked at as a whole, the true conclusion is that any property added to the settlement by virtue of the after-acquired property clause should be treated as becoming part of and as included in the expression "the wife's trust fund". The arguments on which counsel for the infant defendant relies are briefly these: First, going to the after-acquired property clause itself, he calls attention to the form in which the trusts of that property are declared. It is to be held

"upon the trusts and subject to the powers and provisions hereinbefore declared concerning money forming part of the wife's trust fund."

Counsel observes that the direction is not to hold the property on the same trusts or on similar trusts or on like trusts; it is to hold it

"upon *the* trusts and subject to *the* powers and provisions hereinbefore declared concerning money forming part of the wife's trust fund."

Those words, he says, are apt to describe an augmentation of the property subject to the existing trusts, rather than the creation of a new and distinct trust of additional property by reference to the existing trusts. He also places some reliance on the provisions about the half-yearly sales. He points out, as to those provisions, that the settlement there does not use the expression "the wife's trust fund", but uses the expression "the said sum of £3,000 now in the hands of the above named trustees". He relies on that change of language as showing that it was contemplated that the sum of £3,000 would or might be only a part of the total fund or investments comprised at any given time in the wife's trust fund.

Speaking for myself, I cannot attach any great weight to that argument. I find the first defendant's answer to it convincing, and it seems to me that, having regard to the nature of the operation contemplated, the appropriate reference was to "the said sum of £3,000" as distinct from a reference to "the wife's trust fund", whether or not property caught by the after-acquired property clause was to be treated as falling within the description "the wife's trust fund". It will be remembered that the provisions as to the half-yearly sales contemplated a half-yearly raising of £150 out of capital to be carried out until, to put it shortly, the arrival of the testator's time of division or the death of the survivor of Mr. and Mrs. Ryden. That process was to go on, subject to the time limit I have mentioned, until the fund was wholly exhausted, and it then was to cease; but there was a provision for recoupment out of the first money received by the trustees from the property brought into settlement by Mr. Ryden. That being the nature of the scheme, it would clearly have been inappropriate here to use the expression "the wife's trust fund", for "the wife's trust fund" would include not merely the £3,000 out of which the half-yearly payments of £150 were to be made, but it would also include what I may describe as the right to recoupment or the sums actually recouped under the provision as to such recoupment to which I have referred, and it would be wholly inappropriate, because it was obviously not intended—indeed, it was expressly provided that it was not intended—that the provision for the half-yearly payment should extend to anything beyond the original £3,000. I think there is force, too, in the argument of counsel for the first defendant that if the reference to the £3,000 in the provisions about half-yearly payment was put in advisedly as a deliberate reference to part only of the trust fund, then when one comes to the covenant to settle after-acquired property, the exception from the trusts which are to be applicable to the property, "special provisions hereinbefore contained as to half-yearly

sales and application of the proceeds thereof", would be otiose and inappropriate, for ex hypothesi these provisions were only to apply to a defined sum of £3,000. I cannot, for my part, attach any great weight one way or the other to the arguments addressed to the court concerning that provision.

To my mind, however, assistance is to be derived from it in a different way. In order to appreciate that, it is necessary to return for a moment to the after-acquired property clause. A point was made by counsel for the first defendant (and it was the point, I think, which the learned judge considered decisive) to this effect: It is true that the clause provides that the after-acquired property is to be held

"upon the trusts and subject to the powers and provisions hereinbefore declared concerning money forming part of the wife's trust fund",

but that is followed by the exception of

"the special provisions hereinbefore contained as to half-yearly sales and application of the proceeds thereof."

Now, counsel for the first defendant says that, even if the frame of the trust is appropriate to bring about an amalgamation of the after-acquired property with the original fund, nevertheless it is prevented from having that effect by the exception, for (he submits) there can be no consolidation of two funds unless the trusts of the two funds said to be amalgamated are identical. By excepting the special provisions as to half-yearly sales, the settlement has manifested an intention that there is to be no amalgamation, for so long as the provisions as to half-yearly sales remain in force, the position would be, after the so-called amalgamation, that the £3,000 or the unexpended balance of it for the time being would be subject to a trust to raise £150 half-yearly out of the capital of the £3,000 and pay it to Mr. Rydon, if living, and after his death, to Mrs. Rydon. That would be a special trust applicable exclusively to the original fund and not to the fund represented by the after-acquired property.

Counsel cites, in support of that contention, *Re Wood* (1), for certain passages from the judgment of SIR HERBERT COZENS-HARDY, M.R. The learned Master of the Rolls said ([1913] 2 Ch. 583):

"In my opinion there is no law and no presumption applicable to a case of this kind. It depends, in my opinion, upon the true meaning and effect of the will as a whole."

He also said (*ibid.*):

"If separate trustees might have been appointed of these funds there would be no coalescence; one could not be deemed to be an accretion to the other. If separate trustees had been appointed I know of no process of law by which the one set of trustees could be required to hand over the funds to another set, although the beneficiaries might be the same."

He further said (*ibid.*, 584):

"Let me repeat an illustration which I suggested in argument. A very common form of will is a devise of freeholds to trustees upon trust to sell and to hold the proceeds of sale upon settlement trusts. You do not include copyholds because you want to save the expense of admission, and so on; you have separate clauses and a direction to sell the copyholds and to hold the proceeds upon the trusts thereinbefore declared with reference to the proceeds of sale of the freeholds. I should have thought there, unless there were some express words in the will, that that would be an accretion and the helter-skelter clause and everything else would be applicable; but if there is any difference in the trusts at any stage, speaking for myself, I am not prepared to hold that the doctrine of accretion can apply."

Counsel for the first defendant uses the last two passages I have quoted by saying here that the difference in the shape of the trust for the half-yearly sales in the

present case would have enabled separate trustees to be appointed of the original fund, on the one hand, and the fund represented by the after-acquired property, on the other; and further by adopting the view of SIR HERBERT COZENS-HARDY, M.R., that if there was any difference in the trusts at any stage, "speaking for myself, I am not prepared to hold that the doctrine of accretion can apply". Here, he says, there is a difference in the respect I have mentioned. But I conceive that there is no rule of law that it is impossible to have a coalescence of two funds, subject to a charge peculiar to one of such funds, and a difference such as that occasioned by the exception in the present case can really do no more than throw light on the intention of the parties and, for what it is worth, it may be some indication against an intention to consolidate the two funds into one. Speaking for myself, I should not have thought that SIR HERBERT COZENS-HARDY, M.R., when he referred to "any difference", meant to refer to a difference such as this. In the case before him, there was a settlement of three separate funds on each of the testator's three children. There was no question of any one or two of these funds being held on the same trusts as the other or others except in the event of the failure of the primary trust declared concerning the fund in question. There is nothing of that sort in the present case. There was simply an annual sum raisable out of capital, and it was desired to limit that raising of sums out of capital to the original fund. I see no reason, speaking for myself, for regarding a difference of that kind as fatal to the implication of an intention to amalgamate the two funds.

I now return to the passage concerning the recoupment of the amounts raised by means of the half-yearly sales, and I note again it is in these terms: The trustees are to set apart a sum, broadly speaking, representing the amount by which the £3,000 has been depleted, and they are to hold the sum so set apart

"upon the trusts and with and subject to the powers and provisions hereinbefore declared and contained concerning the said sum of £3,000 now in the hands of the above-named trustees (other than and except the foregoing special provisions as to half-yearly sales and payments of and out of capital) or such of the said trusts powers and provisions (other than and except as last aforesaid) as shall for the time being be subsisting or capable of taking effect to the intent that by means of such setting apart and holding the capital withdrawn from the wife's trust fund by the said half-yearly sales of and payments out of capital may be replaced for the benefit of the persons interested hereunder in the wife's trust fund and the income thereof."

I attach considerable importance to that passage for these reasons: It was manifestly intended that the sum set apart by way of recoupment under these provisions was to coalesce with and form part of the wife's trust fund for all purposes. I think that is undoubted; yet, in conjunction with that undoubted intention to effect a complete consolidation, one has the very words of exception relied on to prevent consolidation where they occur in the after-acquired property clause, viz.:

"upon the trusts hereinbefore declared and contained concerning the said sum of £3,000 . . . (other than and except the foregoing special provisions as to half-yearly sales and payments of and out of capital)."

It is true that the passage introduced by the words "to the intent" expressly states the intention of the operation to be the replacement of capital for the benefit of the persons interested in the wife's trust fund, but nevertheless the draftsman used the formula

"upon the trusts and with and subject to the powers and provisions hereinbefore declared and contained concerning the said sum of £3,000" as appropriate to bring about such a consolidation, and he did not consider the exception of the special provisions as to half-yearly sales as in any way repugnant to or inconsistent with such consolidation. That, speaking for myself, seems to

be the most important feature, for the purposes of the question now to be decided, that can be extracted from the provisions about special sales.

A I should next refer to the hotchpot clause, on which considerable reliance was placed by counsel for the infant defendant. I do not think I need read it again. It is in a usual form. The point is that, as it stands, its effect is that any child who or whose issue takes part of either of the two funds (i.e., the husband's trust fund or the wife's trust fund) must bring the amount appointed into hotchpot (i.e., account for it) in the division of either of those funds. So long as there are only two funds, says counsel, all is well; but suppose it is concluded that there is no consolidation between the wife's trust fund as originally constituted and the after-acquired property, he says that the hotchpot provision becomes unworkable or would, at all events, produce unfair and capricious results. To my mind, there is considerable force in that argument, which B commended itself to SARGANT, J., in *Re Fraser* (2). The actual point at issue in that case was the effect of an after-acquired property clause on a hotchpot provision. The learned judge said ([1913] 2 Ch. 235):

C "I think that would be contrary to the general understanding of the profession, and I feel sure that in numberless cases, where funds have from time to time fallen in under after-acquired property clauses, there have been distributions of the original fund and the 'accreted' fund—of course, I am using a word there which begs the question in my favour, so I will say the fund which comes in in that way—on the footing that the appointments which have been made of the original fund before the other funds fell in had to be taken into account under a hotchpot clause as against the total funds. D I think there is this difficulty about the contrary view, namely, that if you have—as often happens and has happened in this case—two or three funds falling in at different times, and in each case the hotchpot clause has to be written out, together with the other trusts, as trusts introduced strictly by reference, you would have on each occasion to have a separate hotchpot clause for each separate fund as it fell in. You could not say that the E original hotchpot clause applied to the original settled fund and that there was a second hotchpot clause applying to all the different items that from time to time came in. If you were to go on the principle of writing out the trusts originally inserted in the settlement with reference to each item as and when it came in, you would have to write them out on each separate occasion with a separate hotchpot clause. I do not think that would be in real F accordance with the intention of persons who make a simple settlement of the kind I have indicated. In my opinion they are intending to treat any fund that may from time to time come in under such a clause as being an accretion to, and augmentation of, the original trust fund."

With those observations I respectfully agree, and I think there is really great force in the argument based on the hotchpot clause as supporting the conclusion G that, under an after-acquired property clause of this kind, the intention is to effect an accretion to the wife's fund or the husband's fund, as the case may be. Counsel for the first defendant sought to minimise the force of the argument against him on the hotchpot clause by submitting that in any case, for the purposes of hotchpot, all sums coming in at any time or from time to time under the after-acquired property clause should be treated as one fund; so there would H only be, as it were, one duplication of the hotchpot process and not a series of hotchpots as and when each piece of property fell in under the after-acquired property clause. I am not satisfied as to that, and it certainly seems to conflict with the view of SARGANT, J., that this question of hotchpot might arise again and again as and when after-acquired property fell in. It must be remembered that the after-acquired property may come from all kinds of different sources and at different times, and to my mind once the view is adopted that the after-acquired property clause introduces trusts strictly by reference, it is difficult to

say that, for the purposes of a hotchpot clause such as this, the whole of the after-acquired property should be treated as constituting one fund held under one set of referential trusts. Then counsel for the first defendant said, as I understood him, that although the working of the hotchpot clause, on his construction of the settlement, might be a little unfair, it was not on the facts of this case so very unfair because the inequality (I think he said) could not exceed £3,000, being the value of the wife's trust fund. I do not think that consideration is a valid one for the purpose of testing the question of principle. A

Counsel referred us—I think this is the only other case I need mention—to *Re Currenlish's Settlement* (3), a decision of PARKER, J., in which he held that words closely resembling the words of trust in the after-acquired property clause in the present case created for the purposes of the hotchpot provision there in question a referential trust and not a coalescence of the after-acquired property with the fund which was originally settled. There was in that case only one fund in question, so that the complications pointed out by SARGANT, J., in *Re Fraser* (2) did not arise. There was also a special feature of the case from which it could be inferred that there was no amalgamation. That point, shortly stated, seems to have been this. The subject-matter of the settlement was £15,000, to which the wife in that case had become entitled under the terms of another settlement. It seems that under the provisions of a certain deed-poll it was possible that certain sums she might receive other than the £15,000 might be taken in reduction of the £15,000, and there was a provision in the settlement which PARKER, J., had to consider to the effect that, in the event of the wife becoming entitled to any sum which, if received, would reduce the £15,000, her right to it might be surrendered by the trustees so as to keep the £15,000 intact. Inasmuch as those additional sums would presumably have been caught by the after-acquired property clause, it was pointed out by PARKER, J., that, if there was coalescence of the funds, it would be a matter of indifference to the parties whether these additional sums were taken or not, because if the £15,000 was reduced, the reduction would be offset by receipt of the additional sums. It seems to me, therefore, that *Re Currenlish* (3) is distinguishable on its facts from the present case, but there is no doubt that PARKER, J., clearly expressed an opinion against consolidation or amalgamation of after-acquired property which I think it is really impossible to reconcile with the view expressed by SARGANT, J., in *Re Fraser* (2). In truth, I think little assistance can be derived from the authorities on this question. I refer again to what was said by SIR HERBERT COZENS-HARDY, M.R., in *Re Wood* (1) ([1913] 2 Ch. 583): B

“In my opinion there is no law and no presumption applicable to a case of this kind. It depends, in my opinion, upon the true meaning and effect of the will as a whole.” C

Speaking for myself, I prefer the view of SARGANT, J., to that of PARKER, J. In my judgment, looking at this settlement as a whole, the effect of the after-acquired property clause, construed in conjunction with the rest of the document, was to bring about an accretion to the assets comprised in the wife's trust fund, so that whenever any property became caught by the after-acquired property clause, thereafter the expression “the wife's trust fund” could be used with accuracy to denote not merely the original £3,000 but the accretion thereto. If that view is right, then it follows that the appointment made by Mrs. Rydon did have the effect of passing the entire fund, both original and accreted, and she was in no way inaccurate in defining the property over which she was exercising her power as “the wife's trust fund.” D

Counsel for the first defendant argued that, even if there were such an amalgamation, nevertheless it was an amalgamation to create a new fund compounded in part of the original wife's trust fund and in part of the accretion thereto. He said it followed that even if there had been an amalgamation, an appointment of the wife's trust fund would not pass the whole fund, but would pass only that E

part of it which was originally comprised in the wife's trust fund. With all respect, I find it impossible to accept that argument, which would lead to the most extraordinary and inconvenient results. I think, once it is held that there has been a consolidation, then the consolidated fund becomes the wife's trust fund for all purposes.

A I should next consider the other aspect of the case, the second of the two questions stated earlier in this judgment. If I am right so far, then (as I have said) it is plain that the appointment contained in cl. 3 of the will passed the whole of the property, both the original trust fund and the after-acquired property. But, supposing I am wrong, it is necessary to consider whether, although Mrs. Rydon was to some extent inaccurate in using the expression "the wife's trust fund" in any sense other than as meaning the original £3,000, yet it is possible to construe cl. 3 as a whole in such a way as to reach the conclusion that she expressed an intention to appoint the whole fund. When this question was argued before the learned judge, great emphasis was placed, on behalf of those interested under the appointment, on the word "property" occurring in the phrase "divers trust funds and property". It was submitted, apparently, that there was here a case of *falsa demonstratio*, because it could not have been intended to use the word "property" in relation to the sum of £3,000. That argument was met by saying that the word "property" was satisfied by the right of recoupment in respect of the half-yearly sales under the settlement. When the case came before us, we were told that it would be possible to show that in fact the provisions as to recoupment had been exhausted before the date of the will, so that the word "property" could not be taken to refer to that. After some discussion, we thought it would not be right to admit fresh evidence on this subject. There appeared to be no reason why the information should not have been available in the court below. It appeared extremely doubtful whether such evidence as could be provided was in truth admissible evidence and also how far any definite or conclusive answer to this particular question of fact would have been provided by it; so, on the whole, in the circumstances of this particular case, we thought it right to exclude further evidence. We were fortified in that decision by the view to which I think we all came that the presence or absence of the word "property" in the recital preceding the appointment really could not to any substantial extent affect the issue one way or the other or add to or subtract anything from the effect of the phrase "divers trust funds";

F Returning to the question of construction, one thing, I think, must be abundantly plain to anyone reading cl. 3 of this will and knowing that the fund originally settled on behalf of the wife consisted merely of £3,000 to be invested in trustee securities, i.e., that Mrs. Rydon could not possibly have meant to refer only to that £3,000 when she used the expression "divers trust funds and property" and went on to say "therein and hereinafter shortly referred to as 'the wife's trust fund'". On the view I am now assuming, it would not be strictly accurate to designate as "the wife's trust fund" anything except the original £3,000 and the investments representing it, but there one is faced with a choice between two inaccuracies: either the testatrix has wholly misdescribed the fund by calling it "divers trust funds and property", when it is really nothing of the sort, or else she is using "the wife's trust fund" otherwise than in the primary and narrow meaning assigned to it by the settlement. The problem of construction must be resolved by choosing between those two inaccuracies.

H We were urged by counsel for the first defendant to hold that the governing words were the words "therein and hereinafter shortly referred to as 'the wife's trust fund'" and that the expression "divers trust funds and property" must be moulded to suit that description exactly. For my part, I can see no reason for that. Having read the settlement, I (as I have said) have come to the conclusion that there was here in the strict sense an accretion to the wife's trust

fund: but, if I am wrong in that, as I will assume for the moment, it cannot possibly be said that it would be clearly and manifestly inappropriate to use the expression "the wife's trust fund" in an extended meaning so as to include not only the original £3,000 but any after-acquired property which had become subject to the trusts declared concerning the wife's trust fund. Therefore, to my mind, the use of the words "therein and hereinafter shortly referred to as 'the wife's trust fund'", even though one must concede they are not wholly accurate, does not provide any sufficiently clear ground for cutting down the meaning of "divers trust funds and property" so as to make it answer the description of the trust fund originally brought in on behalf of the wife. Accordingly, on the question as to the construction of cl. 3 of the will, read in conjunction with the settlement, I come to the conclusion that the effect of cl. 3, on its true construction, was to pass the whole of the fund, both the original fund and the fund representing the after-acquired property.

ROXBURGH, J., who heard a very full argument of the case, very much on the lines of the interesting argument which has been presented to us, would (as I understand his judgment) have come to the same conclusion as I have on the question whether the trusts declared by the after-acquired property clause were referential trusts or such as to bring about an accretion to and coalescence with the original wife's trust fund. He, as I understand him, would have concluded that there was an accretion or coalescence, and he expressed himself thus on this point:

"I would like to say one word about *Re Cavendish* (3). PARKER, J., having stated clearly that the question was one of construction of the document as a whole, I am not quite clear why he found it possible in that case to stop before the end of the document and reach something in the nature of a prima facie conclusion. But whether he was entitled to do so, or whether he was not, I do not know—that is not a case which I have to decide; but, for my own part, I should not have felt any difficulty at all about enlarging the definition of the wife's fund by reference to the later provisions of the settlement, but for the existence of this exception from the trusts. If the words had been 'To be held upon the trusts and subject to the powers and provisions hereinbefore declared concerning the money forming part of the wife's trust fund or as near thereto as the circumstances will permit', I should have had no hesitation in holding that there was an amalgamation, and I should crave in aid *Re Fraser* (2) which, if those had been the words, really seems to me to be indistinguishable, and I should prefer the approach in *Re Fraser* (2), to the approach in *Re Cavendish* (3)."

With those observations of the learned judge I respectfully agree, but he goes on thus:

"But this case is differentiated from any case to which I have been referred by these words: 'except the special provisions hereinbefore contained as to half-yearly sales and the application of the proceeds thereof'. In my judgment, this case turns on what is the true meaning and effect of that exception. In my view, it is not, as Sir Andrew Clark argued, an exception of the provisions relating to a part of the trust, but it is an exception of the provisions relating to the trusts as a whole. Therefore, I have no direct guidance from any of the cases, except the dictum in *Re Wood* (1), to which I have already referred."

For the reasons I have endeavoured to state, I cannot accept the learned judge's conclusion that the exception of the special provisions as to half-yearly sales had the effect of preventing the trusts of the after-acquired property from effecting a coalescence of the after-acquired property with the wife's original trust fund. On the question of the construction of the appointment, the learned judge seems to have taken the view that it must be regarded as appointing only

that which could be described as "the wife's trust fund" on the most strict and narrow application of the definition contained in the settlement. I venture to differ from him on that point also, and would, for my part, take a rather more liberal view of the construction of the appointment, which view has led me to the conclusion which I have already indicated.

A For these reasons, I would allow this appeal and make a declaration to the effect that the appointment did extend to the fund representing the after-acquired property as well as to the fund representing the £3,000 originally settled on behalf of Mrs. Rydon.

SIR RAYMOND EVERSLED, M.R.: I have come to the same conclusion, but, because we are differing from the view of ROXBURGH, J., I should like to state briefly the grounds for my decision.

B The question, in the end, is one of the construction of cl. 3 of Mrs. Rydon's will, dated Nov. 28, 1938. I accept, of course, the argument of counsel for the first defendant that, in approaching that matter of construction we should entertain no speculative bias in favour of what we might think Mrs. Rydon should or did intend, but should endeavour to interpret the intention as she has in fact expressed it.

C As JENKINS, L.J., has pointed out, we have dealt with this matter on the footing that there has been no evidence before the court whether what is called in the settlement the "testator's time for division" had or had not arrived. It is, however, clear that Mrs. Rydon, when she made her will, was aware (or, at least, we must take it that she was aware) that under the settlement she had power to appoint not only whatever might represent the original £3,000 sub-
D scribed by Sir Christopher Palles but also any after-acquired property later brought into the settlement and, further, that there had in fact come into being such after-acquired property before the date of the will.

In those circumstances, the first matter which I confess has impressed my own mind very strongly is this. The question is to be resolved by construing the opening lines of cl. 3 of the will, which is a recital: "Whereas under or by virtue
E of the settlement", which she then describes by date and parties,

"divers trust funds and property therein and hereinafter shortly referred to as 'the wife's trust fund' are settled in trust",

and then she states the trust, so as to indicate the existence in her of a power of appointment over such "divers funds and property". Now, as a matter of
F English, if that phrase is looked at, it seems to me (I confess) very difficult to suppose that Mrs. Rydon was intending to introduce an appointment by her over part only of the subject-matter to which the recited power of appointment related. The phrase "divers trust funds and property", to which JENKINS, L.J., has already alluded, seems to me to indicate a reference to the whole subject-matter over which she had the power. Put conversely, if the lady had by this
G will been intending to exercise the power only in respect of part of the property to which the power related, it would be (I should have thought) difficult to think of a more deceptive introduction in words to the exercise of that power. Still, it is undoubtedly true that she has proceeded to identify that subject-matter by the words "therein" (i.e., in the settlement) "referred to as 'the wife's trust fund'"; and so inevitably one is thrown back to the terms of the settlement
H and required to discover, by reference to the settlement, what identification the appointor had in mind.

Now, for reasons which JENKINS, L.J., has stated and which I do not repeat, I am also of opinion that, for the purposes of the settlement, the subject-matter of the after-acquired property covenant should be treated as, and was intended to be, an accretion to the funds which were initially defined as "the wife's trust fund". I think, putting the matter quite briefly, that the reference to the hotchpot clause provides a powerful incentive to that conclusion, and if in the

hotchpot clause "the wife's trust fund" should be treated as including any accretion by way of after-acquired property, then I think the same must inevitably follow as regards the powers of appointment over corpus which immediately precede in the settlement the hotchpot clause. ROXBURGH, J., indeed, would (as I understand it) have himself come to that conclusion on the meaning of the settlement had it not been for one circumstance. After stating that his mind had greatly vacillated in this case (and it is obviously a most difficult case), he said at the end of his judgment:

"I should not have felt any difficulty at all about enlarging the definition of the wife's fund by reference to the later provisions of the settlement but for the existence of this exception from the trusts."

I do not read again the rest of the concluding paragraph of the judgment which JENKINS, L.J., has already read, but the reference at the end of my citation is to the language in the after-acquired property clause, which has also been read but which I must cite again:

"And it is hereby agreed that the trustees or trustee shall stand possessed of the money to arise from such sale calling in or conversion . . . upon the trusts and subject to the powers and provisions hereinbefore declared concerning money forming part of the wife's trust fund (except the special provisions hereinbefore contained as to half-yearly sales and application of the proceeds thereof)."

But, in my judgment, the suggested effect of that clause as negating accretion is itself displaced when regard is had to the circumstance that earlier on, in relation to that part of the settlement which provides for the replacement of the expended capital of the £3,000 fund, the settlement uses the same exception when stating that the replaced funds should be held on the trusts of the wife's trust fund. It is conceded that the replaced funds are, and ought for all purposes to be, treated as part of "the wife's trust fund", so that the presence in that earlier part of the settlement of the same exception cannot be regarded as fatal to or an obstacle to "the wife's trust fund" having a meaning more extended than merely by reference to the original sum of £3,000. In any case, as JENKINS, L.J., has also stated, and having regard to the great difficulties of construction in the settlement, it seems to me legitimate to construe the language of Mrs. Rydon in her will as giving to "the wife's trust fund" (albeit perhaps somewhat inaccurately) a meaning more extensive than by confining it narrowly to the original sum of £3,000 and whatever should thereafter represent it.

As counsel for the first defendant pointed out, even if, on this form of settlement, the subject of the after-acquired covenant be treated as amalgamated with or an accretion to the original fund, still, as a matter of very strict definition, "the wife's trust fund" remains a definition only of the original subject-matter settled; so that the strict method of describing the sum total of the original fund and all accretions thereto might perhaps be "the funds and property held subject to the trusts declared to be applicable to the wife's trust fund"; but plainly, as counsel for the infant defendant stated in his reply, if there be in truth accretion or amalgamation, then as a matter of conveyancing, a reference in an appointment to "the wife's trust fund" must *prima facie* (at any rate) include not only the original fund but any accretions thereto. In any case, in my judgment, when regard is had to the elaboration of the settlement, it is legitimate, and indeed necessary, in reading cl. 3 of the will, to give (in the mouth, so to speak, of Mrs. Rydon) a meaning to "the wife's trust fund" which is at least sensible and which I think was in substance accurate.

I need not say anything further about the cases, save that in my judgment they can do no more than provide illustrations of what, after all, is the task, in all these cases, of the court, i.e., to construe as a whole the particular document which is put before it; and that I agree with JENKINS, L.J., in thinking that the

language used by SIR HERBERT COZENS-HARDY, M.R., in *Re Wool* (1) ([1913] 2 Ch. 584) ought not to be regarded as laying down (and was not intended to lay down) any strict rule of construction which should compel the court to answer the present question otherwise than, as I think, it ought to be answered.

For these reasons, in addition to those which have been stated by JENKINS, L.J., I think that the answer to be given to the question posed is that which he has suggested, i.e., an answer in favour of the appeal.

HODSON, L.J. : I agree and have nothing to add.

Appeal allowed.

Solicitors: *Kennedy, Genese & Syson* (for the fourth defendant); *Johnson, Weatherall & Sturt* (for the first defendant); *Church, Adams, Tatham & Co.* (for the trustees).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

CRAXFORDS (RAMSGATE), LTD. v. WILLIAMS & STEER MANUFACTURING COMPANY, LTD.

[QUEEN'S BENCH DIVISION (Pilcher, J.), July 23, 26, 27, 1954.]

Statute—Retrospective operation—Repeal—Defence of no sufficient memorandum of sale of goods—Writ issued and defence delivered before repeal—Sale of Goods Act, 1893 (c. 71), s. 4—Law Reform (Enforcement of Contracts) Act, 1954 (c. 34), s. 2.

On Jan. 11, 1954, the plaintiffs issued a writ claiming damages for breach of an oral contract for the sale of goods, viz., 101,000 sets of dolls' parts at 2s. per set, which they were to supply to the defendants. On Feb. 3, 1954, the defendants delivered their defence in which they pleaded, among other things, the absence of a note or memorandum in writing sufficient to satisfy s. 4 of the Sale of Goods Act, 1893. On June 4, 1954, the Law Reform (Enforcement of Contracts) Act, 1954, s. 2, repealed s. 4 of the Sale of Goods Act, 1893, in relation to any contract whether made before or after the commencement of the Act of 1954. The trial of the action was commenced on July 23, 1954.

HELD: the defence under s. 4 of the Sale of Goods Act, 1893, failed, since the section was procedural and had been repealed before the action was tried, and the defendants, by pleading the section, had not acquired any vested right which might have survived the repeal.

AS TO THE RETROSPECTIVE EFFECT OF STATUTES ON RIGHTS OF ACTION, see HALSBURY, Hailsham Edn., Vol. 31, p. 516, para. 672; and FOR CASES, see DIGEST, Vol. 42, pp. 706, 707, Nos. 1229-1242.

Case referred to:

(1) *Hitchcock v. Way*, (1837), 6 Ad. & El. 943; 6 L.J.K.B. 215; 112 E.R. 360; 42 Digest 706, 1235.

ACTION for damages for breach of contract.

The plaintiffs were manufacturers of (inter alia) plastic mouldings forming the component parts of dolls. The defendants made up these component parts into complete dolls for re-sale to the wholesale toy trade. The plaintiffs alleged that on Dec. 9, 1953, they made a contract orally with the defendants for the supply of 101,000 sets of dolls' parts at 2s. per set. The defendants agreed that on that day they gave such an order but deny that any contract was made on that day and allege that the order they gave was only of contractual effect if it was confirmed and confirmed within a reasonable time. At no time after Dec. 9 did either the plaintiffs or defendants take any steps to confirm the order either verbally or in writing and on Dec. 21 the defendants wrote to the plaintiffs cancelling their order. The writ in the action claiming damages for breach of

contract was issued on Jan. 11, 1954. By their defence the defendants relied on s. 4 of the Sale of Goods Act, 1893, claiming that there was no sufficient note or memorandum of the contract. At the trial of the action, HIS LORDSHIP found that a binding contract had been entered into between the parties on Dec. 9, 1953; that the defendants were in breach of that contract and that the defendants would be liable to the plaintiffs subject to the effect of the defence under the Sale of Goods Act, 1893, s. 4.

Ryder Richardson, Q.C., and Vester for the plaintiffs.

Leonard Caplan, Q.C., and N. Lawson for the defendants.

PILCHER, J., stated the facts and the conclusions indicated above and continued: That brings me to the questions of law which arise on the defence raised under s. 4 of the Sale of Goods Act. The Law Reform (Enforcement of Contracts) Act, 1954, which came into force on June 4, 1954, provides by s. 2:

"Section 4 of the Sale of Goods Act, 1893, is hereby repealed in relation to any contract, whether made before or after the commencement of this Act."

It is conceded that if a party to litigation has acquired a vested right or interest in an action, the right or interest will not be destroyed by a subsequent statutory enactment unless the subsequent statutory enactment specifically so provides. The authority for that proposition is *Hitchcock v. Way* (1). It is submitted here by the defendants that they had, before the passing of the new Act, what I think they called a "vested defence" to this action, which was an action in being before the new Act was passed, and it is argued on their behalf that such vested right to rely on the defence afforded by s. 4 of the Sale of Goods Act can only be taken away by express words in the new enactment.

While the new Act provides that s. 4 of the Sale of Goods Act is repealed in relation to any contract made before, as well as after, the passing of the Act, it does not in terms save any right which may have become vested in the litigant before the passing of the Act. The Sale of Goods Act, 1893, s. 4 (1), the material words of which I will read, says:

"A contract for the sale of any goods of the value of £10 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf."

The plaintiffs submit that s. 4 is a procedural section and constitutes only a fetter on the power of the court to grant a remedy. It is submitted (and I think it is not really in dispute) that if it is right to regard the provisions of s. 4 as procedural provisions then the court will only look at the law as it stands at the time when the case comes before it. It is to be borne in mind, I think, that s. 4 does not affect the legal rights of the parties. It does not affect the passing of property under a contract which would be subject to its terms. If a party desires to rely on the section that party has to plead it and plead it with some particularity. It is not a substantive provision of the law in the sense that the court itself will take judicial notice of the fact that the provision of the section has not been complied with, unless the point is raised by one of the parties. The section in effect provides that contracts which are covered by it shall be proved in a certain fashion and that unless they are proved in that fashion the court will not enforce them.

I do not propose to repeat the careful arguments which were addressed by either side to me on this particular point, but I am satisfied that the plaintiffs' argument is right and that s. 4 is a procedural section in the sense that I have indicated. It seems to me difficult to suppose that because this action had

been commenced before the passing of the new Act and the defendants had put in a defence relying on s. 4 before the passing of the new Act, they thereby acquired a vested right to rely on defences open to them under s. 4. Such defences, as I have pointed out, raise questions of the evidence which is available at the trial of the action to support the contract which is being set up; and it is in the light of the evidence which is available that the court will arrive at a determination whether or not a contract for the sale of goods of the value of more than £10 can be enforced. The new Act applies to contracts made before it was passed and I have come to the conclusion that defences based on s. 4 in regard to such contracts can no longer be relied on. That is really sufficient to dispose of the case.

[HIS LORDSHIP referred briefly to other contentions not material to the effect of the new Act and concluded:] The result is that the plaintiffs succeed and are entitled to judgment for a sum to be assessed by a master, if not agreed; and there will be judgment for the plaintiffs.

Judgment for the plaintiffs.

Solicitors: *Ernest C. Randall* (for the plaintiffs); *Tyrrell Lewis & Co.* (for the defendants).

[*Reported by* MICHAEL MALONEY, ESQ., *Barrister-at-Law.*]

BROWN v. F. TROY & CO., LTD.

[QUEEN'S BENCH DIVISION (Gerrard, J.), July 14, 15, 1954.]

Building—Building regulations—Safe means of access to work—Injury to person crossing plank six inches from ground—Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145), reg. 5.

The plaintiff, who was employed by the defendants as a surveyor, was working on a building site. On Sept. 19, 1952, the plaintiff was crossing a plank erected as a temporary gangway, nine inches wide and about six inches above an excavation for a roadway, when he lost his balance, fell and severely injured his knee. The plaintiff brought an action against his employers for negligence and breach of statutory duty imposed by reg. 5 of the Building (Safety, Health and Welfare) Regulations, 1948, which is expressed to relate to scaffolds and means of access. HIS LORDSHIP, having found that the defendants were not in breach of their common law duty,

HELD: the words “. . . sufficient safe means of access shall so far as is reasonably practicable be provided to every place at which any person has at any time to work” in reg. 5 of the Building (Safety, Health and Welfare) Regulations, 1948, refer to access to any place of work and not merely to access to scaffolds: dictum of HILBERY, J., in *Wingrove v. Prestige & Co., Ltd.* ([1953] 1 All E.R. 696), disapproved; but as in this case the plank was as safe as was reasonably practicable there was no breach of statutory duty.

FOR THE BUILDING (SAFETY, HEALTH AND WELFARE) REGULATIONS, 1948, reg. 5, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 8, p. 213.

Case referred to:

(1) *Wingrove v. Prestige & Co., Ltd.*, [1953] 1 All E.R. 694; *affd. on different grounds* C.A., [1954] 1 All E.R. 576; 3rd Digest Supp.

ACTION for negligence and breach of statutory duty.

The plaintiff, who was a surveyor, was employed by the defendants who were builders and contractors. On Sept. 19, 1952, the plaintiff, in the course of his work, was at premises where the defendants were doing some building work under contract. At about 5.30 p.m. the plaintiff was crossing a plank, nine inches wide and about six inches above an uncompleted road, when he lost his balance, fell and severely injured his knee. The roadway in question had been

excavated and partly filled with hard core prior to concreting, and the surface of the incomplete road was about six inches lower than the sides of the road. The plank rested at one end on some new concrete and at the other on a ramp of asphalt and was supported in the middle by two bricks. At the time of his accident the plaintiff was following a Mr. Cooper across the plank and was about four feet behind him. Neither of them felt any movement of the plank while both were on it. When Mr. Cooper stepped off, the plaintiff alleged that the plank tilted sideways, one side rising about a quarter of an inch. His LORDSHIP found as a fact that such a small movement, if it did occur, was not sufficient to throw a man off his balance; that the plank was as safe as any reasonable employer could make it and, consequently, there was no breach of the employer's common law duties. A

Castle-Miller for the plaintiff.

Stephen Chapman for the defendants. B

GERRARD, J., stated the facts and, after finding that the defendants were not in breach of their common law duties, continued: In addition to the allegations of a failure of duty at common law, the plaintiff relies on a breach of the provisions of the Building (Safety, Health and Welfare) Regulations, 1948. He alleges that there was a breach of reg. 5. Counsel for the defendants submitted to me that on any view of the case there could not be a breach of reg. 5 and he cited, in support of that argument, the judgment of HILBERY, J., in *Wingrove v. Prestige & Co., Ltd.* (1) where reg. 5 was considered. HILBERY, J. ([1953] 1 All E.R. 696) said: C

" Regulations 5-30 are designed to protect from danger so far as possible a man who is using a scaffold, and in so far as reg. 5 says ' . . . and sufficient safe means of access shall so far as is reasonably practicable be provided to every place at which any person has at any time to work ', it either means, it seems to me, a safe means of access to a place where men have to work on the scaffold or else it has no relation to the purpose or purposes for which the scaffold is erected or designed." D

Although I have the greatest respect for the views of HILBERY, J. on these matters, I feel constrained to differ from him in this particular matter. Regulation 5, it is perfectly true, comes under the general heading of " Scaffolds and means of access." I will read the whole regulation: E

" Suitable and sufficient scaffolds shall be provided for all work that cannot safely be done on or from the ground or from part of the building, or from part of a permanent structure or from a ladder or other available means of support, and sufficient safe means of access shall so far as is reasonably practicable be provided to every place at which any person has at any time to work." F

HILBERY, J., has said that that means safe means of access to a place where a person has to work on a scaffold, but it seems to me that that construction involves an addition of words at the end of the regulation having a limited effect on the words as they stand by themselves. As a matter of construction I do not feel that the addition is permissible unless the context compels it to make good sense of the regulation itself. The regulation could have read, " and sufficient safe means of access so far as is reasonably practicable be provided to every place at which any person has at any time to work on a scaffold ". But it does not say that. Moreover, the earlier words are words describing a variety of places, in which people may have at any time to work, which are not scaffolds. Indeed, the requirement of the regulation is that scaffolds shall be provided for work that cannot be done from the enumerated places, namely, G

" on or from the ground or from part of the building, or from part of a permanent structure or from a ladder or other available means of support." H

It seems to me that in those circumstances the very terms of the regulation setting out these various places at which people may have to work contemplate safe means of access to all those places and not only to a scaffold as a place on which a person has to work. That is the view which I feel constrained to hold and, therefore, I reject counsel for the defendants' submission that reg. 5 cannot apply here because it only applies to safe means of access to a place where a person has to work on a scaffold.

- A I have to consider whether or not there has been a breach of reg. 5, as the means of access has to be sufficient and safe in so far as is reasonably practicable. What is the situation here? I said that I think this plank was as safe as any plank is ever likely to be on a building site unless fantastic and elaborate precautions are taken. Those are not required. The words "so far as is reasonably practicable" negative any such requirement. I think that this plank was perfectly safe and perfectly sufficient in the ordinary course of work. I think that to any employee on a building site this was as safe as it could reasonably be made. It was at a very low height. I do not think it was reasonably practicable to prevent the very small amount of movement which may have been possible in it and I think the scaffold plank was as safe as it could reasonably be made.
- B
- C I am by no means satisfied that the plaintiff really knows what caused him to fall, and in that sense the plaintiff has not discharged the burden of proof of the manner of causation of the accident. Even if the slight movement did cause him to lose his balance, yet, when one takes into account all the factors—what the plank was there for, how long it had been there, the height at which it was, what it was standing on, the very tiny amount of movement, the very sort of movement which one would expect to encounter on a building site—I think there was sufficient safe means of access, so far as is reasonably practicable, to take the plaintiff or anyone else to a place at which he might have to work on this site. It seems to me that I need add no more to that and, in the circumstances, very regretfully, my judgment must be for the defendants.
- D

Judgment for the defendants.

- E Solicitors: *Rudford, Frankland & Mercer* (for the plaintiff); *L. Bingham & Co.* (for the defendants).

[*Reported by* MICHAEL MALONEY, Esq., *Barrister-at-Law.*]

ADLER v. DICKSON AND ANOTHER.

[QUEEN'S BENCH DIVISION (Pilcher, J.), July 19, 20, 30, 1954.]

- F *Negligence—Exclusion of liability—Shipping—Passenger carriage—Passenger injured by fall of gangway—Action against captain and boatswain—Right of company's servants to claim exemption from personal liability.*
Shipping—Carriage by sea—Negligence—Exclusion of liability in contract of carriage—Protection of independent contractors and others not parties to the contract—Distinction between carriage of goods and carriage of passengers.
- G The plaintiff was a passenger in a vessel belonging to the P. & O. S. N. Co. and the defendants were the master and boatswain of the said vessel. On July 16, 1952, the plaintiff was climbing the gangway of the vessel when it moved and fell with the result that the plaintiff dropped sixteen feet on to the wharf, suffering severe injuries. The ticket issued to the plaintiff by the P. & O. S. N. Co. stated that "passengers . . . are carried at passengers' entire risk" and contained the following conditions: "The company will not be responsible for and shall be exempt from all liability in respect of any . . . injury whatsoever of or to the person of any passenger whether such injury of or to the person of any passenger . . . shall occur on land, on shipboard or elsewhere . . . and whether the same shall arise from or be occasioned by the negligence of the company's servants on board the ship or on land in the discharge of their duties, or while the passenger
- H

is embarking or disembarking, or whether by the negligence of other persons directly or indirectly in the employment or service of the company, or otherwise, or by the act of God . . . dangers of the seas . . . or by accidents . . . or any acts, defaults or negligence of the . . . master, mariners . . . company's agents or servants of any kind under any circumstances whatsoever . . ." It was not disputed that these conditions exempted the P. & O. S. N. Co. from liability. In proceedings for negligence against the defendants the master directed that the issue whether the terms of the ticket afforded a defence to the defendants against the plaintiff's claim should be tried as a preliminary point of law. On trial of the issue His LORDSHIP assumed that the plaintiff's accident was caused by the negligence of one or both of the defendants in the ordinary course of the duties attached to their respective offices as servants of the P. & O. S. N. Co.

Held: in contracting with passengers for exemption from liability in respect of injuries the company were not acting under any implied agency on behalf of the defendants who, accordingly, were not entitled in an action against them for negligence to the protection of the exemption clause in the ticket, and, as the contract of carriage of the plaintiff as a passenger contained no exemption clause expressly extending to the defendants' negligence, the defendants were not exempted thereby from liability to the plaintiff for their negligence.

Per curiam: Although it is now established law that an independent contractor, and possibly also a servant employed by a shipowner to deal with goods which at the material time are subject to a contract of carriage between the shipowner and the goods owner, if sued in tort by the goods owner, is, in appropriate circumstances, entitled in relation to his normal dealings with such goods, to claim the protection of exemption clauses in the contract of carriage between the goods owner and the shipowner (see p. 28, post, letter B), yet this principle does not apply to contracts for the carriage of passengers.

Elder, Dempster & Co. v. Paterson, Zochonis & Co. ([1924] A.C. 522), distinguished.

AS TO AGREEMENTS TO TRAVEL AT OWN RISK, see HALSBURY, Simonds Edn., Vol. 4, p. 186, para. 465; and FOR CASES, see DIGEST, Vol. 8, p. 102, Nos. 680-682.

AS TO THE RIGHTS OF STRANGERS TO A CONTRACT, see HALSBURY, Simonds Edn., Vol. 8, pp. 66-68, paras. 110-117; and FOR CASES, see DIGEST, Replacement Vol. 12, pp. 45-53, Nos. 227-286.

Cases referred to:

- (1) *Paterson, Zochonis & Co. v. Elder, Dempster & Co.*, [1923] 1 K.B. 420; 92 L.J.K.B. 524; 128 L.T. 577; *reversd.* H.L. sub nom. *Elder, Dempster & Co. v. Paterson, Zochonis & Co.*, *Griffiths Lewis Steam Navigation Co. v. Paterson, Zochonis & Co.*, [1924] A.C. 522; 93 L.J.K.B. 625; 131 L.T. 449; 41 Digest 478, 3118.
- (2) *Mersey Shipping & Transport Co., Ltd. v. Rea, Ltd.*, [1925] 21 Lloyd's Rep. 375.
- (3) *Gilbert Stokes & Kerr (Pty.), Ltd. v. Dalgety & Co., Ltd.*, [1948] 81 Lloyd's Rep. 337; 48 S.R.N.S.W. 435.
- (4) *Waters Trading Co., Ltd. v. Dalgety & Co., Ltd.*, [1951] 1 Lloyd's Rep. 385; 52 S.R.N.S.W. 4.
- (5) *Cosgrove v. Horsfall*, (1945), 175 L.T. 334; 2nd Digest Supp.
- (6) *Smith v. River Douglas Catchment Board*, [1949] 2 All E.R. 179; 113 J.P. 388; sub nom. *Smith & Snipes Hall Farm, Ltd. v. River Douglas Catchment Board*, [1949] 2 K.B. 500; 2nd Digest Supp.
- (7) *White v. Warrick (John) & Co., Ltd.*, [1953] 2 All E.R. 1021; 3rd Digest Supp.
- (8) *Pyrene Co., Ltd. v. Scindia Steam Navigation Co., Ltd.*, [1954] 2 All E.R. 158.

PRELIMINARY ISSUE to determine a point of law.

On July 16, 1952, the plaintiff was a passenger in the Peninsular & Oriental Steam Navigation Co.'s vessel Himalaya. On that day the vessel was berthed in Trieste and the plaintiff went ashore. On her return to the ship she mounted the gangway and while she was on it, the gangway moved and fell with the result that the plaintiff was thrown to the wharf from a height of sixteen feet and sustained serious injuries.

A The plaintiff then brought an action for negligence against the two defendants who were the master and boatswain of the vessel. At the material time the plaintiff was travelling on a ticket issued by the P. & O. S. N. Co. which contained a number of conditions, and which, it was not disputed, absolved the company from liability. On the first page of the ticket were the words

“passengers . . . are carried at passengers' entire risk.”

B On the next page were the words:

“This ticket is issued by the company and accepted by the passenger subject to the following conditions and regulations”,

the material part being set out in the following terms:

C “The company will not be responsible for and shall be exempt from all liability in respect of any . . . injury whatsoever of or to the person of any passenger whether such injury of or to the person of any passenger . . . shall occur on land, on shipboard or elsewhere . . . and whether the same shall arise from or be occasioned by the negligence of the company's servants on board the ship or on land in the discharge of their duties, or while the passenger is embarking or disembarking, or whether by the negligence of other persons directly or indirectly in the employment or service of the company, or otherwise, or by the act of God . . . dangers of the seas . . . or by accidents . . . or any acts, defaults or negligence of the . . . master, mariners . . . company's agents or servants of any kind under any circumstances whatsoever . . .”

E Paragraph 3 of the defendants' defence to the plaintiff's claim in negligence was in the following terms:

F “The accident to the plaintiff . . . occurred while the plaintiff was a passenger on the Himalaya upon the terms of the said ticket. If (which is denied) either of the defendants was personally responsible for the safety of the gangway . . . then the defendants' acts or omissions (if any) in relation to the said gangway and any other material acts or omissions on the part of either of the defendants took place in pursuance or performance of the contract between the plaintiff and the Peninsular and Oriental Steam Navigation Company . . . as contained in or evidenced by the plaintiff's said ticket and/or subject to the terms of the said ticket and the defendants are in the premises entitled to rely upon the terms of the said ticket. Further or alternatively any such acts or omissions on the part of either of the defendants occurred while the defendants were acting as the servants or agents of the company and the defendants are accordingly entitled to the same protection as that afforded to the company by the terms of the said ticket. Further or alternatively in contracting with the plaintiff upon the terms of the said ticket the company acted in all material respects as the agent of its servants and agents (including the defendants) and thereby exempted the defendants from any liability such as is referred to in the statement of claim. The said agency arises by implication of law. Further or alternatively by reason of her acceptance of the ticket and of the terms thereof the plaintiff expressly or impliedly agreed to travel in all respects at her own risk and/or impliedly agreed with the company's servants and agents (including the defendants) that they should be under no liability

to the plaintiff in connection with any injury sustained by her as a passenger on the Himalaya."

By an order under R.S.C., Ord. 25, r. 2, the master directed that the issues raised by para. 3 of the defence, viz., whether the terms of the ticket held by the plaintiff at the time of the accident afforded a defence to the defendants against the plaintiff's claim, should be tried as a preliminary point of law. For the purpose of deciding this point His Lordship said that he would assume that the plaintiff's accident was caused by the negligence of one or both of the defendants and that any acts of negligence were performed by them in the ordinary course of their duties of their respective offices on board the Himalaya as servants of the company.

J. G. Le Quesne for the plaintiff.

M. R. E. Kerr for the defendants.

Cur. adv. vult.

July 30. **PILCHER, J.**, in a written judgment, stated the facts and continued: I was referred by counsel for the defendants to a number of authorities commencing with the well-known case of *Elder, Dempster & Co. v. Paterson, Zochonis & Co.* (1). Inasmuch as arguments advanced on behalf of the defendants were founded largely if not entirely on the judgments in the *Elder, Dempster* case (1) it is desirable that I should go into the facts of the case in some little detail. The plaintiffs, Paterson, Zochonis, were the owners of a quantity of palm oil in casks loaded on board the steamship *Grelwen*. The *Grelwen*, which belonged to the Griffiths Lewis Steam Navigation Co. was at the material time under charter by Elder, Dempster & Co. for the purpose of their West African trade. The bills of lading covering the palm oil were issued in the names of the African Steamship Co. and the British & African Steam Navigation Co., Managers, Elder, Dempster & Co. These three companies, together with the Griffiths Lewis Steam Navigation Co., the owners of the vessel, were made defendants in the action. A quantity of casks of palm oil was stowed in the bottom of the vessel's holds and a large number of bags of palm kernels which were stowed on the top of the casks of palm oil crushed those casks with the result that the palm oil was lost and damaged. The vessel was not fitted with "tween decks". ROWLATT, J., who tried the case at first instance, found in favour of the plaintiffs on the ground that the vessel was unseaworthy. His decision was affirmed by the Court of Appeal with SCRUTTON, L.J., dissenting. The bills of lading issued by the charterers absolved them from responsibility for damage due to bad stowage. The owners of the *Grelwen* were not parties to the contract evidenced by the bills of lading. SCRUTTON, L.J., in the Court of Appeal, took the view that there had been no breach by the defendants of the implied warranty of seaworthiness and that the damage to the goods was due to bad stowage. In the Court of Appeal SCRUTTON, L.J., said ([1923] 1 K.B. 441):

"The above considerations lead to the conclusion that the charterers, with whom in my opinion the bill of lading contract was made, and who include the first three defendants, were protected by the exceptions in their bill of lading. But it was argued that the fourth defendant, the owner, was liable in tort because he was not a party to the bill of lading and therefore could not claim the benefit of the exceptions contained in it, but was a bailee liable for negligence—i.e., bad stowage. To this counsel for the owner made reply that the owner in the case of a time charter like the present one was not in possession of the goods. This in my opinion is contrary to all the authorities . . . The real answer to the claim is in my view that the shipowner is not in possession as a bailee, but as the agent of a person, the charterer, with whom the owner of the goods has made a contract defining his liability, and that the owner as servant or agent of the charterer can claim the same protection as the charterer. Were it otherwise there would be an

easy way round the bill of lading in the case of every chartered ship: the owners of the goods would simply sue the owner of the ship and ignore the bill of lading exceptions, though he had contracted with the charterer for carriage on those terms and the owner had only received the goods as agent for the charterer."

A I refer to this passage in the dissenting judgment of SCRUTTON, L.J., because when the matter came before the House of Lords, where it was twice argued, the charterers' and owners' appeal was allowed, the House of Lords agreeing with SCRUTTON, L.J., that the damage was due to bad stowage and not to any breach of warranty of seaworthiness.

Dealing with the position of the shipowners VISCOUNT CAVE said ([1924] A.C. 533):

B "There remains a further question, which arises between the shippers and the shipowners, the Griffiths Lewis Steam Navigation Company. It is contended on behalf of the respondents that, assuming their loss to be due to bad stowage on the part of the master of the ship, the owners are not protected by the conditions of the bill of lading, to which they were not parties, and are accordingly liable in tort for the master's negligence . . .

C I do not think that this argument should prevail. It was stipulated in the bills of lading that 'the shipowners' should not be liable for any damage arising from other goods by stowage or contact with the goods shipped under the bills of lading; and it appears to me that this was intended to be a stipulation on behalf of all the persons interested in the ship, that is to say, charterers and owners alike. It may be that the owners were not directly

D parties to the contract; but they took possession of the goods (as SCRUTTON, L.J., says) on behalf of and as the agents of the charterers, and so can claim the same protection as their principals."

VISCOUNT FINLAY said (*ibid.*, 547):

E "It is said that the imposition of the weight of the kernels on the top of the palm oil barrels was a wrongful act, resulting in the destruction of the barrels and the loss of the oil, and that for this wrongful act, committed by their servants, the shipowners are liable, apart from contract altogether, so that the plaintiffs, in claiming from the shipowners, would not be hampered by the conditions of the bill of lading. This contention seems to me

F to overlook the fact that the act complained of was done in the course of the stowage under the bill of lading, and that the bill of lading provided that the owners are not to be liable for bad stowage. If the act complained of had been an independent tort unconnected with the performance of the contract evidenced by the bill of lading, the case would have been different. But when the act is done in the course of rendering the very services provided

G for in the bill of lading, the limitation on liability therein contained must attach, whatever the form of the action and whether owner or charterer be sued."

LORD SUMNER, dealing with the same point, said (*ibid.*, 564):

H "It may be, that in the circumstances of this case the obligations to be inferred from the reception of the cargo for carriage to the United Kingdom amount to a bailment upon terms, which include the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading. It may be, that the vessel being placed in the Elder, Dempster & Co.'s line, the captain signs the bills of lading and takes possession of the cargo only as agent for the charterers, though the time charter recognises the ship's possessory lien for hire. The former I regard as the preferable view, but, be this as it may, I cannot find here any such bald bailment with

unrestricted liability, or such tortious handling entirely independent of contract, as would be necessary to support the contention."

LORD DUNEDIN agreed with the opinion of LORD SUMNER.

It will be seen from the passages which I have quoted from SCRUTTON, L.J.'s judgment in the Court of Appeal, and the speeches in the House of Lords in the *Elder, Dempster* case (1), that the grounds on which the shipowners were held entitled to escape liability are not all based on the same line of reasoning. VISCOUNT CAVE and VISCOUNT FINLAY appear to have attached some importance to the fact that the bills of lading in terms exempted the "shipowners" from liability for bad stowage. Reference to the record of the case in the House of Lords shows that the bills of lading under which the goods were carried were on the printed form used by the first three defendants when carrying cargo in their own ships. This form of bill of lading was consequently, in some respects, inappropriate for use with a chartered ship. Clause 1 of the bill of lading commences with the words "The shipowners (hereinafter called 'the company') . . ." Clause 2 of the bill of lading which contains the exceptions clause with regard to bad stowage commences, "The company shall not be liable . . ." etc. It is clear that the contractual exemption from liability for bad stowage could only, on the face of it, be an exemption operating in favour of the first three defendants. The responsibility for stowage rested, of course, solely on the master and officers of the ship, and not on the charterers, and it would seem that this fact should be borne in mind in reading the passages which I have quoted from the speeches of LORD CAVE and LORD FINLAY. It will be observed, moreover, that neither SCRUTTON, L.J., nor LORD SUMNER mention the fact that the bills of lading expressly excepted "the shipowner" or, more accurately, "the company" from the consequences of bad stowage. SCRUTTON, L.J., bases his judgment on the fact that, in his view, the shipowner is to be regarded as being in possession of the goods as the agent of the charterer with whom the goods owner has made a contract defining his liability. LORD CAVE appears to take the same view. LORD FINLAY, while making the point that the charterer has specifically agreed that the shipowner should not be liable for bad stowage, stresses the point that the negligence of the shipowner was committed in the course of rendering the very services provided for in the contractual document, namely, the bills of lading. LORD SUMNER took the view that the theory that the shipowner must be taken to be acting as agent for the charterer might be correct, but he preferred the view that the shipowner was not liable because he took the goods on an implied bailment in the terms of the bills of lading.

I have dealt at some length with the *Elder, Dempster* case (1), because the points made by the defendants in the present case, as set out in para. 3 of the defence, are clearly based largely on the passages in the judgments in the *Elder, Dempster* case (1) to which I have referred. It is clear that the notion of an implied bailment is inappropriate to a case where personal injuries to a passenger are in question. The defendants in the present case contend in general terms that on the admitted facts they are entitled to the protection afforded to their employers by the terms of the passenger ticket. They submit that they are entitled to such protection (i) because the acts of negligence which caused the injuries to the plaintiff occurred while they, the defendants, were carrying out their normal duties as the servants of their employers; (ii) because in making the contract with the plaintiff evidenced by the terms of the ticket, their employers were acting as the defendants' agents and thus impliedly exempted the defendants from legal liability for their own negligence to the plaintiff; (iii) because in accepting the terms of the ticket the plaintiff expressly or impliedly agreed to travel at her own risk and impliedly agreed that the company's servants, including the defendants, should be under no liability to her.

Having attempted to analyse the reasons given by the noble Lords in the *Elder, Dempster* case (1) for excusing the shipowners from liability for bad

stowage, it is interesting to observe the view which SCRUTTON, L.J., took in the following year of the effect of the House of Lords' decision on this particular point. The passage I am about to quote is taken from *Mersey Shipping & Transport Co., Ltd. v. Rea, Ltd.* (2). I would, however, add that the passage was not, strictly speaking, necessary for the decision of the case which was being considered. SCRUTTON, L.J., said (21 Lloyd's Rep. 378):

A "I think that the reasoning of the House of Lords in the *Elder, Dempster* case (1) shows that where there is a contract which contains an exemption clause, the servants or agents who act under that contract have the benefit of the exemption clause. They cannot be sued in tort as independent people, but they can claim the protection of the contract made with their employers on whose behalf they are acting. I think that is the result of the second point in the judgments of LORD CAVE and LORD SUMNER with whom LORD DUNEDIN concurs in the *Elder, Dempster* case (1)."

B It will be observed in this passage that SCRUTTON, L.J., states the proposition very generally and widely. It is, I think, conceded on behalf of the plaintiff in the present case, that if the proposition stated by SCRUTTON, L.J., in the passage I have quoted is correct, the point of law which I have to determine must be answered in favour of the defendants.

C My attention has been called to two recent Australian cases in which the facts were that cargo, while subject to the terms of bills of lading, was damaged during discharge by the negligence of a firm of stevedores engaged by the shipowners. In each case the goods owner sued the stevedores in tort, and in each case, although, of course, not parties to the contracts evidenced by the bills of lading, the stevedores were held entitled to the protection of the exception clauses in the bills of lading. The cases to which I refer are *Gilbert Stokes & Kerr (Pty.), Ltd. v. Dalgety & Co., Ltd.* (3) and *Waters Trading Co., Ltd. v. Dalgety & Co., Ltd.* (4). In the *Gilbert Stokes* case (3) OWEN, J., sitting in the Supreme Court of New South Wales, after making an analysis of the judgments of the *Elder, Dempster* case (1), decided in favour of the defendant stevedores on the ground that they were in all the circumstances bailees receiving the goods on the same terms as the shipowner had received them, namely, the terms of the bills of lading. OWEN, J., said (81 Lloyd's Rep. 342):

E " *Elder, Dempster's* case (1) seems to me to be an authority directly in point for the defendant's contention that it is entitled to the benefit of the same limitations of liability which could have been claimed by the carrier had it been sued; but it discloses a difference of opinion as to the reasons for the final conclusion. With all respect, I think that the notion that the grantor of a bill of lading makes it both as a principal and as an agent for those whom he may employ to perform the contract, with the result that all who take part in the performance of the contract become parties to it, and the converse proposition that he acts as an agent for the cargo-owners to make contracts on the latter's behalf with all who may be employed to effect the contractual carriage, introduces an unreal and fictional element into a commercial transaction, and for that reason alone does not appeal. As to the contention that an agent, as a matter of general principle, is entitled to the immunities of his principal, were it not for the fact that both SCRUTTON, L.J., and LORD CAVE appear to have accepted the proposition without demur, I would have thought that no such general principle was to be found in the law of agency."

H In the *Waters Trading Co.* case (4) STREET, C.J., presiding in the Supreme Court of New South Wales, gave judgment in favour of the defendant stevedores and said ([1951] 1 Lloyd's Rep. 387):

"It was obviously contemplated by the parties that the goods would have to be removed and stored for a period before being delivered, and during

that period the contract was still on foot and bound the parties with the same efficacy as it did when the goods were on the ship at sea. In those circumstances, the position of an agent or independent contractor, such as the defendant, has clearly been defined by the House of Lords. Upon what theory in law the House reached its conclusion it is not necessary for this court to consider. Whether the defendant be regarded as an agent or as a bailee holding under a bailment upon terms is immaterial. The decision of the court accorded to the defendant in that case the same protection as was given by the contract to the shipowner, and that decision governs the facts of the present case."

The other two members of the court, one of whom was OWEN, J., agreed with STREET, C.J., founding their judgments on the *Elder, Dempster* case (1).

From what I have said above, it seems reasonably clear that it is now established law that an independent contractor, and possibly also a servant employed by a shipowner to deal with goods which at the material time are subject to a contract of carriage between the shipowner and the goods owner, if sued in tort by the goods owner, is, in appropriate circumstances, entitled in relation to his normal dealings with such goods, to claim the protection of exception clauses in the contract of carriage between the goods owner and the shipowner. The point which I have to decide is whether the same principle can properly be applied, or ought to be applied, to contracts for the carriage of passengers. I start with the general proposition that every person injured by the tortious act of another with whom he is not in contractual relationship has a right to pursue his legal remedy against the tortfeasor. The *Elder, Dempster* case (1) decides that in certain circumstances the relationship between the parties may be such that the tortfeasor, when sued in tort, is entitled to contend successfully in the case of damage to goods either that the goods were impliedly bailed in terms that exempt him from liability, or that his employer has impliedly contracted on his behalf with the goods owner on terms which exempt him, the tortfeasor, from liability. In as much as the notion of bailment is inappropriate in the case with which I am concerned, I have only to consider whether the argument based on implied agency can, or ought to, be applied to the facts of the present case. The argument presented on behalf of the defendants is obviously far-reaching and is one which I should not be disposed to accept unless I were constrained to do so by authority.

The *Elder, Dempster* case (1) and the other cases to which I have referred, which deal with the carriage of goods, seems to me to have little in common with the facts of the present case. The plaintiff in all those cases confided his goods to the shipowner or charterer, as the case may be, and parted with all control over them until they reached their port of destination and ceased to be carried on the terms of the contract evidenced by the bills of lading. In such circumstances, it is well known to everyone that the shipowner will, in all probability, employ independent contractors such as stevedores to perform such duties and obligations in regard to the contract of carriage as are normally carried out by independent contractors such as stevedores. It is not difficult to see that it may be proper to afford to such independent contractors the protection which the shipowner would enjoy if he performed the services by his own servants. The facts of the *Elder, Dempster* case (1) were, as I have pointed out, somewhat unusual and the noble Lords in that case were by no means unanimous in the reasons which they gave for holding that the shipowner was entitled to take advantage of the exception clauses in the bills of lading. While it was no doubt proper in the unusual circumstances of that case to invoke the theory of an implied agency or bailment on terms, it seems to me to be a very different thing to invoke the same principles in the case now before me. To do so would involve the somewhat startling proposition that every shipping company and, indeed, every person or company making contracts with members of the public

under which such person or company is absolved from liability for the negligence of its servants must be taken impliedly to contract on behalf of each of its servants that, in regard to acts done by such servant in pursuance of the contract, the servant shall have the same protection as the employer has stipulated for himself. It is to be observed that there does not appear to be any reported case in which a servant, when sued in tort, has sought to avail himself of contractual exemptions from liability available to his master. No doubt too much importance should not be attached to this fact as actions for damages against the ordinary servant, at any rate when the claim is a substantial one, are rare because any judgment obtained is likely to be of little value.

I was referred by counsel for the plaintiff to the case of *Cosgrove v. Horsfall* (5). In that case a bus driver who had been issued by his employers, the London Passenger Transport Board, with a free pass which allowed him to travel on the board's buses subject to a condition that except when travelling on the board's business neither the board nor their servants would be liable to him for injuries sustained, was injured by the negligence of another bus driver in the service of the board. He thereupon sued the negligent driver and was awarded damages by the county court judge. The negligent bus driver appealed unsuccessfully. *DU PARCQ, L.J.*, in the course of his judgment, said (175 L.T. 335):

"It was said that, in making the contract, or imposing the condition, the London Passenger Transport Board were acting as agents for Horsfall, so that he could take advantage of the condition and rely on it. There was no evidence before the judge on which he could have found that the board acted as agents for Horsfall, and, of course, he did not so find. It was not even proved that Horsfall was in the employment of the board when the pass, on which the condition is indorsed, was issued to the plaintiff. If I assume that Horsfall was then in the board's employment, it remains true that there is no evidence from which agency ought to be inferred. I agree with the judge that Horsfall 'was not a party to and has no right by virtue of the licence or contract'."

It will be observed that in this case the London Passenger Transport Board in issuing the free pass to the plaintiff had specifically provided that when not travelling on the board's business

"neither the company nor their servants would be liable"

to the holder of the pass for injuries sustained. In spite of this specific provision, the plaintiff was held entitled to recover against one of their servants for the injuries which he sustained on the ground that the defendant was not a party to the contract between the board and the plaintiff and had no right by virtue of the licence or contract.

In the case now before me there is no specific provision in the "Conditions" that the servants of the company shall not be personally liable to passengers in tort. I am not prepared to assume in the present case that the Peninsular and Oriental Steam Navigation Co. had any intention when inserting wide exception clauses in their forms of passenger ticket to act as the agents of every member of the crews of their vessels and thus to confer on all their servants the protection against personal liability for negligence which such clauses afforded to the company itself. Such passengers as read the conditions printed on their tickets would be made aware that in the event of an accident they had little hope of obtaining redress from the steamship company, but there is nothing in the terms of the ticket to lead them to suppose, if they paused to consider the matter, that if they sustained injury or loss through the negligence of a member of the crew acting in the course of his ordinary duty they would be precluded from recovering for such injury or loss by a personal action against the tortfeasor on reason of any of the exception clauses on their ticket. There seems to be no good reason why the type of agency which was implied in the *Elder, Dempster*

case (1) should be extended to apply to the very different facts of the case with which I am dealing and every reason why it should not. In this connection I would refer to the judgment of DENNING, L.J., in *Smith v. River Douglas Catchment Board* (6) ([1949] 2 All E.R. 188), in which he deals with the type of interest which will enable a third party to rely on the terms of a contract to which he is not a party. I am satisfied that in the present case it is quite impossible to say that any such common interest existed between the members of the crew of a passenger ship and her owners as would entitle the former to avail themselves as against a passenger of clauses in the contract of carriage introduced by the shipowner for his own protection. If a servant is to be contractually protected against personal claims against himself made by members of the public arising out of the servant's own negligence in the course of his duties, it would seem to me that this fact should be brought home to members of the public with whom he is deemed so to contract. No doubt in the case with which I am concerned, words could have been included in the conditions of the ticket which made it clear that in regard to the relevant words of exception the company was acting as the agent of each of its servants. In the absence of any such words I can see no ground, on the facts of the present case, for implying them.

I was referred to a passage in the judgment of DENNING, L.J., in *White v. John Warrick & Co., Ltd.* (7) ([1953] 2 All E.R. 1026) in which he makes reference to VISCOUNT FINLAY'S speech in the *Elder, Dempster* case (1). The learned lord justice refers to the fact that the clause in the bills of lading in that case

"... exempted the charterers and the owners from liability for bad stowage ..."

I have already given reasons based on an examination of the record in the House of Lords in the *Elder, Dempster* case (1) for doubting whether this statement is completely accurate and for suggesting that the true view is probably that "the company", that is to say, the charterers, were the only persons contractually exempted from liability for bad stowage on the face of the document. In any case, as the learned lord justice himself said, the passage to which I refer had no application to the case he was deciding.

I ought also to mention the very recent case of *Pyrene Co., Ltd. v. Scindia Steam Navigation Co., Ltd.* (8) in which DEVLIN, J., had to consider the rights and liabilities of the plaintiffs who were the sellers and shippers of a fire tender under an f.o.b. contract. The fire tender was dropped and damaged while being lifted by the ship's tackle from the quay at the London Docks and before it crossed the ship's rail. The plaintiff sellers were not in direct contractual relationship with the defendant shipping company and sued the defendants for the cost of repairing the tender. DEVLIN, J., held ([1954] 2 All E.R. 168), among other things, that in the circumstances of the case the inference should be drawn that all these parties, namely, the sellers, the shipowners, and the buyers of the fire tender, intended that the seller should participate, that is to say, do his part in carrying out the contract of affreightment and that in all the circumstances the sellers must be taken to be parties to the contract of affreightment made between the ship and the buyers. He held that the fire tender was, at the moment when it was damaged, subject to the terms of the bills of lading which were to be issued and incorporated the Hague Rules, and that, accordingly, as against the sellers, the ship was entitled to limit its liability in accordance with the provisions of the rules.

I only mention this case because the learned judge had occasion to consider arguments based on the *Elder, Dempster* case (1) and other cases to which I have referred in this judgment. All these cases concern the right of a third party to the benefit of exception clauses in a contract of carriage to which he is not a party. Passages in DEVLIN, J.'s judgment (*ibid.*, 165, 169) indicate many of the sets of circumstances in which it is almost inevitable that in the course of the carriage of goods by sea under modern conditions inference of implied agency

should be drawn which will afford protection to persons necessarily participating in a complex business transaction. DEVLIN, J., decided the only point in the *Pyrene Co.'s* case (8) with which I am concerned because of the view which he took, and if I may say so with respect, very naturally took, as to the unformulated intention of the participants in the business. Being satisfied as I am on the facts of the case which I have to decide that business efficacy does not require me to imply any such terms in the contract as the defendants contend for, and being satisfied

A that neither the shipping company, nor the plaintiff nor the defendants, if they ever considered the matter, had any intention that such a term should be implied, I think it would be wrong to accede to the arguments advanced on behalf of the defendants based on the cases to which I have referred.

I accordingly determine the point of law raised in favour of the plaintiff.

Judgment for the plaintiff.

B Solicitors: Neil Maclean & Co. (for the plaintiff); Ince & Co. (for the defendants).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

C WONG POOH YIN, alias KWANG SIN, alias KAR SIN v.
PUBLIC PROSECUTOR.

[PRIVY COUNCIL (Lord MacDermott, Lord Cohen and Mr. L. M. D. de Silva),
June 29, 30, July 27, 1954.]

D Privy Council—Malaya—Criminal law—Emergency legislation—Charge of unlawfully carrying a fire-arm—Intention to surrender to authorities—"Lawful excuse"—"Lawful authority"—Malaya Emergency Regulations, 1951, reg. 4 (1), as amended by Emergency (Amendment No. 11) Regulations, 1952, reg. 2.

E By the Malaya Emergency Regulations, 1951, reg. 4, as amended by the Emergency (Amendment No. 11) Regulations, 1952, reg. 2: "(1) Any person who without lawful excuse, the onus of proving which shall be on such person, carries or has in his possession or under his control—(a) any fire-arm, without lawful authority therefor . . . shall be guilty of an offence and shall on conviction be punished with death".

F In 1952 the appellant, who was a terrorist, decided to surrender to the authorities, after having read a government pamphlet calling on terrorists to surrender. In November, 1952, he contacted a party of Temiars, and, according to the evidence he gave subsequently at his trial, told them he wanted to surrender, and offered to give up a revolver he was carrying. He was told to keep it until arrangements had been made for the police to take it away. The next day he surrendered to some Temiars and the revolver was taken from him. He was convicted under reg. 4 (1) (a) of carrying a fire-arm without lawful authority and sentenced to death. He appealed on the ground that, when he actually surrendered, he had a

G "lawful excuse" within reg. 4 (1) (a) for carrying the revolver.

H HELD: the word "excuse" in reg. 4 (1) (a) connoted something more than a change of mind on the part of the person accused, and although every act of compliance with the directions of a government department might not supply a lawful excuse for the doing of what would otherwise be an offence, yet a genuine response to an appeal by those responsible for the restoration of order was not incapable of being a lawful excuse; accordingly, the appellant might have had a "lawful excuse" within reg. 4 (1) (a), and, therefore, the appeal must be allowed and the conviction and sentence set aside.

Appeal allowed.

Cases referred to:

- (1) *Sambasirum v. Public Prosecutor, Federation of Malaya*, [1950] A.C. 458; 2nd Digest Supp.
- (2) *Dickins v. Gill*, [1896] 2 Q.B. 310; 65 L.J.M.C. 187; 75 L.T. 32; 60 J.P. 488; 15 Digest 722, 7820.
- (3) *Winkle v. Wiltshire*, [1951] 1 All E.R. 479; [1951] 1 K.B. 684; 115 J.P. 167; 2nd Digest Supp.
- (4) *Ibrahim v. Regem*, [1914] A.C. 599; 83 L.J.P.C. 185; 111 L.T. 20; 14 A Digest 411, 4308.

APPEAL by special leave in forma pauperis from a judgment of the Court of Appeal of the Federation of Malaya, dated Oct. 5, 1953, dismissing the appellant's appeal from a decision of the High Court of the Federation of Malaya on July 21, 1953, whereby the appellant was convicted of carrying a fire-arm without lawful authority under the Emergency Regulations, 1951, reg. 4 (1) (a), as amended, and was sentenced to death. B

Dingle Foot, Q.C., Dr. Colin de Silva and Kellock for the appellant.
Melford Stevenson, Q.C., and D. A. Grant for the Crown.

LORD MACDERMOTT : This appeal is from a judgment dated Oct. 5, 1953, of the Court of Appeal of the Federation of Malaya (MATHEW, C.J., WILSON and BUHAGIAR, JJ.), whereby, for reasons delivered on Nov. 12, 1953, the court dismissed the appeal of the appellant from a decision of the High Court at Kota Bharu, Kelantan, on July 21, 1953, by which the appellant was convicted under reg. 4 (1) (a) of the Emergency Regulations, 1951, of carrying a fire-arm without lawful authority and sentenced to death. The relevant part of reg. 4, as amended, reads as follows: C

"(1) Any person who without lawful excuse, the onus of proving which shall be on such person, carries or has in his possession or under his control—
(a) any fire-arm, without lawful authority therefor; or (b) any ammunition or explosive without lawful authority therefor, shall be guilty of an offence and shall on conviction be punished with death." D

The trial took place before ABDUL HAMID, J., sitting with assessors, the charge being in these terms: E

"That you, on or about Nov. 25, 1952, in the Temiar Ladang Area known as Gua Chah in the District of Gua Musang, Ulu Kelantan, did carry a fire-arm, to wit, a white handled revolver .38 without lawful authority therefor and thereby committed an offence punishable under reg. 4 (1) (a) of the Emergency Regulations, 1951." F

The evidence adduced by the prosecution, in proof of the offence charged, was clear. It showed beyond any question that, on the date and at the place named, the appellant was carrying the revolver described, and that he had no lawful authority to do so. The appellant did not seek to challenge these facts. His defence was simply that, on the occasion referred to in the charge, he had a lawful excuse for carrying the weapon. G

The appellant was the only witness called in support of this plea, and reference must now be made to the parts of his testimony which bear, or were said to bear, on it. He "went underground", he said, in November, 1949, and, after being in different places, eventually came to Kelantan. He belonged to a party of sixty or seventy terrorists, but left them with a companion some ten days before he got in touch with the Temiars by whom he was subsequently arrested. His story, after leaving this party, may best be told by the following excerpts from the note of his evidence as taken at the trial: H

"I left them because whilst in the jungle we have read the government pamphlet calling on us to come out to surrender and that we would be properly treated. The two of us left the party with the intention to surrender to the authorities. We carried with us our ammunition. I brought

out Ex. P2 [the revolver]. After getting away from my comrades I first contacted five or six Temiars who are not in court. I speak little Temiar. I told these few Temiars that I and my friend wanted to surrender to the authorities and requested them to assist and that we wanted to see the Penghulu. They made known to us that they would arrange our surrender to the police. They went away after the conversation."

Then, after a reference to the purchase of food from the Temiars, he continued:

"On Nov. 24 [1952] between eight and nine Temiars came among whom was P.W.2 [the assistant Penghulu]. They told us that the government was willing to let us surrender but we had to wait for some time to enable them to make arrangements. We told them that as we desired to surrender they could take away our ammunition and fire-arms. We were told to keep them till it was arranged for the police to take them away. It was indicated to us that we would have to move on the next day to a place nearer to the police station. On Nov. 25 about eight Temiars came. P.W.2 was among them. They took us to the new place. Arriving at the new place they brought us a dog which we slaughtered and ate. On the same day at about 3 p.m. about sixty Temiars came under the leadership of P.W.1 [the Penghulu]. I greeted P.W.1 warmly. I shook his hand and saluted 'Selamat'. P.W.1 said that arrangements for our surrender had been completed and that the government regulations were that our hands must be tied up. Our hands were tied to the back. When I was on the point of having my hands tied up I surrendered my revolver and ammunition to one of the Temiars in the presence of P.W.1. The attitude of the sixty Temiars towards me was friendly when they came. When they led me away I thought they were taking me for the purpose of surrender. I did not surrender to the police because from the government pamphlets that I have read it would be better to contact the public to arrange for me to surrender. Further as I had fire-arm there would be misunderstanding if I were to go to the police direct."

The learned trial judge, in the course of his summing-up to the assessors, said:

"You have heard the submission of learned counsel for the defence that it could not be an offence if the accused had the genuine intention to surrender the revolver and to offer it to the first group of Temiars. To this submission I am not inclined to agree because intention to surrender is no defence to a charge of possession or carrying of a fire-arm. If this can be a defence any accused person found with a fire-arm can always absolve himself from the charge by saying that at the time he was found with it he had the intention to surrender it to the authorities. That defence can only go towards mitigating the sentence."

The assessors, without retiring, then found the appellant guilty and the judge, agreeing with their opinions, convicted the appellant and sentenced him to death. On appeal, the appellant contended that there had been a misdirection respecting the defence of "lawful excuse", but the Court of Appeal held that the judge had

"rightly rejected the submission of counsel for the accused at the trial that a 'lawful excuse' had been established which entitled the accused to acquittal"

and dismissed the appeal.

At the hearing before the Board, counsel for the appellant submitted that the trial judge had withheld the plea of "lawful excuse" from the consideration of the assessors. This submission was accepted as well founded by counsel on behalf of the Crown, and it also seems to accord with the view taken by the Court of Appeal. When the summing-up is read as a whole, their Lordships are satisfied

that the appellant is right on this point, and that the issue of "lawful excuse" must be regarded as having been withdrawn from the assessors by the learned trial judge. This leaves as the main question for determination in this appeal whether this ruling was sound in law or, to put the matter another way, whether the evidence of the appellant, if accepted by the assessors, was sufficient to sustain a finding of "lawful excuse" within the meaning of the words as used in the regulation.

Their Lordships doubt if it is possible to define the expression "lawful excuse" in a comprehensive and satisfactory manner and they do not propose to make the attempt. They agree with the Court of Appeal that it would be undesirable to do so, and that each case requires to be examined on its individual facts. There are, however, two general conclusions on the construction and effect of the regulation which are relevant to such an examination and which may be appropriately stated at this point. The first of these is that the defence of "lawful excuse" may be sufficiently proved although no "lawful authority" exists for doing what is charged against the accused. The terms of reg. 4 (1) clearly contemplate this and, accordingly, make "lawful excuse" an expression of wider import than "lawful authority", as defined in reg. 4 (2) [which enumerates the persons who have "lawful authority" for the purposes of reg. 4]. It follows from this that, in proving a "lawful excuse", which falls short of "lawful authority", it is the excuse or exculpatory reason put forward by the accused, rather than the carrying, possession or control of the fire-arm, ammunition or explosive, that must be shown to be lawful. And, secondly, it is to be noted that reg. 4 (1) does not call for any special intent on the part of the accused. In *Sambasivam v. Public Prosecutor, Federation of Malaya* (1), the Board ([1950] A.C. 469) accepted the view that knowledge of what is carried, possessed or controlled is an ingredient of this offence; but the prosecution is not obliged to explore the mind of the accused beyond this, or to show that he had any particular purpose or intention.

It is evident that this last consideration weighed with the Court of Appeal, for the learned chief justice, in delivering the judgment of the court, said, after paraphrasing what he considered to be the substance of the appellant's defence:

"This is tantamount to saying that a man can change the nature of his act, from an unlawful to a lawful one, by a mere change in his intention. That may be true of offences of which intention is an ingredient, but it is not true of offences to which the doctrine of 'absolute prohibition' applies."

In so far as this passage decides that a mere change of intention on the part of a person accused under reg. 4 (1) cannot, in itself, constitute a "lawful excuse", their Lordships are in agreement with it. They are of opinion that the word "excuse" connotes something more than a change of mind on the part of the person accused, and they consider that the context strengthens this view; the regulation having been so drawn that no special intent is necessary to constitute the offence thereby created, it is, to say the least, unlikely that the expression "lawful excuse" was meant to make proof of some particular intent, without more, an effectual defence. This, however, does not suffice to dispose of the present appeal, because the evidence of the appellant was not confined to the state of his mind or to a "mere change in his intention". As appears from the excerpts quoted above it went well beyond this. It sought to show, not only a change of mind and purpose, but the reason for that change in the invitation contained in the government pamphlet; and it described, in addition to the overt acts of the appellant in furtherance of his desire to surrender, the events of Nov. 24, 1952 (the day before the occasion to which the charge relates), when, if the appellant is to be believed, he and his companion offered to surrender their weapons to a party of Temiars, including the assistant Penghulu, but were told

"to keep them till it was arranged for the police to take them away."

The question for decision is, therefore, wider than that posed by the Court of Appeal. It is whether all the circumstances of the situation described by the appellant, when taken in conjunction, were enough to sustain a finding of "lawful excuse" in answer to the charge as framed. In approaching this question, it will be convenient to refer specifically to several of the points which were taken against the appellant's defence in the Court of Appeal or before the Board.

A The first of these is the submission of counsel for the Crown that if (as their Lordships would hold) a mere change of intention on the part of a person accused under reg. 4 (1) does not amount to a "lawful excuse", the acts of the accused in implementing that change are no more than evidence of it and cannot, in themselves, or when coupled with the change of intention, constitute a "lawful excuse". This submission does not cover the present case, as the facts here offered as excuse are not limited to the appellant's resolve to surrender and his conduct in consequence of that resolve, and their Lordships do not, therefore, propose to express any concluded opinion on it. While they apprehend that every overt act by an accused person may not suffice to make the defence of "lawful excuse" available, they think it undesirable to decide this particular matter in advance of an instance which makes such a decision necessary. The latitude of the expression under discussion, the infinite variety of circumstance in relation to which it may be invoked, the tendency in this field to confusion between considerations of relevance and weight, and the difficulty which may be experienced in isolating the conduct of an accused person from the impact of external events, are but some of the reasons for leaving this question until it can be settled in the light of a situation that demands an answer.

D The next point concerns the evidence relating to the government pamphlets and their message. It would appear that the Court of Appeal regarded that part of the appellant's testimony as incapable of furthering the defence of "lawful excuse" and, therefore, irrelevant. Thus, in the judgment delivered by the chief justice, he says:

E "We think it right at once to say that the policy which is adopted by the government to induce terrorists to surrender is no concern of ours, and for the courts to attempt to apply a policy that has not been made the subject of a written law, can only lead to confusion. Whether an individual is prosecuted or not is a matter entirely for the authorities responsible for launching prosecutions, and it cannot be submitted successfully as a defence that government in general terms has indicated that certain offences would be overlooked if offenders took a certain course."

F And later he adds this:

G "If a terrorist after some time in the jungle decides to surrender with his arms, he has an excuse, and if he is acting on a 'surrender leaflet' addressed to him by the security forces, he may have a political or an administrative excuse but, in our opinion, that does not amount to a lawful excuse within the meaning of the regulation."

H In the view of the Board, these passages offer no sound reason for leaving this particular part of the appellant's case out of account. It did not involve the court in applying a policy which had not the force of law, or in holding that the authorities responsible for prosecutions were bound by promises of leniency made by some other branch of government. There was no suggestion that the pamphlets altered the law or provided "lawful authority" for the carrying of arms. What was suggested was that the evidence about them was relevant and entitled to consideration because it helped to show a "lawful excuse". It is, of course, clear that every act of compliance with the directions of a government department may not supply a "lawful excuse" for the doing of what would otherwise be an offence. For example, the directions given may themselves be unlawful, or some other element may be present which will taint the act of

compliance and make it unlawful. But, looking only to the evidence about the pamphlets as adduced in this case, their Lordships can find no reason for holding it irrelevant on this issue of "lawful excuse". On the material available, it would be going far, indeed, to say that there was anything unlawful about the pamphlets in question or that conduct induced by them was without excuse. In a state of emergency an appeal to armed terrorists to surrender may well be a justifiable and proper step on the part of those responsible for the restoration of order, and their Lordships think that the fair assumption in the present case is that these pamphlets were appeals of that character. If so, it would be giving the expression "lawful excuse" a narrow and unnatural meaning to hold that it was incapable of applying to acts done by those appealed to in the course of making a genuine response. As already indicated, this view relates to the particular aspect of the evidence which has just been considered. It remains to be seen whether the evidence as a whole sufficed to sustain the defence.

The last submission on behalf of the Crown which calls for notice was to the effect that, as the appellant's possession of the revolver had been unlawful from the beginning, no supervening event could give him a "lawful excuse" for carrying it. This was the substance of the Crown case and, though not so expressed, a similar reasoning seems to underlie the judgment of the Court of Appeal.

In support of this argument, reference was made to several decisions, of which it is only necessary to mention the two that are most in point and were cited in the opinion delivered by the chief justice. The first of these was *Dickins v. Gill* (2). It related to a prosecution for an offence under s. 7 (c) of the Post Office (Protection) Act, 1884, which enacted that a person should not

"... (c) make, or, unless he shows a lawful excuse, have in his possession, any die ... for making any fictitious stamp."

The defendant, who was the proprietor of a newspaper circulating among stamp collectors, had caused a die to be made for him abroad, from which representation of a certain colonial postage stamp could be produced. He had ordered this die and subsequently kept it in his possession solely for the purpose of illustrating one of his publications. The charge preferred against him was not one of making the die, but of having it in his possession. The magistrate who heard the case found that the defendant's conduct was bona fide, and that he had not the die in his possession for any improper purpose. He held that this constituted a "lawful excuse" and, accordingly, dismissed the information. On appeal, by way of Case Stated, a Divisional Court (GRANTHAM and COLLINS, JJ.) held that the facts, including the finding that the defendant intended to use the die only for innocent purposes, did not show a "lawful excuse". Their Lordships cannot regard this decision as an authority for the proposition now under discussion. Not only did the defence pleaded sound in intention, but it is to be observed that the court was at pains to point out that the possession charged was not innocent. Thus, GRANTHAM, J., says ([1896] 2 Q.B. 315):

"Knowing that the die could not be made in this country, and with the idea of evading the very penalties that he would be liable to under this Act if he had it made here, he had it made abroad. I think that the respondent committed an offence under that part of the section, and that he could have been made liable to a penalty under it; he was, in my judgment, acting illegally in having the die made. However that may be, it seems to me that it would be very difficult to show innocence after the die so obtained is once in his possession."

And again (*ibid.*, 316):

"But in a case like the present, when a man has a die made abroad because he knows he cannot have it made here, how can he have a lawful excuse for its subsequent possession? Looking at the language of s. 7 of the Act of

1884, which absolutely prohibits the making of a die or a fictitious stamp, and omits all suggestion of 'lawful authority' for such making, I think that the words 'lawful excuse' must be construed more strictly than they would be if the section had contemplated a lawful authority for the making."

A It is, no doubt, true to say that, in that instance, the court looked to the circumstances of the acquisition of the die. But the case was not concerned with the effect of some subsequent supervening situation, and the decision was not directed to any submission resembling that under consideration. The second case was *Winkle v. Wiltshire* (3). There the defendant was charged with having in his possession without lawful excuse seven fictitious national insurance stamps contrary to s. 65 (1) of the Post Office Act, 1908, as applied to stamps of that kind. The material part of this enactment read:

B "A person shall not . . . (b) have in his possession, unless he shows a lawful excuse, any fictitious stamp . . ."

C The defendant bought the stamps in his own public-house, and for his own use, from a man who had no licence or other authority which would have enabled him to sell them lawfully. The defendant acted in good faith; he did not know the stamps were fictitious, he honestly believed they were genuine and was unaware that the man from whom he purchased had no authority to deal in insurance stamps. The magistrate found that the defendant had shown a "lawful excuse" but a Divisional Court (LORD GODDARD, C.J., HUMPHREYS and DEVLIN, JJ.) took a different view, and remitted the matter with a direction to convict. In the opinion of the Board, this decision does not advance the case for the Crown in this appeal. Apart from being distinguishable on its facts, the judgment of LORD GODDARD, C.J. (in which the other members of the court concurred) did not touch on the effect of a new situation arising after a period of unlawful possession. There was no reason why it should. The case was one in which the excuse offered was plainly based on the circumstances of an acquisition which the court held to be an unlawful transaction. In the result, the excuse was adjudged unlawful because the acquisition was unlawful. This is very far from saying, however, that an excuse can never be lawful if it follows on an unlawful acquisition: and it is also very far from saying that the like result should attend the facts of the present appeal; for the appellant here made no attempt to rest his defence on the nature of his acquisition or on the character of his possession previous to the occasion in respect of which he was charged. F On the contrary, his whole case was that he had a lawful excuse, despite his previous guilt, because the facts and circumstances of that occasion gave him an excuse which was lawful and which he had not had before.

G Their Lordships cannot, therefore, regard this submission as supported by authority. Nor are they aware of any general principle of law which would be capable of sustaining it. Indeed, it appears to them that the submission runs against the implications of the regulation. As a general proposition, it appears to confuse "lawful excuse" and "lawful authority"; but, as already observed, these expressions raise distinct issues and the question here is not necessarily determined by the absence of "lawful authority". It is still whether, without having "lawful authority", the appellant had yet a "lawful excuse". While the evidence as to the contents of the government pamphlets was meagre, their Lordships are of opinion that the testimony of the appellant, if accepted, went far enough to justify a finding that he was carrying the revolver on the occasion charged in the course of complying with the government's request, and because he wanted, and was waiting, to surrender with it to the police when they arrived, and had actually tendered it to the Temiers to whom he had made his offer of surrender. In the light of the views already expressed in dealing with the points made against the appellant, their Lordships are unable to resist the conclusion that

such a finding would have warranted a verdict of "lawful excuse" and they are, accordingly, of opinion that that issue ought to have been left to the assessors. It by no means follows that, had this course been taken, the appellant would have been acquitted; but he might have been, and, having regard to the conclusions reached, and the practice of the Board as stated by LORD SUMNER in *Ibrahim v. Regem* (4) ([1914] A.C. 615), the verdict clearly ought not to stand.

For these reasons, their Lordships have humbly advised Her Majesty that the appeal should be allowed and the conviction and sentence set aside. A

Appeal allowed.

Solicitors: *H. S. L. Polak & Co.* (for the appellant); *Charles Russell & Co.* (for the Crown).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

BATES v. STONE PARISH COUNCIL.

[COURT OF APPEAL (Somervell, Birkett and Romer, L.J.J.), July 14, 15, 16, 29, 1954.] C

Child—Negligence—Allurement—Children's playground controlled by local authority and open to children of all ages—Chute with platform—Child of three years falling through gap between rails and floor of platform—Liability of local authority—Foreseeable danger—Similar accident in 1934—Damages—Injuries resulting in blindness.

The defendant council controlled and managed a children's playground to which children of all ages were admitted. The playground contained a chute, which comprised a platform some twelve feet above the ground, a stairway leading up to it, and a slide descending from the platform on the side opposite to the stairway. On each of the other two sides of the platform were two horizontal rails attached to the platform by a vertical bar. Between the lower horizontal bar and the platform, the vertical rail and the boarded side of the descending slide, was a gap some 13½ inches by 13½ inches. If the groundsmen saw young, unaccompanied children on or approaching the chute they sent those children away, but there was no notice prohibiting the use of the chute by young children unless they were under competent supervision. In 1934 a boy aged four years fell from the platform and to prevent a similar accident the defendant council erected additional rails at the sides of the platform. The fact of the accident and the measures taken by the council were recorded in the council's minutes. By May, 1950, the additional rails had disappeared. On May 4, 1950, the infant plaintiff, a boy of three and a half years, went into the playground accompanied by a child of six years. Having climbed to the platform of the chute, the infant plaintiff fell through the gap at the side to the ground, sustaining severe injuries as a result of which he became blind. Two members of the defendant council in May, 1950, had been members of the council when the accident occurred in 1934. The infant plaintiff and his father having brought an action against the council for damages, the jury found the council liable and assessed the damages for the infant plaintiff at £17,500, and judgment was given for the infant plaintiff for that amount. On appeal, D

Held: (i) the permission given by the defendant council to infant children to enter the playground not being qualified by any condition as to being accompanied by responsible persons or as to use of the chute, and there being no circumstances from which such a qualification should be inferred, the plaintiff was a licensee on the chute; and, as the council knew, or must on the facts be deemed to have known, that a similar accident E

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had occurred in 1934, they must be taken to know of the dangerous nature of the chute, and, accordingly, they were liable in damages.

Latham v. R. Johnson & Nephew, Ltd. ([1913] 1 K.B. 398), considered.

(ii) the sum of £17,500 awarded by the jury to the infant plaintiff by way of damages was excessive and should be reduced to £9,000.

Appeal allowed in part.

A AS TO THE DEGREE OF CARE REQUIRED TOWARDS CHILDREN, see HALSBURY, Hailsham Edn., Vol. 23, p. 584, para. 836; and FOR CASES, see DIGEST, Replacement Vol. 36, pp. 115-122, Nos. 577-619.

Cases referred to:

- (1) *Burchell v. Hickisson*, (1880), 50 L.J.Q.B. 101; 36 Digest, Replacement, 69, 374.
- B (2) *Latham v. Johnson (R.) & Nephew, Ltd.*, [1913] 1 K.B. 398; 82 L.J.K.B. 258; 108 L.T. 4; 77 J.P. 137; 36 Digest, Replacement, 49, 262.
- (3) *Schofield v. Bolton Corp.*, (1910), 26 T.L.R. 230; 36 Digest, Replacement, 114, 567.
- (4) *Stevenson v. Glasgow Corp.*, 1908 S.C. 1034; 45 Sc.L.R. 860; 16 S.L.T. 302; 36 Digest, Replacement, 74, 423.
- C (5) *Coates v. Rautenstall Borough Council*, [1937] 3 All E.R. 602; 157 L.T. 415; 101 J.P. 483; 36 Digest, Replacement, 118, 593.
- (6) *Gough v. National Coal Board*, [1953] 2 All E.R. 1283; [1954] 1 Q.B. 191; 3rd Digest Supp.
- (7) *Holdman v. Hamlyn*, [1943] 2 All E.R. 137; [1943] K.B. 664; 113 L.J.K.B. 7; 169 L.T. 85; 2nd Digest Supp.

D APPEAL by the defendants, the Parish Council of Stone, from an order of CASSELS, J., with a jury, dated Mar. 31, 1954.

The defendants controlled and managed a recreation ground, known as the Stone Recreation Ground, for the use of the inhabitants of the parish and visitors. Access to the ground from the highway was uncontrolled. A part of the ground was made into a children's playground and contained a swing, a turntable and a chute. The chute, which was erected in or about 1928, comprised a small platform some twelve feet above the ground, a stairway leading up to the platform, and a sloping chute, or slide, descending from the platform on the side opposite to the stairway. On each of the other two sides of the platform were two horizontal rails attached to the middle of the side of the platform by a vertical bar. Between the lower horizontal rail, the vertical bar, the platform and the boarded side of the descending slide, was a gap some 13½ inches by 13½ inches. Children of all ages were admitted to the ground. The groundsmen tried to prevent small children who were unaccompanied from using the chute, but there was no notice board prohibiting the use of the chute by young children unless they were under competent supervision.

G In 1934 a boy, named Donald Rixson, aged four years, fell from the platform, the circumstances of the fall being uncertain. As a result of the accident, the defendants erected additional rails which made the gap between the rails and the platform too small for a child to fall through. The fact of the accident and the steps taken by the defendant to prevent a similar accident were recorded in the minutes of the defendant council. At some time before May, 1950, the additional rails had rusted or been broken away, and in May, 1950, the chute was in the same condition as it was when the accident occurred in 1934.

H On May 4, 1950, the infant plaintiff, a boy of three and a half years, went on to the playground with his mother's permission and accompanied by a child aged six years. The infant plaintiff mounted the stairway of the chute to the platform and fell through the gap between the lower horizontal rail and the platform to the ground below. As a result of the injuries which he sustained he became permanently blind. Two persons who were members of the defendant council

in May, 1950, had been members of the council when the accident to Donald Rixson occurred in 1934. The infant plaintiff, suing through his father as his next friend, brought an action against the defendants for damages for personal injuries occasioned by the negligence or breach of duty by the defendants, their servants or agents. The father, the adult plaintiff, claimed damages, amounting to £27 13s. 9d., for consequential loss occasioned by the negligence.

At the trial of the action certain questions, which had been agreed by counsel for the parties, were put to the jury by CASSELS, J., at the conclusion of his summing-up. The questions and answers were as follows:

" 1. Did the infant plaintiff fall from the platform and sustain injuries ? Yes. 2. Was the infant plaintiff in the children's section of the recreation ground with the permission of the defendants ? Yes. 3. Was the infant plaintiff a trespasser when he went on the slide ? No. 4. Was the slide by reason of the gap in its then state at the side of the platform a dangerous equipment for children's amusement ? Yes. 5. (a) Was the slide an allurement to the infant plaintiff ? Yes. (b) Was the infant plaintiff allured ? Yes. 6. If answers to 4 and 5 are 'yes' was the slide a danger to the infant plaintiff which he would not appreciate ? Yes. 7. Did the defendants know that the slide was dangerous ? Yes. 8. If 'no' to 7 ought they to have known ? — 9. If the answer to 4 and 6 is 'yes' had the defendants given sufficient warning of the danger ? No. 10. Had the defendants taken any steps to protect the infant plaintiff from danger ? No."

The jury, having found the defendants liable, assessed the damages at £17.527 13s. 9d., £17,500 being apportioned to the infant plaintiff and £27 13s. 9d. to the adult plaintiff, and CASSELS, J., gave judgment for the plaintiffs for the sum of £17.527 13s. 9d., with costs. The defendants appealed on the issue of liability, and, alternatively, they asked for a reduction of the damages awarded to the infant plaintiff.

Beney, Q.C., and N. Lawson for the defendant council.

Vaughan, Q.C., and R. G. Dow for the plaintiff.

Cur. adv. vult.

July 29. The following judgments were read.

SOMERVELL, L.J., stated the facts and said: I will deal first with the alleged misdirection as to liability. Counsel for the defendants submitted, first, that there was no proper direction with regard to questions 2 and 3 put to the jury, namely:

" 2. Was the infant plaintiff in the children's section of the recreation ground with the permission of the defendants ? 3. Was the infant plaintiff a trespasser when he went on the slide ? "

By para. 5 of their defence the defendants alleged that the infant plaintiff was a trespasser in that he was not in the custody or under the control of a competent person. The principle on which this allegation is based was stated by LINDLEY, J., in *Burchell v. Hickisson* (1). In that case the plaintiff, a boy of four years, fell through a gap in railings on the side of the steps leading up to the defendant's front door. He was accompanied by his sister, who was twelve, and to whom, of course, the gap was obvious. LINDLEY, J., said (50 L.J.Q.B. 102):

" There could be no duty on the part of the defendant towards the plaintiff further than that the defendant must take care no concealed danger exists. The plaintiff was, no doubt, too young to see or guard against any danger, but the logical way of considering the matter is to consider it alternatively in this way: the defendant never invited such a person as the plaintiff to come unless he was taken care of by being placed in charge of others, and if he was in charge of others then there was no

concealed danger. In other words, there was no invitation to the plaintiff if he was not guarded, and if guarded, then there was no trap."

In *Latham v. R. Johnson & Nephew, Ltd.* (2) FARWELL, L.J., said ([1913] 1 K.B. 407):

"I am not aware of any case that imposes any greater liability on the owner towards children than towards adults: the exceptions apply to all alike and the adult is as much entitled to protection as the child. If the child is too young to understand danger, the licence ought not to be held to extend to such a child unless accompanied by a competent guardian. See *Burchell v. Hickisson* (1), *Schofield v. Bolton Corpn.* (3) and *Sterenson v. Glasgow Corpn.* (4)."

HAMILTON, L.J., said ([1913] 1 K.B. 414):

"The child must take the place as he finds it and take care of himself; but how can he take care of himself? If his injury is not to go without legal remedy altogether by reason of his failure to use a diligence which he could not possibly have possessed, the owner of the close might be practically bound to see that the wandering child is as safe as in a nursery. The way out of the dilemma was found in *Burchell v. Hickisson* (1) by deciding that the circumstances may evidence the attachment of a condition to the licence or permission to enter, namely, that the child shall only enter if accompanied by a person in charge capable of seeing and avoiding obvious perils and thus of placing both himself and his charge in the position of an ordinary licensee both able and bound to look after himself."

HAMILTON, L.J., then cited the passage which I have quoted from *Burchell's* case (1) and concluded (*ibid.*, 415):

"Logically this principle is applicable to all cases of infirmity or disability and not to infants only."

In *Coates v. Rawtenstall Borough Council* (5) a child aged three and a quarter had an accident on a slide similar to that in the present case. The defendant council contended that the recreation ground was provided for children of school age only, and that the plaintiff was a trespasser. This court decided that, as the plaintiff was accompanied by a competent guardian, a boy of fourteen years, he was a licensee.

I have dealt with these cases because, in my view, the principle is an important one. A wholly undue burden would be placed on the provision of facilities for the young, whether by local authorities, institutions, or private individuals, if they were held liable in damages because some of those facilities were a danger to very small unattended children. If a man put up a diving board he is not, I think, by the fact of opening it to the public, "inviting" small unattended children who cannot swim to climb up it. It depends, of course, on the circumstances whether the defendant can or cannot rely on this limitation. Counsel for the defendants submitted that the matter had not been left to the jury. The difficulty in the defendants' way, however, arose from the evidence of the present chairman of the council, Mr. Roberts, and the action of the defendants' predecessors in 1934. Having read all Mr. Roberts' evidence, I think that the learned judge was justified in treating it as negating any limitation on the defendants' invitation. In other words, their policy was to admit all children, whether young and unattended or not. The groundsmen, if they saw very young, unattended children approaching or using the slide, prevented them and did their best to send them home. The groundsmen had other things to do and, if the plaintiff was a licensee in the ground, it seems to me impossible to hold that he became a trespasser when he got on the slide. The other difficulty arises out of the policy pursued by the defendants in 1934. When the small boy fell off the slide in 1934, the defendants might, of course, have decided to exclude

unattended children who were under the age of, say, five, or to make it clear that such children were not there with their permission. They pursued a different policy. By stopping up the hole through which only a very small child would be likely to fall, they provided some evidence for the policy as indicated in Mr. Roberts' evidence. In view of this evidence, although the learned judge did not formally withdraw the issue from the jury he was, I think, justified in indicating, as he did, that substantially the defendants' own evidence and action precluded them from maintaining the limitation on which they sought to rely.

Counsel for the defendants further submitted that there was misdirection as to the answers to questions 4 and 7 which read as follows:

" 4. Was the slide by reason of the gap in its then state at the side of the platform a dangerous equipment for children's amusement ? 7. Did the defendants know that the slide was dangerous ? "

This point raises, *inter alia*, the question of the defendants' knowledge or ignorance of the accident in 1934. The then clerk [of the council] had retired, the present clerk was not called. The then chairman was still a member of the council and was not called. The accident and the action taken as a result of it are fully recorded in the minutes. In these circumstances, I would have thought that the defendants knew or must be taken to know of the accident of 1934. I do not think it would be right to lay down as a matter of principle that a council must be taken to know all the past contents of its minute book. Counsel for the defendants said that the learned judge did not refer to the fact that there had been no accidents since the unknown date when the extra rail disappeared. I do not think it was necessary for him to do so. Once the position was reached that very small and unattended children were permitted access to this slide, the learned judge was justified, I think, in directing the jury as he did on those two questions [*viz.*, 4 and 7], to each of which the jury answered " Yes ".

That leaves the question of damages. Could a jury, properly directed, reasonably have given such a sum ? The learned judge properly directed the jury as to the infant plaintiff's chances of being trained and of earning his living. He also referred them to the medical reports which indicate the possibility of future trouble. He adopted the submissions of counsel for the plaintiff which were not before us, and this course had relevance to one passage in the summing-up which, I think with respect, is open to criticism.

" How right everybody has been in this case when they have said to you (as, indeed, I say to you) that no amount of money can restore that boy's sight."

Although the learned judge followed this by referring to and emphasising what is done for the blind today, I think that that sentence without some cautionary words might well have been taken to mean, in effect, that no figure for the blindness in itself would be too high. If that sentence did not mislead the jury, then I think that the figure cannot stand on the other ground. Both parties agreed that, if we came to the conclusion that a new trial ought to be ordered on this ground, we should ourselves assess the damages. We think that the proper figure is £9,000.

BIRKETT, L.J.: I agree with the judgment which has just been delivered by my Lord. It is natural and inevitable that all the proceedings in the court below should be coloured by the disaster which overtook the infant plaintiff. Because of the accident, he has lost his sight without hope of recovery, and the accident, with this lamentable consequence, was alleged to be the result of the negligence of the defendants, a local authority. Quite apart from any questions of fact or law by which the case was to be decided, it is easy to understand the instinctive sympathy for a small boy on whom such a grave calamity had fallen, and it was proper that all the proceedings in the court below should be subjected to a critical examination at the hands of counsel for the defendants.

I am bound to express my own deep regret that the infant plaintiff should have been allowed to go to the recreation ground at all, accompanied only by another small boy of some six years of age. A boy of six could not be expected to be a proper or a competent guardian, and to a child of three and a half most things in this world take on an aspect of danger if he is not protected against them. To reach the recreation ground from the plaintiffs' home required the two little boys to cross two public highways with all the dangers of modern traffic, and that fact by itself, I should have thought, would have been enough for a careful and thoughtful parent to forbid a small boy to go unless he were in watchful and careful hands. Yet the fact remains that the infant plaintiff was allowed to go in the care of a boy of six, and it was the alleged negligence of the defendants that was alone in question.

When all the evidence had been given, the learned judge formulated a series of questions for the jury which were agreed by counsel on both sides. No objection, therefore, can be taken to the form of the questions, but objection is taken by counsel for the defendants to the summing-up in relation to some of them. Questions 2 and 3 were designed to elicit the jury's view as to the status of the infant plaintiff at the time of the accident in relation to the defendants. [HIS LORDSHIP stated the form of the questions, and continued:] The learned judge drew the attention of the jury to the pleading of the defendants that the infant plaintiff was a trespasser when he used the slide in that at the time he was not under the control of a competent guardian. Counsel for the defendants complained that the learned judge had failed to direct the jury on this all-important matter. The submission of counsel was that the child, at the time of the accident, was not a licensee on the recreation ground but a trespasser, inasmuch as the licence granted by the defendants to young children was limited to young children who were in the care of a competent guardian at the time when they entered the recreation ground. That such a limited licence can exist is plain from the cases already cited by my Lord, but the important words for the decision of this point in the present case seem to me to be the words of HAMILTON, L.J., in *Latham v. R. Johnson & Nephew, Ltd.* (2), where he said ([1913] 1 K.B. 414):

"The child must take the place as he finds it and take care of himself; but how can he take care of himself? If his injury is not to go without legal remedy altogether by reason of his failure to use a diligence which he could not possibly have possessed, the owner of the close might be practically bound to see that the wandering child is as safe as in a nursery. The way out of the dilemma was found in *Burchell v. Hickisson* (1) by deciding that the circumstances may evidence the attachment of a condition to the licence or permission to enter, namely, that the child shall only enter if accompanied by a person in charge capable of seeing and avoiding obvious perils and thus of placing both himself and his charge in the position of an ordinary licensee both able and bound to look after himself."

It is the circumstances of the particular case which must be examined to see if they do evidence the attachment of a condition or not.

The evidence, which has been read to this court at some length, was discussed before the jury in relation to the questions which had been formulated. The learned judge had stated the point raised in the defendants' pleading and had discussed with some fullness the evidence given by Mr. Roberts, the chairman of the defendant council. Nobody, apparently, had suggested that this particular point should be incorporated in the two questions in any more specific way, and it seems to me that the point was fairly before the jury when they made their answers. Indeed, it seems to me that the jury on the evidence could not have answered otherwise. There do not appear to have been any printed regulations calling attention to this point; there was no notice of any kind limiting the entry into the recreation ground, which was open to the highway, and there was

certainly no prohibition on the entry of young children; no circular had ever been sent to parents limiting entry to the recreation ground to those young children who were in charge of a competent guardian; and the jury were entitled to regard the evidence of Mr. Roberts, as indicating that the defendants had never sought to limit the entry of young children in the manner now suggested, although he did say that the defendants relied on the parents not to allow young children to come to the recreation ground. The jury were also entitled, however, to consider the events of 1934. In circumstances which are a little obscure, a small child had actually fallen through this very small gap at the top of the chute. Whether the child crawled through or was pushed through or fell through matters little, but the fact remained that on this very chute at this very place a small child had fallen through the gap which then existed. And the jury were entitled to consider what the defendants did on that occasion. There was no circular, no notice, no prohibition, but a horizontal bar was fixed in position so that a child could no longer fall through the gap. To the jury this could only mean that the policy of the defendants at that time was to make provision for small children, and children so small that they might fall through the gap unless the horizontal bar prevented them. There was no evidence before the jury that that policy had ever been changed. In my opinion, the evidence was all one way, and the jury, in their answers to questions 2 and 3, properly decided that on the day of the accident the plaintiff was a licensee and not a trespasser. I do not think that the submission by counsel for the defendants that the learned judge misdirected the jury on this issue is well founded.

Many other criticisms of the summing-up were made by counsel for the defendants. For example, he complained that the learned judge had said nothing about "foreseeability". Could the defendants have foreseen that a child of three would be on the platform of the chute when he was unaccompanied? Could they have foreseen that he would put his head through this small gap and slip, or be jostled or pushed so that he fell? Was there any danger on the chute which they ought to have foreseen? These and similar questions were raised by counsel for the defendants, but, if the agreed questions are examined, it will be seen that, whilst nothing is said therein about "foreseeability", nevertheless the agreed questions cover the point. If questions 4 and 7 are taken together, the one asking whether the slide was dangerous because of the gap, and the other asking whether the defendants knew of the danger, and the jury answer both questions in the affirmative, the question of "foreseeability" answers itself. For if one permits young children unrestricted entry to the recreation ground, with no limitation as to age or any other thing, and if, in fact, there is a chute that is dangerous and one knows of the danger, then one must be taken to foresee that an accident may take place. Counsel for the defendants urged, however, that there had not been a proper direction to the jury on the important question of the knowledge of the defendants of the danger existing. It was a remarkable circumstance that a similar accident had taken place in 1934 and that a horizontal bar had been inserted to prevent a similar accident happening. That horizontal bar had vanished and since 1941, at least, it had not been in its place, and the gap through which the infant plaintiff in this case fell was the self-same gap through which the small boy fell in 1934. The complaint made by counsel for the defendants was that the learned judge should have told the jury that there had been no accident since 1934, and no accident, therefore, after 1941 when the bar was missing, and it was for the jury to consider whether the defendants could reasonably have foreseen that an accident of this kind would take place after all those years of immunity. To this counsel added the submission that the learned judge should have told the jury on the question of knowledge that actual knowledge of the danger must be proved and that knowledge was not to be taken as proved merely from the minutes of the council in 1934, but must be shown as knowledge of the clerk to the council or of the groundsman or of some other

responsible person. Although the point is not free from difficulty I think that the learned judge was right on the facts of this case in directing the jury as he did when he said:

A “And so far as one can attribute knowledge to a council, may we not say that one can ascertain the knowledge of the council by looking at their minutes? Look at what they have recorded in their minutes with regard to the accident in 1934; and look what was the result of the action which was taken of improving the condition of the slide by putting on that extra horizontal bar on each side which was there to be seen by any member of the council who happened to pass by.”

B The knowledge of the council as recorded in its official minutes of twenty years ago must be regarded, I think, as the knowledge of the council when dealing with the same subject-matter today. It is also relevant that the then chairman of the council was still a member in 1950. In my opinion, the verdict of the jury and the judgment founded thereon ought not to be disturbed so far as the liability of the defendants is concerned.

C There remains the important question of damages, and by consent of the parties we have been asked to assess the damages if in our opinion the sum awarded ought not to stand. Counsel for the defendants submitted that the sum of £17,500 was a sum that no reasonable jury, properly directed, could give. In one or two earlier appeals in this court I have spoken of the difficulties that the assessment of damages creates. The difficulties which face an appellate court when the damages have been assessed by a jury are greater still. There are no means of knowing with certainty what were the considerations which D entered into the jury's calculation, by what feelings they were influenced, or whether the verdict is a compromise verdict or not. The evidence in the case, the summing-up, and the amount awarded are the only guides. There is the further difficulty, of course, that according to our procedure no specific figures may be mentioned to the jury, and no minimum or maximum figure may be indicated. Counsel must content themselves by asking for “substantial” or E “heavy” or “moderate” or “small” damages, as the occasion warrants. A jury is without experience in the assessment of damages and has no experience of comparable cases, and words like “substantial” or “moderate” do not help them very much. To all this is added the fact that the jury is being asked to assess in money that which is not strictly measurable in money at all. It is quite true to say as a general observation that there is no sum of money that F can compensate for the loss of sight or the loss of limbs or for the loss of health and general well-being; but such a general observation without careful qualifications may mislead a jury. The duty of the jury is to consider the evidence in the case and then to award a reasonable sum by way of compensation, and not by way of punishment.

G There are two passages in the summing-up of the learned judge that may well have led the jury astray. After reading from the medical reports the learned judge said:

H “Those are, you may think, terrible reports. You may find it difficult to get out of your minds the memory of that little man, the boy as he was led into this court, and he sat down on that seat not knowing where he was, not seeing anything or anyone . . . I would not try to add to the submissions which have been made to you by [counsel for the plaintiff] because I could not do it anything like so well. We have no need to look for glowing words in order to have for ourselves a picture of the consequences to that small boy, at the age of three and a half, his sight taken from him; and if he grows to manhood's stature, he will be a blind man—a blind man. How right everybody has been in this case when they have said to you (as, indeed, I say to you) that no amount of money can restore that boy's sight.”

It is true that the learned judge then spoke of the infant plaintiff's prospects and of the remedial agencies actively working for the welfare of the blind, but there was no cautionary word to the jury after the use of the words "no amount of money can restore that boy's sight". It is impossible, as I have said, to be certain what the jury took into consideration, and whether they took into consideration matters which they ought not to have or omitted considerations which it was their duty to take into account. Looking at the figure of £17,500, however, I am led to the conclusion that one of those things happened, and that the figure is much too high. At one stage of the argument counsel for the defendants asked us to look at the sum as if it were invested in four per cent. consols at their present price, or as if the interest were allowed to accumulate until the infant plaintiff reached the age of twenty-one. If that is done, it might appear that the jury took no account of the fact that the infant plaintiff might grow up to be a most useful citizen earning a good livelihood when adequately trained, but, however the sum is viewed, in my opinion the figure is too high, and I would substitute the figure of £9,000.

ROMER, L.J.: The principal point on which the defendants seek to rely in this appeal on the issue of liability is that at the time when the infant plaintiff met with his very unfortunate accident he was not a licensee on their premises and was not, therefore, entitled to the rights which the law attaches to that status. The defendants' contention is that the only licence which they granted to children who were too young to be able to appreciate danger was to enter the recreation ground in the company and care of some competent guardian. As an alternative way of putting their case they argued that, even if children of immature perception had unconditional permission to enter the recreation ground itself, the condition requiring the presence of a guardian qualified their licence to go on the chute. The defendants' complaint before us was that these submissions were not fully put to the jury in the learned judge's summing-up and that the jury, accordingly, did not have them sufficiently in their minds when they considered the questions as to trespass which were formulated for their decision. The learned judge did, in fact, refer twice to the question of the infant plaintiff being accompanied by a guardian. The relevant passages in the summing-up were as follows:

"... the defendants plead that the infant plaintiff was a trespasser when he used the slide in that at the time he was not under the control of a competent guardian. The defendants say that they owed him no duty and were not in breach of any duty . . . There were no notices which parents could have read that children under a certain age were not allowed unless accompanied by an elder."

Nevertheless, in the later stages of the summing-up the case does seem to have been presented to the jury rather from the standpoint that the infant plaintiff's status, when he entered the recreation ground, was that of an unqualified licensee and that, on that hypothesis, nothing that happened afterwards could convert him into a trespasser. For example, the learned judge, at one point towards the end of the summing-up, said:

"I have endeavoured to explain to you that, once one is on the land by permission, one does not become a trespasser when one steps on to something which is there . . ."

It is, moreover, to be observed that, although a number of citations from reported cases were read to the jury, none of them was on the point whether a licensee to infant children should in some circumstances be regarded as being conditional on their being accompanied by a guardian. It may well be, therefore, that the jury did not have this point very clearly in their minds. As against this they had their attention specifically directed to the evidence which was relevant to the matter and on which they would necessarily have founded their conclusion on

the defendants' submissions if those submissions had been put to them in plain and unequivocal terms. In my opinion, that evidence showed beyond question that no condition of the kind suggested by the defendants attached to the permission which they gave to infant children to enter on the recreation ground.

Before reverting to that evidence, however, I would like to say a word or two about the legal principle itself which the defendants sought to invoke and to utilise as a defence in these proceedings. The question was considered by this court in *Latham v. R. Johnson & Nephew, Ltd.* (2), in which an infant plaintiff sought to recover damages in respect of an injury which she had sustained while playing on the land of the defendants on which they permitted children to play. This court held that, there being neither allurement nor trap, nor invitation to the plaintiff, nor dangerous object placed on the land, the defendants were not liable. In the course of his judgment, FARWELL, L.J., said ([1913] 1 K.B. 407):

"I am not aware of any case that imposes any greater liability on the owner towards children than towards adults: the exceptions apply to all alike and the adult is as much entitled to protection as the child. If the child is too young to understand danger, the licence ought not to be held to extend to such a child unless accompanied by a competent guardian."

This last proposition would, at first sight, appear to be one of general application and unrelated to the facts of any particular case. This, however, was not, in my opinion, what the lord justice intended to convey. He cited three cases in support of his statement, namely, *Burchell v. Hickisson* (1), *Schofield v. Bolton Corpn.* (3), and *Stevenson v. Glasgow Corpn.* (4). Of these cases the last does not warrant any such general principle as might be inferred from the proposition stated by FARWELL, L.J., while in the first two the conditional nature of the licences which were in question was deduced from the particular circumstances which were established at the trial. In my opinion, the lord justice meant no more than that, when a landowner allows the public to come on property of his on which there is a source of potential danger to infants, then, if the circumstances reasonably permit of it, the court would assume that, so far as infants were concerned, the licence to enter is conditional on their being accompanied by a competent guardian. This view of what FARWELL, L.J., intended is confirmed by the fact that in *Latham's* case (2) the jury had found on the evidence that there was no invitation to the plaintiff (an infant aged between two and three years) to go on the defendants' land unaccompanied, and also assimilates the lord justice's statement with the observations of HAMILTON, L.J., in the same case ([1913] 1 K.B. 414), and which my Lord has cited in his judgment. It is plain that, in the view of HAMILTON, L.J., the question whether a permission which is granted to very young children to enter on land should be regarded as being subject to the condition that they should be accompanied by some responsible person falls to be determined in accordance with the circumstances of each particular case.

Approaching the matter, then, from this standpoint I can see no evidence to support the view that the licence which the defendants undoubtedly gave to children to enter on the recreation ground was qualified, so far as infants of three or four years were concerned, by the condition that they should be accompanied by a responsible person. There is no evidence that unaccompanied infants were ever turned off the recreation ground or from the children's playground itself by reason merely of their age. The evidence of the groundsmen, Mr. Harding and Mr. Earl, when taken as a whole, proves no more than that young children who were by themselves were turned off if they were seen on, or in close proximity to, the chute. The evidence of the chairman of the council, Mr. Roberts, on the other hand (which was laid very fairly before the jury in the summing-up) shows that children of all ages were welcomed to the recreation ground, from whence they could proceed easily enough into the playground, which was expressly provided for their entertainment. He said that no attempt was made to regulate

who did or did not enter the recreation ground, that there was access from there into the children's section and that it had never been the policy of the defendants to stop anybody from going into that section. It further appeared from Mr. Roberts' evidence that in 1948 the defendants decided to earmark about one acre of the recreation ground for the use of the younger children, including quite small children of three or four years, and a notice board was put up saying, in effect, that that area was reserved for young children only. The notice board, however, eventually became rotten and was taken down. In these circumstances, and having regard also to the safeguards for small children in respect of the chute which the defendants put in hand after the accident to Mr. Rixson's child in 1934, it seems to me to be clear that no case was made out on the evidence to support a case of conditional licence to children such as the infant plaintiff and that the jury could not have come to a contrary conclusion if the matter had been put to them even more specifically than it was.

With regard to the defendants' alternative point, namely that, even if the licence to infants to enter on the recreation ground and playground was unconditional, they nevertheless had no licence to use the chute except under responsible supervision, there are, I think, two answers. The first is that there is no evidence, in my opinion, to warrant any such assumption. The evidence of the groundsmen, to which I have already referred, is quite insufficient for the purpose and there is no other. No notice boards were erected for the information of the parents of infants prohibiting the use of the chute by young children except under parental or other competent supervision, nor were any other steps taken to indicate that the apparatus was for the use of older children only. Moreover, as already observed, precautions were taken in 1934 to ensure the safety of small children on the chute. The second answer, which is associated with the first, is that in the absence of evidence (in which, of course, I include circumstances) leading to a contrary conclusion the court would, in my judgment, presume that, if the owner of a children's playground unconditionally permits children of all ages to enter on it, and knows that they do so, he intends his permission to extend to the use by the children of apparatus which he has provided on the ground for their amusement: for such apparatus are "allurements" to all children old enough to use them, or to try to use them, and it is, indeed, because they are allurements that they are there at all. This view is in conformity with the decision and reasoning of this court in *Gough v. National Coal Board* (6). In that case the defendants operated a colliery tramway which ran over their land and they permitted children to enter on the land. The infant plaintiff did so and went for a ride on one of the moving trucks. He fell off it and was injured. It was argued for the defendants that, although (as the judge found) the plaintiff was a licensee over the whole land, he lost that status when he climbed on the truck and eo instanti became a trespasser. SINGLETON, L.J., expressed himself on that point as follows ([1953] 2 All E.R. 1289):

"The submission of counsel for the defendants that the plaintiff became a trespasser when he got on the truck appears to me to be answered by a passage from the judgment of DU PARCQ, L.J., in *Holdman v. Hamlyn* (7) where he said ([1943] 2 All E.R. 141, 142): 'It was indeed argued that the infant plaintiff was a trespasser. The truth is, however, that he was an invitee, at any rate down to the moment when the threshing machine proved an irresistible temptation. If the boy strayed beyond the strict limit imposed by the terms of the invitation, it was because of the failure of the defendant's agent to guard him against a dangerous allurements; and if he can properly be called a trespasser at all, the trespass was a natural and probable result of the negligence of the defendant's agent. A defendant who has lured an invitee into a forbidden area cannot thereafter treat him as a trespasser.' An examination of the authorities leads me to the conclusion that, if an occupier allows children of tender years on his land, and if he has thereon

something which is, to his knowledge, attractive to them and which is dangerous, he must take reasonable care to protect them from the danger."

BIRKETT, L.J., expressed a similar view on the point and HODSON, L.J., said ([1953] 2 All E.R. 1295):

"Once the child is a licensee on the land, the question of trespassing on an object on the land does not, in my opinion, arise. The trap or concealed danger will often be an object on the land, but I cannot conceive that the licence to go on the land is to be taken to exclude the thing which, being an allurement to children, is a concealed danger for them."

It appears to me that the application of the law as so formulated by the lords justices to the facts and circumstances of the present case is destructive of the contention that the plaintiff became a trespasser from the moment he mounted the ladder of the chute notwithstanding that he had previously been a licensee. I agree with my brethren in thinking that the defendants cannot be acquitted of knowing the dangerous quality of the aperture in the chute through which the plaintiff fell. The mere fact that the minutes of a parish council contain an entry which had been minuted many years before does not necessarily fix the council with knowledge of the subject-matter of the entry. In the present case, however, two gentlemen who were members of the council when the accident in 1934 occurred were still members in 1950 but neither of them gave evidence at the trial, although one of them was, it seems, in court. Moreover, the evidence of the present clerk, who was appointed in 1946, was not made available to the jury. In these circumstances the defendants cannot, in my opinion, legitimately complain of the jury's finding that the defendants knew of the danger, nor is there any ground for impeaching the judge's summing-up on the point.

On the question of liability I only desire to say in conclusion that, had it not been for the accident to Donald Rixson in 1934 and the defendants' knowledge, or presumed knowledge of it, the plaintiff would, in my judgment, have had no ground of action. The evidence shows that the possibility of an accident happening such as that which unfortunately did occur would not have presented itself to the mind of any reasonably prudent person who was unaware of the previous mishap. It would, in the long run, be disadvantageous in the extreme to the public and to children in general if such a person, or body of persons, were to be held liable for an accident of so improbable and unforeseeable a nature as that which befell the plaintiff; for the prospect of being sued for heavy damages (insurable, perhaps, but only at considerable cost) would in all probability result in the disappearance altogether of amenities which many local authorities and private persons voluntarily provide for the entertainment and amusement of children. In *Latham's case* (2) FARWELL, L.J., said ([1913] 1 K.B. 407):

"It is impossible to hold the defendants liable unless we are prepared to say that they are bound to employ a groundkeeper to look after the safety of their licensees, and the result of such a finding would be disastrous, for it would drive all landowners to discontinue the kindly treatment so largely extended to children and others all over the country."

That which the lord justice envisaged as disastrous in 1913 would, at least, be equally so today when the dangers of the streets, which in many cases would become the substitutes for playgrounds, considerably exceed such perils as exist in chutes and swings.

I agree entirely with what my brethren have said with regard to the general damages which the jury awarded. The court is, I think, for the reasons stated in the judgments which have been delivered, justified in setting that part of the verdict aside, and the damages should be revised to the sum of £9,000.

Appeal allowed on the quantum of damages.

Solicitors: *William Charles Crocker* (for the defendant council); *Kinch & Richardson*, agents for *T. G. Baynes & Sons*, Dartford (for the plaintiff).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

MAERKLE AND ANOTHER v. BRITISH & CONTINENTAL FUR CO., LTD.

MAERKLE v. BRITISH & CONTINENTAL FUR CO., LTD.

[COURT OF APPEAL (Jenkins and Hodson, L.JJ.), July 26, 1954.]

Trading with the Enemy—Custodian of Enemy Property—Property vested in custodian—Rights of action not rested in plaintiff, former enemy subject—No cause of action in plaintiff—Striking out statement of claim—R.S.C., Ord. 25, r. 4—Trading with the Enemy (Custodian) Order, 1951 (S.I., 1951, No. 153), art. 1 (a).

Declaratory Judgment—Discretion of court—No cause of action rested in plaintiff.

In 1939 the plaintiffs carried on business in Leipzig, Germany, and the defendants, their London agents, in that year purchased lambskins on behalf of the plaintiffs. None of the skins had been delivered to the plaintiffs at the outbreak of war in September, 1939, although full payment had been made to the vendors. In 1948 a statement of account was rendered by the defendants to the plaintiffs, purporting to show that the proceeds of sale of the skins had been paid to the Canadian Custodian of Enemy Property. In their statement of claim the plaintiffs alleged that the defendants had failed to account to the plaintiffs or to the Canadian Custodian of Enemy Property in respect of the skins, and that the skins were shown as having been sold for \$C.59,000 whereas the true price was \$C.79,000. The plaintiffs claimed (a) an account of the sales effected by the defendants, (b) payment to the Canadian Custodian of Enemy Property or the United Kingdom Custodian of Enemy Property for and on behalf of the plaintiffs of such sum as was found due, (c) damages for breach of trust, (d) damages for breach of the contract of bailment, (e) damages in conversion, and (f) a declaration that the defendants had not truly accounted to the Canadian Custodian of Enemy Property in respect of the sale of the skins, or that the defendants had converted the proceeds of sale to their own use. By the Trading with the Enemy (Custodian) Order, 1951, beneficial interests of enemy subjects, in property therein mentioned, including property existing by virtue of any contract or agreement, vested in the Custodian of Enemy Property.

Held: the statement of claim should be struck out as disclosing no reasonable cause of action because (a) the rights in question, being proprietary or contractual in origin, had become vested in the Custodian of Enemy Property and at the time when the action was brought were not vested in the plaintiffs, whose rights were now limited to the possibility of participation in any surplus available for distribution under the Distribution of German Enemy Property Act, 1949, after satisfying prior claims; and (b) although in some cases a declaration might be made notwithstanding that the party seeking it had no cause of action, the granting of declaratory relief was discretionary, and the plaintiffs' possibilities of interests were too nebulous to warrant the exercise of the court's discretion in their favour.

Guaranty Trust Co. of New York v. Hannay & Co. ([1915] 2 K.B. 536), considered.

Semle: German enemies may have had rights of action in tort which were such that they would not have vested in the Custodian of Enemy Property (see p. 53, letter E, post).

Appeal dismissed.

EDITORIAL NOTE. The applications to strike out the statements of claim were founded on the vesting of the proprietary interest, if any, which was the subject of the action, in the Custodian of Enemy Property under the trading with the enemy legislation. The legislation was reviewed by WYNN-PARRY, J., and the relevant part of his judgment is printed at p. 55 post.

JENKINS, L.J., accepts (see p. 54 post) that in some cases a declaration may be made although the party claiming it has no cause of action. The Court of Appeal did not regard the present case as an appropriate one in which to make a declaration. On this point the present case may be compared with *Re Lewis's Declaration of Trust* ([1953] 1 All E.R. 1005), where a declaration was made as to title although no cause of action was established.

A FOR THE TRADING WITH THE ENEMY (CUSTODIAN) ORDER, 1939 (S.R. & O., 1939, No. 1198), and the subsequent orders referred to at pp. 55, 56 post, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 23, p. 116 et seq.

Cases referred to:

- (1) *Guaranty Trust Co. of New York v. Hannay & Co.*, [1915] 2 K.B. 536; 84 L.J.K.B. 1465; 113 L.T. 98; 30 Digest, Replacement, 174, 239.
- B (2) *Stevenson (Hugh) & Sons v. Akt. für Cartonnagen Industrie*, [1918] A.C. 239; 87 L.J.K.B. 416; 118 L.T. 126; 2 Digest 177, 416.
- (3) *Reuter (R. J.) Co., Ltd. v. Ferd Mulhens*, [1953] 2 All E.R. 1160; 3rd Digest Supp.

C APPEALS by the plaintiffs from orders of WYNN-PARRY, J., dated May 20, 1954, ordering that the statements of claim in two actions be struck out as disclosing no reasonable cause of action.

The material allegations appear in the judgment of JENKINS, L.J.

A. R. Campbell for the plaintiffs in both actions.

Settle for the defendants in both actions.

D JENKINS, L.J.: These are appeals from two orders of WYNN-PARRY, J., made on May 20, 1954, ordering the statement of claim in each of the two actions to be struck out as disclosing no reasonable cause of action. The question in each case is the same, viz., whether the subject-matter of the claim has become vested under the trading with the enemy legislation in the Custodian of Enemy Property, with the result that the actions are not maintainable by the plaintiffs.

E The plaintiffs in the first action are Mr. Franz Maerkle and Mr. Rudolph Tenzler; the plaintiff in the second action is Mr. Maerkle alone. The defendant in both cases is a company called British & Continental Fur Co., Ltd. In the first of the two actions, the plaintiffs, by their statement of claim, state that they carried on business at Leipzig in Germany in 1939. They further allege that the defendants were the London agents of the plaintiffs, and that in or about 1939 the defendants purchased, as agents for and on behalf of the plaintiffs and others, F 12,666 Persian lambskins, approximately forty per cent. of which were bought for the account of the plaintiffs. The statement of claim goes on to allege in para. 3 that at the outbreak of war in September, 1939, these skins had not been delivered by the defendants to the plaintiffs, although, as appears from an earlier paragraph, full payment had been made to the vendors of the skins. None of the skins had been delivered at the outbreak of war. By para. 4 the statement G of claim alleges that something in the nature of a statement of account was rendered by the defendants to the first-named plaintiff in or about 1948, and this purported to show that the proceeds of sale of the lambskins in question had been paid over to the Canadian Custodian of Enemy Property. In para. 5 it is alleged that the defendants have failed to account to the plaintiffs or to the Canadian Custodian of Enemy Property in respect of the lambskins in question, H and there is a specific complaint to the effect that in the statement I have mentioned the skins were shown as having been sold for 59,000-odd Canadian dollars, whereas the true price was 79,000-odd Canadian dollars. In respect of this transaction the plaintiffs make these claims:

1. That an account be ordered to be taken of all sales by the defendants of the 12,666 lambskins referred to in para. 2 hereof. 2. That on the taking of such account and after deduction of such sums less contra accounts as were

paid by the defendants to the Canadian Custodian of Enemy Property an order be made for payment by the defendants to the Canadian Custodian of Enemy Property or the United Kingdom Custodian of Enemy Property for and/or on behalf of the plaintiffs of such sums as may be found to be due and owing on the taking of such account together with interest thereon at the rate of four per centum per annum . . . 3. Damages for breach of trust. 4. Damages for breach of the contract of bailment. 5. Damages in conversion. 6. A declaration that the defendants have not truly accounted to the Canadian Custodian of Enemy Property in respect of the sale of the said 12,666 lambskins, and/or that a true account of the sale of such skins is £C.79,468.76 as pleaded, and/or that the defendants have converted the sum of £C.19,600 to their own use of which forty per centum namely £C.7,840 represented the share of the plaintiffs."

In the second action, Mr. Maerke, who in this case, as I have already mentioned, is the sole plaintiff, alleges by his statement of claim that:

"In or about 1935 when the defendants were the London agents for the plaintiff who carried on business in Germany it was orally agreed between the plaintiff and one Buttman for and/or on behalf of the defendants that the defendants should receive and retain certain moneys and/or trade credit balances in favour of the plaintiff for the plaintiff's use and benefit and as trustees for the plaintiff and that a record of such said moneys and/or balances should be kept under the style 'B. Buttman "B" account'."

The statement of claim goes on to allege that moneys were received by the defendants in pursuance of this agreement and that the defendants, in an account which they submitted, showed a number of payments as having been made out of the moneys in question when no such payments had in fact been made, and these allegedly fictitious payments are said to amount to £7,199 6s. 6d., those being payments which were never in fact made by the defendants, and it is alleged that if the payments were made they were made fraudulently and in breach of trust. It is also put as a conversion of the sums in question to the defendants' own use. Then in a paragraph introduced by amendment by way of alternative the plaintiff says that he will contend

"that his right to repayment of the sum of £7,199 6s. 6d. had and received by the defendants to his use and benefit vested in the Custodian of Enemy Property for the United Kingdom by virtue of art. 1 of the Trading with the Enemy (Custodian) Order, 1951 (S.I., 1951, No. 153)",

and that the defendants as alleged in the preceding paragraphs

"failed to disclose or declare such right to the said custodian pursuant to art. 1 of the Trading with the Enemy (Custodian) Order, 1939, and that the plaintiff has been thereby occasioned damage in that he has been deprived of his interest in the said moneys (including his interest thereon) whether such interest in the said moneys be adjudged to be or to have been complete or suspensory, and claims that the defendants be ordered to pay forthwith to the said custodian the sum of £7,199 6s. 6d. and/or interest thereon at the rate of four per centum per annum."

The claim in the prayer is:

"1. Damages in conversion. 2. Damages for breach of trust. 3. A declaration that the defendants have converted the sum of £7,199 6s. 6d. to their own use as alleged, or 4. An order requiring the defendants as trustees for and/or on behalf of the plaintiff to pay the sum of £7,199 6s. 6d. together with interest thereon at the rate of four per centum per annum as from September 1939 until the date of payment (inclusive) forthwith to the Custodian of Enemy Property for the United Kingdom. 5. Further or other relief. 6. Costs."

A As I stated earlier, the objection taken by the defendants to these statements of claim (the objection which succeeded before the learned judge) was that the subject-matter of the claim in both cases was vested in the Custodian of Enemy Property, so that the plaintiffs were not in a position to maintain any action in respect of those claims. The learned judge, in the course of his judgment, fully reviewed the relevant statutory provisions bearing on the vesting of what may be compendiously described as enemy debts. His review was, I think, accepted by counsel for the plaintiffs as an adequate review of the relevant provisions, although he joined issue with the learned judge as to the effect of those provisions in their application to the claims here in question. After referring to the various statutory provisions the learned judge said:

B “On that review of the relevant statutory provisions, it appears to me to follow inevitably that as between the respective plaintiffs on the one hand, and the defendants on the other hand, the plaintiffs have ceased to have any interest whatsoever in the property which was the subject-matter of the transactions referred to in the respective statements of claim and that as between the plaintiffs on the one hand, and the Custodian of Enemy Property on the other hand, their interest consists only of the right to participate in any distribution or distributions which may hereafter be made under the provisions of the Distribution of German Enemy Property Act, 1949, the Custodian of Enemy Property having the duty (to the exclusion of the plaintiffs) of swelling the funds at his disposal by pursuing any rights which the respective plaintiffs had against the defendants in regard to the property the subject-matter of the transactions in the respective statements of claim as he may be advised.”

D Counsel for the plaintiffs submitted that, comprehensive as the language of these statutory provisions may be, some limit must, nevertheless, be placed on that language as regards the character of the property to which it applies, and he said that the claims to which these two actions relate are not property of such a character as to be caught by the vesting provisions in this legislation. He submitted that the sums claimed are in the nature of damages for tort; he said that they are personal claims, and at one stage in his argument he contended that they were not assignable. I cannot accept counsel for the plaintiffs’ argument. It may be that there are claims in tort of certain kinds the rights of action in respect of which would not vest in the custodian. That may well be so, but the rights here in question seem to me to be essentially proprietary in their origin, arising, as they do, out of contracts or trusts which conferred interests in the nature of property on the plaintiffs. It seems to me that claims of this kind are clearly such as to be caught by the legislation. I am fortified in that view by the very wide definition of “property” contained in the Trading with the Enemy Act, 1939, s. 7 (8) (b), which is in these terms:

G “the expression ‘property’ means real or personal property, and includes any estate or interest in real or personal property, any negotiable instrument, debt or other chose in action, and any other right or interest, whether in possession or not.”

H I hope I will not be regarded as being disrespectful to the argument of counsel for the plaintiffs if I do not go in detail through the provisions which were carefully reviewed* by the learned judge; I am content to adopt his view of the legislation and his conclusion as to its effect in the present cases.

A second argument of counsel for the plaintiffs should be dealt with, and that was that even if these rights or claims were vested in the custodian, the plaintiffs were, nevertheless, entitled to maintain the first action for the purpose of obtaining a declaration in the form set out in para. 6 of the prayer to the statement of claim to which I have already referred. In support of that contention

*The relevant part of the judgment of WYNN-PARRY, J., is set out on pp. 55, 56 post.

(which by parity of reasoning was equally applicable to the declaratory relief sought in the second action) counsel relied on the case in the Court of Appeal of *Guaranty Trust Co. of New York v. Hannay & Co.* (1). That was an entirely different kind of case, but it was cited by counsel for the plaintiffs as authority for the proposition that a declaration can be made even though the party seeking it has no cause of action against the party against whom the declaration is sought. The case was of this nature: The defendants brought an action against the plaintiffs in America to recover the amount of a bill of exchange paid by the defendants in reliance on a forged bill of lading. It was admitted that the law of England applied to the case. The plaintiffs brought an action in England claiming a declaration to the effect that they did not, by presenting the bill of exchange for acceptance with the bill of lading attached, represent that the bill of lading was genuine, and that they were not bound to repay the amount of the bill of exchange; and it was held by the majority of the court that the plaintiffs' claim for a declaration in those terms was free from objection, although they had no cause of action against the defendants in the proceedings in which the declaration was claimed. That is an entirely different case from the present one, and although it is authority for the proposition that in some cases a declaration may be made, although the party seeking it has no cause of action, it by no means follows that in every case where a party has no cause of action he can maintain a claim for a declaration.

In dealing with this part of the argument of counsel for the plaintiffs, the learned judge seems to have misapprehended some observations which counsel for the defendants attributed to himself. The learned judge treated this claim for a declaration as made with a view to assisting possible proceedings in Germany, or any proceedings that were contemplated in Germany, by the plaintiffs. In fact, as I understand the position, there never was any intention on the part of the plaintiffs to take any such foreign proceedings. Except for his reference to foreign proceedings, the learned judge gave no reason for refusing the plaintiffs' claim to declaratory relief. The granting of such relief as the only relief in an action is always a matter for discretion, and it has been said, I think, that such discretion should be sparingly exercised.

In the present case, treating the matter as *res integra*, I cannot think that it would be right to allow either of these actions to go forward for the purpose of obtaining declaratory relief of the kind sought. If it is the case that the whole of the plaintiffs' rights, title and interest in the subject-matter of these actions has passed to the custodian, then the claims which the plaintiffs now seek to assert are, in truth, claims maintainable by the custodian, and no one else, against the defendants, subject to whatever defences the defendants may have. They are claims which the custodian may, or may not, see fit to litigate between himself and the defendants; they are claims which might, or might not, be compounded or compromised between the defendants and the custodian. In those circumstances I cannot think that it would be right to allow either of these actions to go forward for the purpose of obtaining declaratory relief in proceedings to which the custodian is not a party. The plaintiffs' interest in such relief could only be described as nebulous, for the only advantage (if one may call it such) that counsel for the plaintiffs claims might be achieved by such relief is that it might increase the prospect of his clients ultimately participating in any surplus that the custodian might have on hand after all prior claims had been disposed of. That, counsel admitted, is no more than a spes; it is not a right or enforceable interest; it is at most a possibility. I cannot, therefore, think that it would be right to allow these actions to go forward merely for the purpose of obtaining relief of that kind, which could confer no tangible benefit on the plaintiffs, and might be productive of much embarrassment as between the defendants and the custodian in any litigation or negotiations which may hereafter take place between them on the subject-matter of these two actions.

For these reasons, in my view the learned judge came to a right conclusion, and I would dismiss these appeals.

HODSON, L.J.: I agree.

Appeals dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Crawley & de Rega* (for the plaintiffs); *Theodore Goddard & Co.* (for the defendants).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

NOTE.

In his judgment in *Maerkle and Another v. British & Continental Fur Co., Ltd.*, and *Maerkle v. British & Continental Fur Co., Ltd.*, WYNN-PARRY, J., reviewed the trading with the enemy legislation so far as it was relevant to the two matters before him. On appeal, JENKINS, L.J., adopted the view of WYNN-PARRY, J., of the legislation and did not himself in his judgment consider the provisions in detail: see p. 53, ante. The relevant part of the judgment of WYNN-PARRY, J., is, therefore, printed below.

WYNN-PARRY, J. (having stated the facts): With this introduction, I turn to the relevant legislation. [HIS LORDSHIP read the Trading with the Enemy Act, 1939, s. 7 (1), and the Trading with the Enemy (Custodian) Order, 1939 (S.R. & O., 1939, No. 1198), art. 1 (1), art. 2 (1) (iii), and art. 5 (1), and continued:] Put shortly, the effect of that order was that all moneys from time to time held by the defendants on behalf of the plaintiffs were liable to be paid to the custodian, that a vesting order could be made as regards any property for the time being held by the defendants on behalf of the plaintiffs, and that they were under a duty to give full information to the custodian regarding all such moneys and property. Clearly, therefore, the only person who could give the defendants a good discharge was the custodian.

The next order to which I must refer is the Trading with the Enemy (Custodian) (No. 2) Order, 1945 (S.R. & O., 1945, No. 887). [HIS LORDSHIP read art. 1 of that order and continued:] This is very wide language, and its inevitable result was that the whole of the right, title and interest of the plaintiffs in any moneys for the time being held by the defendants on their behalf vested in the custodian. Up to this point it may well be argued that the rights of the plaintiffs in the property, the subject-matter of the respective transactions, were merely suspended; and it may well be that if the legislation had gone no further, the observation of LORD FINLAY, L.C., in *Hugh Stevenson & Sons v. Akt. für Cartommagen Industrie* (2) ([1918] A.C. 244) would have applied, viz.:

“It is not the law of this country that the property of enemy subjects is confiscated. Until the restoration of peace the enemy can, of course, make no claim to have it delivered up to him, but when peace is restored he is considered as entitled to his property with any fruits which it may have borne in the meantime.”

I have to consider, however, the effect of the Distribution of German Enemy Property Act, 1949. [HIS LORDSHIP read s. 1 and s. 2 of that Act and continued:] The effect of this Act was considered by SIR RAYMOND EVERSHED, M.R., in *R. J. Reuter Co., Ltd. v. Ferd Mulhens* (3). In the course of his judgment SIR RAYMOND EVERSHED, M.R., said ([1953] 2 All E.R. 1173):

“In my judgment, the passing of the Act of 1949 materially altered the nature of any arrangements that could reasonably be contemplated as likely, or, indeed, possible, to be made at the conclusion of peace. Thenceforward it was, as it seems to me, plain that any such arrangements would not comprehend the return to German nationals of property formerly belonging

to them, such as the trade marks here in question (at least if capable by their nature of being sold or disposed of); and that thenceforth it was the duty of the Board of Trade, in contemplation of arrangements which would ultimately be made for applying the proceeds of German enemy property in the manner indicated in the Act of 1949, to realise the trade marks to the best advantage as occasion offered."

Under the Distribution of German Enemy Property Act, 1949, s. 1 (1), the Distribution of German Enemy Property (No. 1) Order, 1950 (S.I., 1950, No. 1642), was promulgated. [His LORDSHIP read art. 18 (1) and (3) of that order and continued:] Finally, to complete my statement of the relevant statutory provisions I would refer to the Trading with the Enemy (Custodian) Order, 1951 (S.I., 1951, No. 153). Article 1 of that order is as follows:

"Without prejudice to the effect of any order made by the Board of Trade prior to the date of this order and save as hereinafter otherwise provided, there shall vest in the custodian— (a) the beneficial interest of any enemy or enemy subject in any property belonging to or held or managed on behalf of an enemy or an enemy subject at the date of this order consisting of securities, or being property existing by virtue of any will, settlement, trust, intestacy or of any contract or agreement of any kind whatsoever, (b) without prejudice to the generality of the foregoing paragraph, the right to receive (i) any moneys payable presently or at any future time in respect of any such property as aforesaid, (ii) any dividends, bonus or interest payable presently or at any future time in respect of any such securities as aforesaid and in respect of any securities comprised in any vesting order made prior to the date of this order, and (iii) any moneys payable presently or at any future time in respect of any such securities as are mentioned in the last preceding sub-paragraph upon redemption or on maturity or upon such securities being drawn for payment or otherwise."

[His LORDSHIP then read art. 4 of that order, which conferred powers of disposition and other powers on the custodian in relation to property referred to in art. 1, and continued:] Article 7 (d) of the order provides:

"The custodian, acting under a general or special direction of the Board of Trade, may at any time pay over any particular money paid to him under this order or transfer any particular property vested in him by this order to or for the benefit of the person who would have been entitled thereto but for the operation of the [Trading with the Enemy Act, 1939] or any order made thereunder or to any person appearing to the custodian to be authorised by such person to receive the same."

On that review of the relevant statutory provisions, it appears to me to follow inevitably that as between the respective plaintiffs on the one hand, and the defendants on the other hand, the plaintiffs have ceased to have any interest whatsoever in the property which was the subject-matter of the transactions referred to in the respective statements of claim and that as between the plaintiffs on the one hand, and the Custodian of Enemy Property on the other hand, their interest consists only of the right to participate in any distribution or distributions which may hereafter be made under the provisions of the Distribution of German Enemy Property Act, 1949, the Custodian of Enemy Property having the duty (to the exclusion of the plaintiffs) of swelling the funds at his disposal by pursuing, as he may be advised, any rights which the respective plaintiffs had against the defendants in regard to the property the subject-matter of the transactions referred to in the respective statements of claim.

It follows that if the actions were allowed to proceed, the plaintiffs could not obtain any order for the payment of any sums to themselves. Further, it appears to me that it would be quite wrong to allow the actions to proceed with a view to orders being made for payment of any sums by the defendants to the

Custodian of Enemy Property. The custodian has full power to take proceedings in his own name, if he thinks fit.

[His LORDSHIP then considered the question whether the actions ought to be permitted to proceed in order that the plaintiffs might have an opportunity of obtaining declaratory relief, and held that the actions should not be permitted so to proceed.]

A

F.G.

LE ROY-LEWIS v. LE ROY-LEWIS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), July 2, 1954.]

B *Husband and Wife—Maintenance—Application to High Court—“Reasonable maintenance”—Desertion of wife by husband—Wife under no duty to earn—Liability of husband—Matrimonial Causes Act, 1950 (c. 25), s. 23 (1).*

The parties were married on July 4, 1947. Before the marriage the wife had been employed as a shop assistant. The husband was of independent means and allowed the wife £5 a week for housekeeping. On June 21, 1952, the husband deserted the wife and thenceforth made her weekly payments of £3. The wife applied for an order for her maintenance alleging that the husband had wilfully neglected to provide her with reasonable maintenance. The husband contended that there being no children and the wife being young, she should return to the position she was in before the marriage and earn her living. Since the marriage the husband's means had increased.

D HELD: the marriage having ended through no fault of the wife, there was no reason why she should go back to earning her living in order to reduce the husband's liability to maintain her; in the circumstances, the husband had not provided reasonable maintenance and she was entitled to an order for the payment after the deduction of tax of £6 a week.

E FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 23 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 410; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 84, 85, Nos. 631-636.

Case referred to:

(1) *Scott v. Scott*, [1951] 1 All E.R. 216; [1951] P. 245; 27 Digest, Replacement, 85, 634.

F ORIGINATING SUMMONS by the wife for an order, under the Matrimonial Causes Act, 1950, s. 23 (1), on the ground that the husband had wilfully neglected to provide her with reasonable maintenance.

G The parties were married on July 4, 1947, and on June 21, 1952, the husband left the wife. Before the marriage the wife had been employed as a shop assistant. The husband was in receipt of an income from a trust settlement which for the year ending Apr. 5, 1950, was approximately £480, and which increased each year until for the year ending Apr. 5, 1954, it was approximately £915. The husband was also in receipt of about £5 10s. a week from his employment.

Eastham for the wife.

Lovegrove for the husband.

H BARNARD, J.: The parties were married on July 4, 1947. The husband was a man of independent means and the wife at the time of the marriage had been working as a shop assistant. After the marriage the husband was apparently content to make the matrimonial home with the wife's mother. He allowed her £5 a week for housekeeping and out of that she paid her mother £1 10s. a week for rent. It is also obvious that this £5 a week which the wife received for housekeeping was not the only financial benefit she received from the husband during the few years that they were living together. On June 21, 1952, the

husband left the wife in circumstances which, I think, quite clearly show that he had deserted her. I do not think that it is really material to the question that I have to decide, but after the marriage the husband did receive a large capital sum of over £12,000. There is still some conflict between them as to what happened to the £12,000, but there is no doubt that the £12,000 has now vanished. The husband, having deserted his wife on June 21, 1952, reduced her allowance to £3 a week. That is the sum that he continued to pay until the wife took out this summons. (I have been informed that since the summons was taken out he has given a banker's order to pay her £4 a week. She has not yet received any benefit from that banker's order because he was in the habit of paying these sums quarterly in arrears.)

The first matter I have to decide is whether the husband on these figures has been guilty of wilful neglect to provide her with reasonable maintenance. I think that a safe guide is given by HODSON, J., in *Scott v. Scott* (1). In the course of his judgment HODSON, J., said this ([1951] 1 All E.R. 217):

"In my view, the question what is reasonable maintenance for the wife and children has to be considered with reference to the husband's common law liability to maintain his wife and children, and, no doubt, the word 'reasonable' has to be interpreted against the background of the standard of life which he previously has maintained."

That is a good but certainly not an exhaustive guide, because whatever was the previous standard of life, I think I must take into account the fact in the present case that the husband's means have very much increased, and, if the husband had not deserted his wife, as he did, she would have received some benefit at any rate from his increased means. She ought not now to be deprived of that benefit, and I ought to put her in the position in which she would have been but for the husband's wrongdoing in deserting her.

I have no doubt on the facts put before me that £3 a week which he has been allowing his wife is not reasonable maintenance for her. It has been suggested that because she was working before the marriage, that because she is still young and there are no children of the marriage, she ought at once to go back into the position she was in before the marriage and start earning her living—as far as I can see with only one object, to reduce the amount of money that the husband should pay her. I do not accept that view at all. She may have been lucky, or at any rate thought she was lucky at the time, in marrying someone who brought about an improvement in her financial, and, possibly, her social position, but it has been through no fault of hers that their married life together has come to an end and I see no reason whatever why the wife should go back to earning to reduce the husband's liability to maintain her. It only remains for me to fix what I think is reasonable maintenance on the figures put before me and taking into consideration, of course, the conduct of the parties.

[HIS LORDSHIP considered the facts and concluded:] I have come to the conclusion that as the husband has £25 a week net, from the trust settlement and from what he earns, as purely spendable income, I shall not be doing any hardship in the present case if I order him to pay the wife such sum as after deduction of income tax at the current rate will amount to £6 a week, and that is the order that I propose to make.

Order accordingly.

Solicitors: *C. Butcher & Simon Burns* (for the wife); *Burton, Yeates & Hart*, agents for *Malcolm, Wilson & Cobby*, Worthing (for the husband).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

BRAVERY v. BRAVERY.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Hodson, L.J.J.),
May 26, 27, July 26, 1954.]

*Divorce—Cruelty—Sterilisation operation on husband—Consent of wife—Effect
on wife's health—Matrimonial Causes Act, 1950 (c. 25), s. 1 (1) (c).*

The parties were married in 1934, the husband was then twenty five and the wife twenty-one years of age. In 1936 a son was born. In 1938 the husband had an operation for sterilisation. On Sept. 3, 1951, the wife left the husband, and on July 8, 1952, presented a petition for divorce on the ground of the husband's cruelty, alleging, inter alia, that he had during 1938 "... without consulting [her] who had often expressed her desire to have more children, informed [her] that he ... had arranged for sterilisation which operation subsequently was performed, thereby causing [her] to suffer great anguish and the commencement of the deterioration of the marriage." The husband by his answer denied the allegations. The petition having been dismissed, the wife appealed.

HELD (DENNING, L.J., dissenting): there was no evidence that the operation was performed against the wishes of the wife, or that she suffered in health by reason of that operation; accordingly, the wife had failed to establish a case of cruelty.

PER SIR RAYMOND EVERSHERD, M.R., and HODSON, L.J.: We feel bound to dissociate ourselves from the more general observations of DENNING, L.J., in which he has expressed his view that the performance on a man of an operation for sterilisation in the absence of some "just cause or excuse" is an unlawful assault, an act criminal per se, to which consent provides no answer or defence ... In our view, in the circumstances of the present case, it is neither the duty nor the function of this court to do more than draw attention to the obviously grave potentialities of such an operation for the parties to a marriage.

PER DENNING, L.J.: On the facts, the wife did not consent to the operation which produced, if not immediately, injury to her health, and she had, therefore, proved her charge of cruelty; but even assuming that the wife did consent at the time to the operation, her consent did not preclude her from complaining of its ill effects in later years when it did in fact injure her health.

Appeal dismissed.

AS TO CRUELTY AS A GROUND OF RELIEF, see HALSBURY, Hailsham Edn., Vol. 10, pp. 649-654, paras. 954-962; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 293-311, Nos. 2384-2590.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 1 (1) (c), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 389.

Cases referred to:

- (1) *Walsham v. Walsham*, [1949] 1 All E.R. 774; [1949] P. 350; [1949] L.J.R. 1142; 27 Digest, Replacement, 299, 2440.
- (2) *R. v. Concy*, (1882), 8 Q.B.D. 534; 51 L.J.M.C. 66; 46 L.T. 307; 46 J.P. 404; 15 Digest 826, 9030.
- (3) *R. v. Donovan*, [1934] 2 K.B. 498; 103 L.J.K.B. 683; 152 L.T. 46; 98 J.P. 409; Digest Supp.
- (4) *J. v. J.*, [1947] 2 All E.R. 43; [1947] P. 158; [1947] L.J.R. 1468; 177 L.T. 157; 27 Digest, Replacement, 280, 2254.

APPEAL by the wife against an order of Mr. Commissioner BUSH JAMES, Q.C., dated Oct. 29, 1953. The facts appear in the headnote.

Grayson for the wife.

Stranger-Jones for the husband.

Cur. adv. vult.

July 26. The following judgments were read.

SIR RAYMOND EVERSLED, M.R., and **HODSON, L.J.** (read by **HODSON, L.J.**): The parties were married on Oct. 25, 1934, and there is one child, a son Leslie, who was born on Dec. 19, 1936. At all material times the husband was employed as a hospital porter first at the General Hospital at Croydon, and latterly at the Royal Northern Hospital, where they lived together from a time shortly before the birth of the child until the wife left the husband on Sept. 3, 1951. The case for the wife depends in the main on an allegation in the petition as follows:

"6 (iii) . . . during the year 1938 . . . the [husband] without consulting [the wife] who had often expressed her desire to have more children, informed [the wife] that he had seen the surgeon at the Royal Northern Hospital and had arranged for sterilisation which operation subsequently was performed, thereby causing [the wife] to suffer great anguish and the commencement of the deterioration of the marriage . . ."

The remaining allegations were summarised on her behalf in this court as consisting of the husband's dirty habits, of his excessive interest in Indian philosophy, art and music, and of his meanness in keeping her short of money. The question of money disappeared from the case, and the other two matters were dealt with by the learned commissioner in this way:

"The wife says that the husband had some unpleasant and distasteful domestic habits, that he was dirty and untidy, and I think possibly there was some element of truth in what she said. But there again in English law legal cruelty must be a grave and weighty thing, something far removed from the ordinary ups and downs and unpleasantnesses which accompany married life."

This is, we think, tantamount to finding that although the wife's evidence was not rejected on this topic, yet she had not proved anything sufficiently serious to be properly classified as an act, or acts, of cruelty on the husband's part, at any rate, taken in isolation from the rest of the case. The commissioner continued, dealing with the Indian allegations:

"The wife also says that the husband was addicted to what were described as Indian associations, and that he would burn incense in front of various idols that were put up in the matrimonial home, and that he became addicted to these practices to such an extent that he used to play records of Indian music at all hours of the day and night and that it distressed her. I have the evidence of a neighbour who was living almost cheek by jowl with these people, and she says she never heard anything of the kind; and it also appears that some of these idols at least were purchased by the wife and put up by her in the matrimonial home."

It appears to us from this passage that the learned commissioner was not at all impressed with the wife's complaint on this topic. After referring to the use of bad language, which was denied by the husband, and to other complaints of money shortage, to which we have referred earlier, the commissioner added that the petition contained a whole series of trivialities. He formed the opinion that

"there was discord in this household and that discord became more exacerbated as time went on, and it may be that to a certain extent that affected the wife's health and also the husband's health",

but that sexual relations had continued until shortly before the wife left.

The main allegation, on which this appeal is founded, and which, in our opinion, is the only substantial matter to be considered in view of the nature of the other allegations and the commissioner's conclusion thereon, was that the husband had himself sterilised against her wishes, thereby causing a deep-seated and persistent grievance which disrupted the marriage, resulted in progressive deterioration of the relations of the parties, caused injury to her health or reasonable apprehension thereof, and culminated in the wife finding life so intolerable that she left the husband. This allegation was not made out to the commissioner's satisfaction. In our opinion, as we understand the judgment and the evidence, it failed for want of proof at all material points. The husband did in 1938 submit to a sterilisation operation performed, as he said, by a surgeon (who was named) at the well-known London hospital at which he was employed. As between husband and wife for a man to submit himself to such a process without good medical reason (which is not suggested here) would, no doubt, unless his wife were a consenting party, be a grave offence to her which could without difficulty be shown to be a cruel act, if it were found to have injured her health or to have caused reasonable apprehension of such injury. It is also not difficult to imagine that if a husband submitted to such an operation without the wife's consent, and if the latter desired to have children, the hurt would be progressive to the nerves and health of the wife; but such was never the case put forward by the wife in the present proceedings. This operation, as it seems to us, took a relatively minor place among the wife's complaints both in her petition and in her evidence. She left her husband (according to her own evidence) because his temper got worse and worse. Although, according to her own admission, she plainly knew all about the operation before it was done, she said that she afterwards "refused to talk about it" and never suggested that he should (as could, apparently, have later been done) have his normal function restored. According to the wife the marriage was only "fairly happy" at the start and though it subsisted a long time, matters appear to have steadily got worse for reasons altogether disconnected with the operation.

Did the wife consent to the operation? As we have said, there is no doubt on the wife's evidence that she knew her husband was going to have it performed. She said that he had it done at the hospital where they were living, and that she took his clothes when he came out afterwards. In cross-examination her knowledge of the matter was further investigated. She said that he had told her what was going to be done. Then these questions and answers follow:

"Q.—Did you make any attempt to stop him having it done? A.—I was so astounded and upset at his making the suggestion to have it done that I could not discuss it at that time. When first he spoke to me he just said: 'I will have to discuss it with you.' Q.—You knew the surgeon Mr. [B.]? A.—Yes. Q.—And you knew the sister in the hospital, Sister [B.], I think? A.—Yes. Q.—And the nurse who looked after him, staff nurse [C.]? A.—I do not remember the other nurse's name. Q.—I put it to you that you knew the surgeon, and the matron, and the sister and everybody concerned with this operation and that you never took any steps, did you? A.—No. (The commissioner): Do you agree that you could have? A.—No, because my husband always had what he wanted. (Counsel): But you did not approach any of these people and say you did not want him to have this operation, did you? A.—No."

The husband's evidence was to the effect that after the birth of the child Leslie, the wife did not want any more children—that she was, indeed, very much afraid lest she should; and, further, that, because she disliked contraceptives, he consulted a surgeon, and said to her: "It is possible, I understand, to have an operation, a simple thing, which will prevent our having any more children. This will be a temporary measure and a slight operation can be repeated later if we decide to change our minds." He was asked what she said to that, and he replied that she said that it was a good idea and they agreed that it was. In this state of the evidence the learned commissioner's finding is not very precise, but he said this:

"... apparently after the birth of the boy Leslie the parties were not happy, but they were having intercourse and using preventatives, and then for some reason [the husband] goes and has this operation performed on himself . . . —and I think the wife quite possibly might have objected to it."

"Might have objected" could be read as meaning that "she possibly did so" or "that she might have done but did not". In view of the wife's own evidence, it is, in our view, impossible to conclude that she ever made any effective objection at all. She was living in the hospital and knew the persons concerned, surgeon and nurse, and had ample opportunity of making objection if she were not a consenting party. No doctor was called on either side, but we find it difficult to believe that any surgeon, a member of an honourable profession, would perform an operation of this kind on a young married man, unless he were first satisfied that the wife consented. We have already observed that the commissioner's findings are not, perhaps, as precise as we could have wished; but we find it impossible to avoid the conclusion that he did not accept the evidence of the wife (on whom the onus of proof lay) that the husband had had the operation performed in disregard of the wife's feelings and wishes, and notwithstanding her known desire to have more children. It is, indeed, reasonably clear that the wife (and her son) did not strike the commissioner as impressive witnesses, since he invited argument at the end of their evidence on the question whether the husband had any case to answer. It seems to us, therefore, that the wife's case fails in limine.

Even if, however, it were legitimate to find in her favour that the operation had been performed against the wife's will, this would not be the end of her difficulties. It would not be difficult, as we have said already, to construct in imagination a case of grave cruelty on a wife founded on the progressive hurt to her health caused by an operation for sterilisation undergone by her husband in disregard of, or contrary to, the wife's wishes and natural instincts. As we have pointed out, however, that was not the case presented by the petition and evidence of the wife in the present proceedings, and the question for us is: What did the wife here allege and prove? According to her evidence she never referred during the succeeding thirteen years to the matter of the operation after her husband came back from it, although the husband said that she did once refer to it a year or so ago, by which he presumably meant shortly before she left home. When she did leave home she wrote to the husband as follows:

"Dec. 29, 1951. To Mr. Bravery. I had hoped by now you would have started the divorce proceedings, but apparently you have not so I shall wait a week or two to hear from you via Leslie. If you do not reply I shall start the proceedings myself bringing in the illegal operation. This will mean bringing in also the name of the surgeon and probably the hospital. I have no wish to do this but unless you divorce me I have no choice. I may add that I have it on good authority that it would win my case for me. So I

hope to get a note from you soon otherwise I shall take it that you wish me to proceed. Sincerely yours, Iris Bravery."

A The reference in the letter to the illegal operation reads more like a threat to bring up something which the husband would not like resurrected than a serious complaint of the infliction of an injury on the writer. More serious still, so far as actual injury to health is concerned, the commissioner, in our view, negatived it by his finding. After referring to the case of *Walsham v. Walsham* (1) he said:

"In that case it was proved that the husband's conduct was such as definitely to affect his wife's health, and I have no evidence of that sort in the case which is before me."

B At the end of his judgment he said, referring to discord in the household:

"... it may be that to a certain extent that affected the wife's health and also the husband's health."

C We do not regard this as a material qualification of the previous finding which was in accordance with the husband's evidence and not, we think, effectively contradicted by the wife. Certainly no medical evidence was called on her behalf to prove injury to her health. In the absence of proof of actual injury to health, in a case of this kind after the lapse of a period of thirteen years from the act complained of, we do not think the court is justified in drawing an inference of apprehended injury to health. We do not for ourselves think it legitimate, on the commissioner's findings as to other causes of discord and as to the circumstances attending the operation, to attribute the deterioration in the marriage relationship to the effect on the wife of this operation. We do not forget that D the wife said that for some time after the operation she could not bear her husband near her, but this was a matter of controversy. The husband attributed it to fear of conception dating from the birth of their only child. For these reasons we think the appeal fails.

E On the facts of the present case, and the inferences to be drawn from the judgment of the learned commissioner, we have felt, accordingly, compelled to reach a different conclusion from that of DENNING, L.J., whose judgment we have had the advantage of reading in advance. The most, if not the only, significant question in the present case has been undoubtedly the operation undergone by the husband for sterilisation in the year 1938. The divergence in view between DENNING, L.J., and ourselves has been mainly, if not entirely, F in regard to the effect of this operation—did the operation or its consequences constitute cruelty to the wife? Though we do not doubt the grave potentialities to the marriage relationship of such an operation, we think that in the present case the commissioner clearly intended to find as a fact the wife's failure to establish that the husband, by undergoing, or as a result of his having undergone, G the operation, had been guilty of "cruelty" to the wife. And our reading of the evidence, including the evidence directed to the wife's knowledge of, and consent to (if not her initiation of) what was done, has not led us to any other conclusion than that which we attribute to the commissioner.

H We also feel bound to dissociate ourselves from the more general observations of DENNING, L.J., at the end of his judgment, in which he has expressed his view (as we understand it) that the performance on a man of an operation for sterilisation, in the absence of some "just cause or excuse" (as was not, in his view, shown to exist in the present case) is an unlawful assault, an act criminal per se, to which consent provides no answer or defence. The court must, no doubt, take notice of any relevant illegality which appears in the course of any proceeding before it; but in the present case both the general question, whether an operation for sterilisation is *prima facie* illegal, and the more particular question whether the operation here performed was a criminal assault, are alike irrelevant

to the issue to be determined. We have heard no argument adduced either to the general or to the particular question. Further, though it is true that no evidence was produced or called from the records or the staff of the hospital concerned showing what were the steps (if any) taken on the part of the hospital to see that the nature of the operation was fully appreciated and consented to by both spouses, we are not on that account prepared, in the absence of the surgeon and any member or representative of the hospital staff, to hold that the operation was done without proper justification. In *R. v. Coneg* (2), one of the cases referred to by DENNING, L.J., the question decided was that persons voluntarily present at a prize-fight could not be regarded as guilty of an assault as aiding and abetting such a fight. The whole court expressed, however, the view that a prize-fight was illegal, and the passage cited by DENNING, L.J., from the judgment of STEPHEN, J., was related to this latter point. STEPHEN, J., said (8 Q.B.D. 549):

"... the injuries given and received in prize-fights are injurious to the public, both because it is against the public interest that the lives and the health of the combatants should be endangered by blows, and because prize-fights are disorderly exhibitions, mischievous on many obvious grounds."

In our view, these observations are wholly inapplicable to operations for sterilisation as such, and we are not prepared to hold in the present case that such operations must be regarded as injurious to the public interest. In *R. v. Donovan* (3), also referred to by DENNING, L.J., there was some discussion of cases of assault being per se unlawful, to which consent would be no defence, but none of the examples given appears to bear any close analogy to an operation for sterilisation, which was nowhere mentioned. It is, moreover, to be noted that, in the case cited, the conviction was quashed by the Court of Criminal Appeal, the court not being prepared to hold that the alleged assault (namely, caning or flagellation of a young girl), in spite of its disreputable character, could be regarded, without evidence of bodily harm likely to be done, or of the doer's intention (or both), as per se criminal.

In the circumstances of the present case and for the reasons we have given, we are unable to accept the conclusion of DENNING, L.J., at the end of his judgment. The nullity case of *J. v. J.* (4) appears to be the only other case in the books in which the fact of an operation for sterilisation came before the court. It was then argued for the petitioner (wife) that the operation had been an illegal act. The question of illegality was, however, irrelevant to the question then before the court, as it is irrelevant in the present case. The court in *J. v. J.* (4) expressed no view on the point. In our view, in the circumstances of the present case, it is neither the duty nor the function of this court to do more than draw attention to the obviously grave potentialities of such an operation for the parties to a marriage, a matter which the facts of the present case have well illustrated.

DENNING, L.J.: The parties married on Oct. 25, 1934, when the husband was twenty-five and the wife twenty-one years of age. They lived happily together for two years until a son was born to them on Dec. 19, 1936. About eighteen months later, in 1938, a shocking thing took place. The husband underwent an operation to have himself sterilised. He was the porter at a London hospital. One of the surgeons operated on him, and he was attended by the sister and staff nurse.

This operation provokes several questions. The first is: Why did the husband have this done? Let me give his answer in his own words. Counsel asked him:

"What was the immediate cause of the operation? A.—It was because

of my wife's attitude towards the boy. He was not a baby to be caressed and loved. He was a show-piece . . . Q.—Why did you agree to have an operation for sterilisation? A.—Because my wife was so installed. She was so installed with the home, and with this baby she had. Q.—You said the baby was a show-piece? A.—Yes. Q.—In what way? A.—She wanted to have him perfectly dressed, and when he was tiny, if there was the least thing missing, she would be absolutely beside herself.”

Those answers throw a flood of light on the husband's mentality. Why did he object to the wife treating the baby as a show-piece? Although he did not realise it, he must in some strange way have been jealous of the place which the child had in the wife's affections, and his jealousy found expression in a determination not to give her any more children, seeing that was the way she treated this baby. But it may well be asked why go to the length of sterilisation? Why not use contraceptives? Both agreed that ever since the birth of the child they had been having intercourse using contraceptives. He was the one who used them, not she. And yet he went and had himself sterilised. It is, as the commissioner said, “an amazing story”, and it was done simply because he was jealous of the baby. He did it so as to “pay her out” for making so much of it. That seems to me to be cruelty in itself.

The second question is: Did the wife consent to it? The husband said she did. She says she did not. The commissioner has not accepted the husband's version. He has not found that the wife consented. On the contrary, he has found that the wife “quite possibly might have objected to it.” I take that to mean that it is quite possible that she did object, but that she did not object as effectively as she might have done. The husband told her beforehand that he was going to have it done, but she did not go to the surgeon and protest. She was too astounded and upset, she said, to discuss it. I do not think this should be taken too much against her. It was not for her to approach the surgeon, but for the surgeon to approach her. It has never been suggested throughout the present case that the surgeon ever saw her or asked her consent. The husband said that he signed papers assenting to the operation, but no one has ever suggested that she signed anything. If she had signed, I cannot help thinking that the paper would have been forthcoming, because the husband is still the Lead porter of the hospital and has clearly had access to all the records dealing with the employment of himself and his wife. His counsel gave exact details of the dates and amounts of their wages, and so forth, which must have been got from the records. Nothing has been produced to show that she signed. Nor was the surgeon called. The only proper inference, to my mind, is that she did not consent.

The third question is: What was the effect of the operation? The physical details were not given in evidence, but if it was the same operation as in *J. v. J.* (4), the result of it was to leave the husband just as capable as before of the actual sexual act, and even of an emission, but, nevertheless, to render him sterile. The husband said that his fertility could be restored by another operation, so long as this second operation was done within a few years—five years was mentioned—but not if it was delayed longer. The husband never had any such operation to restore his fertility, so that after 1942 or 1943 he was permanently sterile. It is significant that, on his own showing, it was then that the marriage fell to pieces.

The fourth question is: What was the effect of the operation on the wife? The commissioner says the operation “very probably did affect her” and, indeed, both parties agree that it did. She could not bear him near her. Let me give their answers in their own words. She was asked:

“Q.—How did this operation affect you in your relationship with your

husband and your married life ? A.—Well, I was disgusted with him, and for some time after the operation I could not bear him near me, and especially since the operation he has become really effeminate and I could not bear him near me.”

The husband was asked:

“How do you say things went on from 1942 ? A.—Things became very difficult. Q.—In what way ? A.—My wife could not bear me near her. If I tried to embrace her, she became frivolent (sic) to begin with, and then she refused, and I had to give up.”

I must say that that is just what I should expect. I cannot think of anything more disruptive of a marriage than for a party to sterilise himself in this way.

The fifth question is: What was the effect on the wife's health ? The commissioner has summarised the position in these words:

“... there was discord in this household, and I think that discord became more exacerbated as time went on, and it may be that to a certain extent that affected the wife's health, and also the husband's health.”

The most cogent evidence comes from the son who was aged fifteen and a half years when his mother left and who stayed with his father for six months longer. His father said that he and his son were perfect friends. Yet this son gave evidence describing the rows which his parents had, and he attributed the responsibility for them to his father. He was asked:

“Do you remember how that affected your mother ? A.—It made her very distracted and nervous and—well she was very miserable. Q.—Did that show itself in any way ? A.—Yes. Very often, especially at night, I heard her crying, and she was nervous, and it was this sort of thing that upset her, I am quite sure.”

So on Sept. 3, 1951, she left the husband after nearly seventeen years of married life. Both had worked in the hospital for many years, he in the lodge and she in the laboratory. They were regarded by the hospital folk as an ideal couple, but in their own home there was discord, and the health of both was injuriously affected. It is said that this injury to health was due to the discord in the home, not to the operation, but the two cannot be severed in this way. The operation produced the discord, and the discord produced the injury to health. There were other troubles, too, which seem to have followed on the operation. The husband had some unpleasant and distasteful domestic habits, and he was dirty and untidy. He also kept Indian idols and burnt incense in the sitting-room, but the wife seems to have acquiesced in this. These incidents by themselves could not be said to have been cruelty. The important question is the effect of the sterilisation. After she left, she hoped he would bring divorce proceedings. As he did not, she wrote a letter on Dec. 29, 1951, in which she said:

“If you do not reply, I shall start the proceedings myself bringing in the illegal operation. This will mean bringing in also the name of the surgeon and probably the hospital. I have no wish to do this but unless you divorce me I have no choice. I may add that I have it on good authority that it would win my case for me.”

She can, no doubt, be criticised for writing such a letter, but I do not think that she should be blamed overmuch for it. The marriage had come to an end. She wanted a divorce. She had no chance of getting one except by complaining of the operation, and she warned him that she would have to bring it in. That

is all it comes to. The crucial question remains—whether by undergoing the operation he treated her with cruelty.

A I start with this: There was no just cause or excuse for this operation at all. If the husband had undergone it without telling his wife about it beforehand, no one could doubt that it would be cruelty. It was an act most disruptive of the married state, and she was the victim of it. It was, indeed, aimed at her, because it was done so as to prevent her having another child. It was likely to injure her health, and did in fact do so. The only defence that I can see to the charge is the wife's acquiescence. He told her of the operation beforehand, and she made no effective protest. She stayed with him for years before instituting proceedings on account of it. This would be a defence, if it amounted to condonation. Condonation was not pleaded, however, and the facts do not warrant it, and for this reason: when this husband was sterilised, the effect of it was not over and done with at once, like a blow with the fist or like an act of adultery. This operation had an effect which continued, day in and day out, year in year out, throughout the marriage. No act of sexual intercourse could result in a child. The effect on the wife's health might not be immediate. It might have a delayed effect. That seems, indeed, to have been what happened. The husband said that his wife first complained to him about the operation in 1942—four years after it had taken place—and that from that time things became very difficult. The son said that his parents had rows about the sterilisation operation, and he knew his mother very much wanted him to have a brother or sister. Eventually the wife, when she was aged thirty-eight, left her husband as she could stand it no longer. It is interesting to note that, in the only other case in the LAW REPORTS where a husband had had himself sterilised, the wife agreed to it before marriage and put up with it for eleven years, and yet this court granted her a remedy by way of nullity: see *J. v. J.* (4). So here I do not think the acquiescence of the wife should deprive her of a remedy when the ill effects of the operation can last so long and be so devastating to the marriage. I think the charge of cruelty was proved, and that she should be granted a divorce.

E I have had the advantage of reading the judgment of SIR RAYMOND EVERSHED, M.R., and HODSON, L.J., in which they think that the wife must have consented, because she made no effective objection, and no surgeon would do this operation without her consent. I do not agree with this. I do not think she did consent, but even if I am wrong about this, even if we assume that the wife did consent at the time to the operation, I do not think that her consent then precludes her from complaining of its ill effects in later years when it does in fact injure her health. F In this respect an analogy is, I think, to be found from the criminal law about surgical operations. An ordinary surgical operation, which is done for the sake of a man's health, with his consent, is, of course, perfectly lawful because there is just cause for it. If, however, there is no just cause or excuse for an operation, it is unlawful even though the man consents to it. The classic instance is a case G recorded by LORD COKE, tried at Leicester in 1604, when a "young strong and lustie rogue, to make himselfe impotent", got his companion to cut off his left hand so that he might avoid work and be able the better to beg. Both were found guilty on indictment of a criminal offence: see CO. LITT. 127a and 127b, 1 HAWK. P.C. 108. A later instance can be given from early Victorian days when soldiers, as part of their drill, had to bite cartridges. A soldier got a dentist to pull out his front teeth so as to avoid the drill. In the opinion of STEPHEN, J., both were guilty of a criminal offence: see STEPHEN'S DIGEST OF CRIMINAL LAW, 3rd ed., p. 142. Another instance is an operation for abortion, which is "unlawful" within the statute [Offences against the Person Act, 1861, s. 58] unless it is necessary to prevent serious injury to health. Likewise with a sterilisation operation. When it is done with the man's consent for a just cause, it is quite lawful, as, for instance, when it is done to prevent the transmission of an hereditary disease; but when it is done without just cause or excuse, it is unlawful,

even though the man consents to it. Take a case where a sterilisation operation is done so as to enable a man to have the pleasure of sexual intercourse without shouldering the responsibilities attaching to it. The operation then is plainly injurious to the public interest. It is degrading to the man himself. It is injurious to his wife and to any woman whom he may marry, to say nothing of the way it opens to licentiousness; and, unlike contraceptives, it allows no room for a change of mind on either side. It is illegal, even though the man consents to it, for it comes within the principle stated by STEPHEN, J. (who was a great authority on criminal law), in *R. v. Coney* (2) (8 Q.B.D. 549):

A

"The principle as to consent seems to me to be this: When one person is indicted for inflicting personal injury upon another, the consent of the person who sustains the injury is no defence to the person who inflicts the injury, if the injury is of such a nature, or is inflicted under such circumstances, that its infliction is injurious to the public as well as to the person injured."

B

That principle is well illustrated by *R. v. Donovan* (3), and clearly covers cases of sterilisation.

Those cases under the criminal law have a bearing on the problem now before the court, because the divorce law, like the criminal law, has to have regard to the public interest, and consent should not be an absolute bar in all cases. If a husband undergoes an operation for sterilisation without just cause or excuse, he strikes at the very root of the marriage relationship. The divorce courts should not countenance such an operation any more than the criminal courts. It is severe cruelty. Even assuming that the wife, when young and inexperienced, consented to it, she ought not to be bound by it when in later years she suffers in health on account of it, especially when she was not warned that it might affect her health. I would, therefore, for myself, have allowed this appeal.

C

D

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *James Brodie & Co.* (for the wife); *Hy. S. L. Polak & Co.* (for the husband).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. BUTTERLEY CO., LTD.

[CHANCERY DIVISION (Roxburgh, J.), July 27, 1954.]

Profits Tax—Computation of profits—Income received from investments or other property—Nationalisation of colliery undertaking Interim income payments, revenue payments, further revenue payments pending satisfaction of compensation—Finance Act, 1937 (c. 54), sched. IV, para. 7, as amended by Finance Act, 1947 (c. 35), s. 32 (1) Coal Industry Nationalisation Act, 1946 (c. 59), s. 22 (2), (3)—Coal Industry (No. 2) Act, 1949 (c. 79), s. 1 (2).

A A colliery concern, which was carried on as a separate trade among several trades of a company, was nationalised under the Coal Industry Nationalisation Act, 1946, and its assets vested in the National Coal Board on Jan. 1, 1947. The company became entitled under s. 19 (1) of the Act of 1946 to compensation in respect of the assets due on that date subject to determination of the amount of the compensation. For the period between that date and the date on which the compensation was fully satisfied the company became entitled to the following payments: (i) interim income under s. 19 (2), comprising under s. 22 (2) (a) "a money payment of an amount equal to interest for that period on [the] amount of compensation" at prescribed rates; (ii) revenue payments under s. 22 (3) (a), for the years 1947 and 1948, "equal to one half of the comparable ascertained revenue of the concern . . . attributable to activities thereof for which the transferred interests thereof were used or owned" before nationalisation; and (iii) further revenue payments for 1949 and subsequent years under the Coal Industry (No. 2) Act, 1949, s. 1 (2). The payments under heads (ii) and (iii) alike were payable in substitution pro tanto for the right to the interim income mentioned under head (i). The Special Commissioners having decided that payments under all three of the foregoing heads were not receipts of any trade carried on by the company in the relevant chargeable accounting periods, or income received from investments or other property, and ought not to be included in computing the profits of the company for the purposes of profits tax, the Crown appealed.

E HELD: all the payments were income of the compensation, which was "other property" within the meaning of the expression "income received from investments or other property" in para. 7 of sched. IV to the Finance Act, 1937, as amended by the Finance Act, 1947, s. 32 (1) and, therefore, ought to be included in computing the profits of the company for profits tax purposes.

F FOR THE FINANCE ACT, 1937, sched. IV, para. 7, and THE FINANCE ACT, 1947, s. 32 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 12, pp. 383 and 777.

G FOR THE COAL INDUSTRY NATIONALISATION ACT, 1946, s. 19 and s. 22 (2) and (3), see *ibid.*, Vol. 16, pp. 301 and 304; and FOR THE COAL INDUSTRY (No. 2) ACT, 1949, s. 1 (2), see *ibid.*, Vol. 28, p. 1014.

CASE STATED by the Special Commissioners of Income Tax.

H The Inland Revenue Commissioners in computing the profits of the company for the purposes of assessments to profits tax for chargeable accounting periods from Jan. 1, 1947, to Dec. 31, 1950, included sums received by it under the Coal Industry Nationalisation Act, 1946, s. 22 (2) and (3), and the Coal Industry (No. 2) Act, 1949, s. 1 (2). The company carried on several trades, including coal mining, iron founding, structural steel manufacturing, wagon building, wrought iron production, brick making, civil engineering and dairy farming. The profits of the various trades had always been brought together into one profit and loss account of the composite business of the company and one assessment to income tax and profits tax had been made, but its trade of colliery

proprietors constituted a separate trade from its other trades. On Jan. 1, 1947 (the primary vesting date for the purposes of the Act of 1946), the assets of the company's colliery trade vested in the National Coal Board and the company ceased to carry on any colliery trade. The provisions of s. 31 (1) (a) of the Finance Act, 1926, were applied when the colliery trade ceased. The company continued to carry on its other trades. It became entitled (i) to compensation under s. 10 to s. 17 of the Act of 1946 in respect of its assets transferred, which compensation was declared to be due on the primary vesting date subject to determination of the amount (s. 19 (1)), and (ii), for the period between the primary vesting date and the date when compensation was fully satisfied, to a right to interim income (s. 19 (2)). By s. 22 (2) (a) this interim income was to be satisfied by making a money payment

"of an amount equal to interest for that period on that amount of compensation at such rate or rates as may be prescribed . . ."

and the money payment was to be made as an addition or additions to stock issued from time to time in or towards satisfaction of the compensation.

Revenue payments for the years 1947 and 1948 were made to the company by virtue of s. 22 (3) and (4) of the Act of 1946 which provided as follows:

"(3) The following provisions of this sub-section shall have effect as to the making to colliery concerns . . . of payments in respect of each of the two years beginning with the primary vesting date and the first anniversary thereof respectively, that is to say,—(a) a colliery concern . . . shall be entitled in respect of each of the said two years to a payment of an amount equal to one half of the comparable ascertained revenue of the concern . . . attributable to activities thereof for which the transferred interests thereof were used or owned . . . [before July 1, 1946] (4) The provision made by the last preceding sub-section shall be deemed . . . to be in substitution for the provisions of sub-s. (2) of this section, so far as regards additions* thereunder for the said two years or any part thereof to compensation for a transfer of transferred interests being compensation attributable to transferred interests of that concern . . . except as to any excess of the aggregate amount of such additions over the aggregate amount of the revenue payments of that concern . . ."

Further revenue payments for the year 1949 and thereafter were to be made to the company by virtue of the Coal Industry (No. 2) Act, 1949. Section 1 (1) of that Act provided that s. 1 should have effect with respect to

" . . . the making to colliery concerns . . . of payments in respect of the year 1949 and subsequent years towards satisfaction of the right to interim income . . ."

under s. 19 (2) of the Act of 1946. Section 1 (2) provided:

"A colliery concern . . . shall, in respect of the year 1949 and in respect of any subsequent year before that in which compensation under the principal Act in respect of the transfer of the transferred interests of the concern . . . is satisfied in full, be entitled to a payment of an amount equal to the amount by which one third of the comparable ascertained revenue of the concern . . . attributable to activities thereof for which the transferred interests thereof were used or owned exceeds an amount equal to interest for the year in question on the aggregate amount of that compensation satisfied before the end of that year."

* These "additions" are the payments of interim income, which was payable under s. 22 (2) (a) of the Act of 1946 in money as additional payments made with stock as and when stock was issued in satisfaction of compensation for the transferred interests acquired by the National Coal Board.

Section 1 (3) required the "further revenue payments" under s. 1 (2) to be treated for the purposes of s. 22 (2) (a) of the Act of 1946—

"... as being made towards satisfaction of the aggregate of the proportions attributable to that year of amounts which that paragraph requires to be paid as additions to stock issued or money payments made after the expiration of that year in satisfaction of compensation in respect of transfers of transferred interests of the concern..."

The company appealed to the Special Commissioners against the inclusion of revenue payments, further revenue payments and interim income payments in computing the profits of the company for the chargeable accounting periods in 1947, 1948, 1949 and 1950. It was common ground between the parties that during the whole of the relevant periods the company was carrying on a trade or business within the meaning of s. 19 (1) of the Finance Act, 1937, and that its function did not consist wholly or mainly in the holding of investments or other property within the meaning of s. 19 (4) of that Act. The question at issue was, therefore, whether the payments received by the company under the Acts of 1946 and 1949 were profits of a trade or business chargeable to profits tax under s. 19 and s. 20 of the Finance Act, 1937, or were included in such profits as being "income received from investments or other property" within the meaning of para. 7 of sched. IV to the Finance Act, 1937, as amended by s. 32 (1) of the Finance Act, 1947. The Crown contended that the payments were properly included in the computation of profits for profits tax purposes since they were (i) part of the profits of the trade or business carried on by the company in the chargeable accounting periods; and (ii) "income received from investments or other property." The company contended that the payments were not income of the company and in any event (i) were not part of the profits of the trades or businesses it carried on during the relevant chargeable accounting periods but arose to it from its colliery concern, which trade ceased on Jan. 1, 1947; and (ii) were not "income received from investments or other property". The commissioners held that all the payments constituted income of the company but that the company's composite trade or business consisted of separate and severable trades of which the colliery concern was one and that the trade of the colliery concern ceased on Jan. 1, 1947, with the consequence that the revenue, further revenue, and interim income payments were not receipts of any trade carried on by the company in the relevant chargeable accounting periods. They held further that the payments were not "income received from investments or other property." They, therefore, allowed the appeal. The Crown appealed.

The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.) and Sir Reginald Hills for the Crown.

Senter, Q.C., and D. C. Miller for the company.

ROXBURGH, J.: This appeal relates to three categories of payments: (i) payments received by the company and described as "interim income" under s. 19 (2) and s. 22 (1) of the Coal Industry Nationalisation Act, 1946; (ii) "revenue payments" under s. 22 (3) of that Act; and (iii) "further revenue payments" under the Coal Industry (No. 2) Act, 1949, s. 1 (1) (2). The company carried on many distinct trades, including coal mining and trades which could not possibly be described as coal mining. On Jan. 1, 1947, its colliery trade was vested in the National Coal Board but the company continued to carry on its other trades, so that there was a cessation of the particular trade, but no cessation of trading in general.

Section 19 (1) of the Act of 1946 provided that compensation in respect of a transfer of transferred interests, in this instance the company's colliery concern, should be due (and I attach importance to that word) on the primary vesting

date, Jan. 1, 1947, subject to determination of the amount thereof. Sub-section (2) provides:

"For the period between the primary vesting date and the date on which any such compensation is fully satisfied, there shall be a right to interim income, to be satisfied in accordance with the provisions of s. 22 of this Act."

Section 22 is the general provision with regard to interim income. It provides:

"(1) The right conferred by s. 19 (2) of this Act to interim income for the period between the primary vesting date and the date of the satisfaction in full of compensation in respect of a transfer of transferred interests, or of an overhead expenses increase, shall be satisfied in accordance with the provisions of this section. (2) Subject to the provisions of sub-s. (3) and sub-s. (4) of this section as to the revenue payments therein mentioned – (a) the said right conferred by s. 19 (2) of this Act shall be satisfied, so far as regards interim income for the period between the primary vesting date and the time when any amount of compensation in respect of a transfer of transferred interests . . . is satisfied, by making, in addition to the issue of the stock then issued in satisfaction of that amount of compensation . . . a money payment of an amount equal to interest for that period on that amount of compensation at such rate or rates as may be prescribed . . ."

Sub-sections (3) and (4), which are important, contain provisions restricted to the first two years from the vesting date, and provide for what are called in the Act "revenue payments", which are to be pro tanto in substitution for the interim income provided for by s. 19 (2) and s. 22 (1), (2). Sub-sections (1) and (2) of s. 22, apart from an amendment, run on indefinitely until the compensation is satisfied. The revenue payments were confined to the first two years. Then in 1949 the Coal Industry (No. 2) Act, 1949, was passed. I can put the effect of this quite shortly: its effect was to substitute "further revenue payments" in or towards satisfaction of the interim income payments [under s. 19 (2) and s. 22 (1), (2) of the Act of 1946] in respect of the year 1949 and subsequent years. So the sequence is: revenue payments for 1947 and 1948, further revenue payments for the year 1949 and thereafter and throughout, any surplus of interim income payments.

The company received payments under each of these headings, and the first question which had to be determined by the Special Commissioners was whether they were to be treated as taxable income, as distinct from capital. The commissioners held that they were, and I cannot feel any doubt about that aspect of the case, and I do not think it is necessary to elaborate the matter further. There remains the question with which I am really concerned. The case relates to profits tax, and, of course, there are differences between profits tax and income tax. The Crown contended before the commissioners that the payments were part of the profits of the trade or business carried on by the company in the chargeable accounting periods commencing Jan. 1, 1947, and ending on Dec. 31, 1950. The company contended that the payments were not part of the profits of the trades or businesses carried on by the company during the relevant chargeable accounting periods, but arose to it from its colliery concern, which trade ceased entirely on Jan. 1, 1947.

In the view that I take of this case, it is unnecessary for me to determine whether the commissioners' finding, which was in favour of the company on this point, was well founded. I leave it entirely at large, except to mention (because probably this case will go elsewhere) that counsel for the Crown did argue it strenuously, and only forbore to continue his argument in deference to a request from me. I dissuaded him from continuing his argument because I could not see how the company could escape from the alternative argument of the Crown that the revenue payments, the further revenue payments and the interim income payments were, on the true construction of para. 7 of sched. IV

to the Finance Act, 1937, as amended by s. 32 (1) of the Finance Act, 1947, income received from investments or other property. That schedule as so amended makes special provisions with regard to what is now called profits tax. Paragraph 7 provides:

“ Income received from investments or other property shall be included in the profits . . . ”

A There are certain exceptions which nobody suggests are applicable to this case. Though I may be wrong about this short point, yet having reached a clear conclusion on it, I did not think it necessary to pursue the difficult questions which arise under the other contention of the Crown. These sums were certainly received by this company and, in my view, they were undoubtedly income. The question, therefore, is: Were they received from investments or other property ?

B It is not contended that the words “ other property ” can be restricted by the application of the principle of ejusdem generis and it seems to me that they plainly cannot. I do not think that this compensation can be properly regarded as an investment, but I cannot see any reason why it should not be “ other property ”.

C Compensation under s. 19 of the Act of 1946 was due on Jan. 1, 1947, but it was not immediately payable, because it had not been determined. In my judgment the company's right to that compensation was plainly a chose in action, and none the less so because it was the creature of statute. Counsel has argued that that may be so, but that the interim income, the revenue payments and the further revenue payments (and for my own part I think they must all stand on the same footing) do not arise from the property—i.e., the right to compensation—but that they are an additional correlative right. It is a question of how these two words are regarded. The right to interim income raises the question: “ interim income from what ? ” It is income for a period. True, it is a right conferred by statute, but what is it to be income from ?

D I should have thought that the answer was as plain as anything could possibly be—from the compensation due, but of which payment was still deferred. In other words, in my view these payments arose from the chose in action, consisting of compensation due but still unpaid, and fall directly within the words “ income received from other property ” and, therefore, by virtue of para. 7, to be included in the profits. Accordingly, on that ground I allow the appeal.

E

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Thicknesse & Hull* (for the company).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

Re A DEBTOR (No. 20 of 1953). *Ex parte* THE DEBTOR v.
SCOTT AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.JJ.),
July 27, 28, 1954.]

Bankruptcy—Debt—Judgment debt for damages and costs—Costs not taxed and thus not a liquidated sum at date of act of bankruptcy—Petition based on aggregate of damages and costs—Costs not available as debt at date of act of bankruptcy—Common law of bankruptcy—Bankruptcy Act, 1914 (c. 59), s. 4 (1), s. 5 (2).

Costs—Bankruptcy—Petition based on judgment debt for damages and costs—Costs not taxed at date of act of bankruptcy—Costs not available as debt for purposes of bankruptcy petition.

On Mar. 17, 1953, the creditor obtained judgment in the Queen's Bench Division against the debtor for £200 damages and costs. On Apr. 16, 1953, a bankruptcy notice was issued against the debtor by the creditor for £200. The costs of the action not then having been taxed, they were not the subject of the notice. On Apr. 27, 1953, the debtor gave notice of appeal against the judgment of the Queen's Bench Division. After service of the bankruptcy notice, the debtor filed an affidavit in opposition, and on June 26, 1953, the registrar dismissed the debtor's opposition. The time for compliance with the notice expired on July 3, 1953. On July 17, 1953, the taxation of the costs of the action in the Queen's Bench Division was completed and a certificate was issued that the costs amounted to £226 9s. 9d. On July 28, 1953, the creditor filed a petition for the amount of £426 9s. 9d. being the judgment debt of £200 and £226 9s. 9d. costs. On Oct. 12, 1953, the debtor's appeal from the registrar's order was dismissed. On Oct. 22, 1953, the debtor's appeal from the judgment of the Queen's Bench Division was heard, and the damages (£200) were reduced to £25, and, although the order for costs in the Queen's Bench Division was upheld, the debtor was awarded half the costs in the Court of Appeal, such costs to be taxed and set-off against the judgment debt and costs awarded against him. On the hearing of the petition a receiving order was made. The debtor appealed to the Divisional Court and his appeal was dismissed. On appeal to the Court of Appeal,

Held: the express requirements of the Bankruptcy Act, 1914, s. 4 (1) and s. 5 (2), that the debt should be proved to have amounted to £50 and to have been a liquidated sum both at the date of the presentation of the petition and at the date of the hearing of the petition, were satisfied, but, under the common law of bankruptcy, the debt must be shown to have existed, and to have the character and quality stated, at the date of the act of bankruptcy as well as at the date of the presentation and hearing of the petition; and, as at the former date (July 3, 1953) the costs of the action payable by the debtor did not constitute a liquidated sum (taxation not having been completed), the petitioner could not establish that the whole of the debt on which the petition was founded existed as a debt available for bankruptcy purposes at the time of the act of bankruptcy, and the debtor was entitled to succeed.

Re Debtors (No. 669 of 1926) ([1927] 1 Ch. 19), applied.

Re Crump. Ex p. Crump (1891) (64 L.T. 799), considered.

Decision of the DIVISIONAL COURT OF THE CHANCERY DIVISION ([1954] 1 All E.R. 454), reversed.

AS TO NATURE OF PETITIONING CREDITOR'S DEBT, see HALSBURY, Simonds Edn., Vol. 2, pp. 292, 293, paras. 552, 553; and FOR CASES, see DIGEST, Vol. 4, pp. 113-126, Nos. 1025-1148.

Cases referred to:

- (1) *Re Debtors* (No. 669 of 1926). [1927] 1 Ch. 19; 96 L.J.Ch. 33; 136 L.T. 182; Digest Supp.
- (2) *Ex p. Muirhead, Re Muirhead*. (1876). 2 Ch.D. 22; 45 L.J.Bey. 65; 34 L.T. 303; 4 Digest 124, 1127.
- (3) *Re Whelan, Ex p. Sadler*. (1878). 48 L.J.Bey. 43; 39 L.T. 361; 4 Digest 117, 1066.
- (4) *Moss v. Smith*. (1808). 1 Camp. 489; 170 E.R. 1031; 4 Digest 116, 1050.
- (5) *Re Crump, Ex p. Crump*. (1891). 64 L.T. 799; 4 Digest 92, 833.

APPEAL by the debtor against an order of the Divisional Court of the Chancery Division (HARMAN and DANCKWERTS, J.J.), dated Jan. 25, 1954, and reported [1954] 1 All E.R. 454, dismissing the debtor's appeal against a receiving order dated Nov. 27, 1953, made by the registrar of the Brentford County Court.

Muir Hunter for the debtor.

Corley for the petitioning creditor.

SIR RAYMOND EVERSLED, M.R. : In this case, HARMAN, J., opened his judgment in the court below with the words ([1954] 1 All E.R. 454): " This case raises one or two novelties ", and, indeed, it does.

In order to appreciate what are the points which we have to decide, it is necessary, briefly, to give the history of this litigation. It begins, so far as it is relevant, with a judgment for £200 damages and costs pronounced on Mar. 17, 1953, by LYNKEY, J., in an action by the petitioning creditor as plaintiff against the debtor as defendant. The action related to land in Eel Pie Island on the River Thames, on which island the two parties to the action were neighbours. The debtor, for I will so call the appellant henceforth, asked for a stay of execution, intimating that he desired to appeal, but in effect no stay was granted. Thereupon the petitioning creditor served a bankruptcy notice on the debtor in respect of the sum of £200. The debtor applied to set the bankruptcy notice aside, but that application did not succeed. The bankruptcy court did, however, grant, from time to time, extensions of the time within which the debtor was required to comply with the bankruptcy notice. Finally, the time for compliance was extended until July 3, 1953, and that date is, as will be seen, of some significance, for the costs which the debtor had been ordered by LYNKEY, J., to pay had not then been taxed, or, perhaps, I should say, the taxation of them had not then been completed. In the meantime, however, the debtor had served a notice of appeal against LYNKEY, J.'s judgment, and in order to deal with that appeal, I will anticipate the narrative a little by stating that the appeal was heard on Oct. 22, 1953, and the order made by this court was in the following terms:

" It is ordered that this appeal be allowed and the judgment herein of the Honourable Mr. Justice LYNKEY dated Mar. 17, 1953, whereby it was adjudged that judgment be entered for the plaintiff for the sum of £200 with costs aforesaid be varied by substituting the sum of £25 for the sum of £200. It is further ordered that the defendant do have one half of the costs of this appeal such costs to be taxed by a taxing master and set off against the judgment debt and costs."

When I come to deal with the judgment of HARMAN, J., I shall have to refer again to the terms of that order, but I might, perhaps, usefully say now that in my judgment the form of orders of that kind may require hereafter a little careful consideration whether the court does or does not intend that the sum total of the original debt plus costs, or the original debt as reduced plus costs, should be subject to a set-off which might have the effect of extinguishing the debt itself altogether; or whether the court merely intends to give to the appellant in such

a case a right to set off the costs he is entitled to recover against the costs or the costs plus the judgment which he is bound to pay.

The taxation of the costs of the action before LYNSEY, J., was subsequently completed, the taxing master's certificate bearing the date July 17, 1953—exactly fourteen days after the expiry of the time for compliance with the bankruptcy notice. Those costs, when taxed, amounted to £226. We have not before us any copy of the judgment itself, but the learned counsel have told us it followed the form usual in actions in the Queen's Bench Division, that is to say, the form which will be found in Appendix F to the Rules of the Supreme Court, and this case has been argued on the footing that the judgment did take that form. Looking at the form, it will, therefore, appear that the judgment starts by being dated, that being in accordance with the earlier rules, and the date on which this judgment was made was Mar. 17, 1953. The judgment provided, according to the form, as follows:

"It is this day adjudged that the plaintiff recover against the defendant £200 and £——— costs. The above costs have been taxed and allowed at £——— as appears by a taxing officer's certificate dated the —— day of ——."

As we have been informed, and as we understand, when the judgment in this case was completed and perfected on Mar. 17, 1953, it became a judgment for £200 immediately enforceable for that sum, but on July 17, or immediately after July 17 when the taxing master's certificate was given, the blanks in the final paragraph which I have read were filled in, so that thenceforth the order would read with the first blank for costs filled in with the figure of £226 odd, and the last paragraph would read:

"The above costs have been taxed and allowed at £226 9s. 9d. as appears by a taxing officer's certificate dated July 17, 1953."

That would be the form which the judgment took. The next date to mention is eleven days later, when the petition in the present case was presented by the petitioning creditor. The petition states, so far as is material, as follows, that the debtor

"is justly and truly indebted to me in the aggregate sum of £426 9s. 9d. under a judgment of the High Court of Justice dated Mar. 17, 1953, being £200 in respect of damages awarded by the court in the action to which the said judgment relates and £226 9s. 9d. in respect of the taxed costs of the said action."

In the final paragraph the petition alleges that the debtor

"within three months before the date of presentation of this petition has committed the following act of bankruptcy, namely he has failed to comply before July 3, 1953 [the final date given for compliance] with a bankruptcy notice issued against him in this court . . ."

and then particulars of that bankruptcy notice are given.

The petition first came on for hearing on Oct. 21, 1953, being the day before, as the bankruptcy registrar was informed, the appeal was coming on in this court. The hearing of the petition was, therefore, adjourned until after the appeal had been heard and decided. It finally came before the registrar on Nov. 27, 1953. A receiving order was then made.

It will be appreciated from what I have said that there had been something of a change in the nature of the obligations of the debtor to the petitioning creditor between the time when the petition was presented and first came on for hearing, and the time when it came for the second time to be heard, for in that interval the £200 had been reduced to £25, and the debtor was at least given the right to set off half his costs in the Court of Appeal against the judgment debt

so reduced and the costs of £226 which he had been ordered to pay. But the registrar proceeded on what is a simple, and may be called a common-sense, arithmetical view. I read now from HARMAN, J.'s judgment ([1954] 1 All E.R. 455):

"He simply took the view that, as the costs to be taxed in favour of the debtor when taxed would not reduce the total debt of the creditor below £50, there was a good petitioning creditor's debt and a receiving order ought to be made."

I should, perhaps, say in explanation that, although the costs in the Court of Appeal had not been taxed, the debtor was able to give a reasonably accurate forecast of what they would amount to, and that forecast justified the arithmetic which I have stated from HARMAN, J.'s judgment. The debtor appealed against the receiving order, and two grounds of appeal were taken and were considered by the judges. The first point taken was that as a result of the order of the Court of Appeal first reducing the judgment debt to £25 and then providing for a set-off, and since the debtor's costs would be and were admittedly more than £25, therefore, the original debt, the non-payment of which constituted the alleged act of bankruptcy, had ceased to exist altogether. The matter was thus put by HARMAN, J. (*ibid.*, 455):

"Under the Bankruptcy Act, 1914, s. 5 (2), the court is bound to require proof of the act of bankruptcy, and it is said here that it could not be satisfied in that respect because, in the events which happened, there was no proof of an act of bankruptcy despite the fact that this court had declared the act of bankruptcy a good one and there has been no appeal against that. This bizarre result is arrived at in this way. It is said the act of bankruptcy alleged was respecting £200. The Court of Appeal reduced that to £25. £25 would be a sufficient debt to avail as an act of bankruptcy, but it is further said that the debtor has the right to set off against the debt, i.e., the £25, the right to costs which may amount to £60, and, therefore, having regard to the effect of the order of the Court of Appeal, there was no debt to support the act of bankruptcy, the condition of the statute was not complied with, and the court cannot make an order."

Then, secondly, the point was taken, and again I will read from the judgment (*ibid.*, 455) that

". . . if a creditor serves a bankruptcy notice on a man for a very large sum which he cannot pay and follows it up by a petition admitting that the sum is very much smaller, the debtor has suffered an injustice . . ."

and, therefore, putting it briefly, in the exercise of the discretion under s. 5 (3) of the Act of 1914, the court ought to refuse to make a receiving order.

The learned judges, HARMAN and DANCKWERTS, JJ., rejected both those arguments, and for my part I do not in any way dissent from the view they took on them. On the more general point, the second one, I think it is sufficient to say, as the judges said, that here no such case was made out as would justify the exercise of discretion in the debtor's favour. On the former point, I cannot, I think, do better than read a short passage from the judgment of DANCKWERTS, J. (*ibid.*, 456):

"It is true that the judgment of LYNSKEY, J., for £200 damages was reduced by the Court of Appeal to £25, and, therefore, the bankruptcy notice when it was issued was demanding a sum which ultimately turned out to be larger than the proper sum. Presuming, therefore, that it is to be treated as stating too large a sum, and that the judgment of LYNSKEY, J., must be treated as if it ought to have been from the beginning one for £25, it seems to me that that amount was a valid subject for a bankruptcy notice. As to

the argument that it would be wiped out by the amount of costs which were recoverable by the debtor under the order of the Court of Appeal. I agree that, at the date of the bankruptcy notice, that right of the debtor could not possibly be operative. It was a claim which did not and could not arise until the Court of Appeal dealt with the matter on Oct. 22, 1953."

In other words the learned judges were of opinion, putting it briefly, as JENKINS, L.J., put it during the argument, that at each stage of these proceedings you should take the facts as you found them.

But another point was taken before us which, if it was taken before the learned judges in the court below, is not noticed in their judgment, and on which, in my view, the debtor is entitled to succeed. The petition which I have read was founded on the claim that the debtor was indebted to the petitioning creditor in the sum of £426 9s. 9d. Of that sum £226 9s. 9d., rather more than half, represented costs. As I have said, those costs were not taxed, and the figure, therefore, was not ascertained until July 17, 1953, two weeks after the date of the alleged act of bankruptcy. It has been argued by counsel for the debtor (and in my view correctly argued) that the petitioning creditor must establish that the debt on which his petition is founded was a debt presently payable and available to the petitioning creditor at the date of the act of bankruptcy—though he need not show that non-payment of the whole debt constituted the act of bankruptcy alleged. In order to make that point good, I will refer to two sections of the Bankruptcy Act, 1914. Section 4 (1) provides:

"A creditor shall not be entitled to present a bankruptcy petition against a debtor unless—(a) the debt owing by the debtor to the petitioning creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to the several petitioning creditors, amounts to £50, and (b) the debt is a liquidated sum, payable either immediately or at some certain future time . . ."

Section 5 (2) provides:

"At the hearing [of the petition] the court shall require proof of the debt of the petitioning creditor, of the service of the petition, and of the act of bankruptcy, or, if more than one act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy, and if satisfied with the proof, may make a receiving order in pursuance of the petition."

It is well known that bankruptcy is a matter which not only affects the debtor and his status, but it also affects the general public, and the court, therefore, has a duty to see that all the requirements, either express or implicit in the statute, have been strictly observed. The statute itself makes it quite plain that the petitioning creditor's debt, i.e., the debt on which the petition expresses itself as founded, must be proved to be existing and have the quality and character mentioned in s. 4, both at the date when the petition was presented, and at the date of the hearing. In this case, those statutory requirements are satisfied, but I think there is a further requirement which emerges from what has been called the common law of bankruptcy, i.e., the rules or principles which the courts have held to be applicable in bankruptcy proceedings, though in terms this requirement does not appear to be expressly stated in the statute. The requirement, in my judgment, is that the petitioning creditor's debt must also be shown to have existed and to have the necessary character and quality stated in s. 4 at the date of the act of bankruptcy as well as at the dates of the presentation and hearing of the petition. I think that emerges sufficiently from the case to which counsel for the debtor alluded, and which I understand he did not cite in the court below, *Re Debtors (No. 669 of 1926)* (1). That was a case in which the debtors were members of a rubber trade association, and the debt arose out of the contract

as I follow it) which membership of that association involved; but the headnote, which sufficiently bears on the present case, is as follows ([1927] 1 Ch. 19):

"In order to constitute a good petitioning creditor's debt the debt must be a liquidated sum, payable either immediately or at some certain future time at the date of the act of bankruptcy. It is not sufficient that the debt should have become a liquidated sum in the interval between the date of the act of bankruptcy and the presentation of the petition."

Subject to one point, to which I will come back in a moment, that is the situation here. The statement in the headnote is founded on the judgment of LORD HANWORTH, M.R. I will not take time by reading a long extract, but after referring to the judgments of COCKBURN, C.J., in *Ex p. Muirhead, Re Muirhead* (2), and BACON, C.J., in *Re Whelan, Ex p. Sadler* (3), LORD HANWORTH, M.R., states ([1927] 1 Ch. 27):

"The decisions in those cases show that there must be at the date of the act of bankruptcy an available debt payable and due from the debtor, and therefore, under s. 4 of the Bankruptcy Act, 1914, the creditor is not entitled to present a bankruptcy petition against the debtor unless the debt is a liquidated sum."

He then cites a passage from WILLIAMS' BANKRUPTCY PRACTICE, 13th ed., p. 42:

"By what may be called the common law of bankruptcy, it has always been held that the petitioning creditor's debt must have accrued due before the act of bankruptcy on which it is intended to found the petition: *Moss v. Smith* (4); but the debt need not have been due to the petitioning creditor at the date of the act of bankruptcy."

The last sentence has no bearing on the present case. WARRINGTON, L.J., refers to the same passage in the text-book, and concludes thus ([1927] 1 Ch. 29):

"In my opinion that passage correctly expresses what is really the law, that is to say, the debt must, at the date of the act of bankruptcy, be such a debt as could be relied upon by the petitioning creditor to support his bankruptcy petition."

I have sufficiently stated the facts to make it clear that if the matter is looked at in the way which, when I was dealing with the rest of the case seemed to me the correct way, i.e., by treating the facts as they were at each of the various stages, then on July 3, 1953 (the date of the alleged act of bankruptcy) it could not be said of the costs of the action that they constituted a liquidated debt presently payable to the creditor, for they had not then been certified.

To meet that, counsel for the petitioning creditor has contended that the form of judgment which I have read by my reference to the forms in Appendix F has the effect that after the taxing master has certified the costs, and the amount of those costs has been written into the judgment, then for all purposes (or at least for the purposes with which we are concerned) we must treat the sum of costs as having been written back and related back to the date of the original order, viz., Mar. 17, 1953, so as to enable the creditor to say, when her petition came to be heard: "I am now in a position to say that the sum of costs was, on July 3, a liquidated debt presently payable." I have been unable to accept that view. I think, apart from any other considerations, that the circumstance that the order refers to the date of the certificate, which in this case would be July 17, 1953, makes it impossible to say that one has to read this order as though it had, from the start, included the sum of £226 9s. 9d. It is quite true that under the rules as they now are, and following the Judgments Act, 1838, it is established that interest on costs will, *prima facie*, run from the date of the judgment, i.e., the debtor will be liable to pay interest on the sum of costs when finally ascertained, viz., £226 9s. 9d. from a back date, that is, the date of the judgment, Mar. 17, 1953. That may well be so, but that does not seem to me to carry with it the

consequence, particularly in a bankruptcy matter, that we must treat the original judgment as though it contained from its own date the figure of £226 9s. 9d. as part of the sum due—a figure which it did not in fact contain—and, I think, that view of the matter is supported by another case, to which counsel for the debtor referred us, *Re Crump. Ex p. Crump* (5).

That case does not bear directly on the present case. It was of this nature. A judgment had been obtained in the same form as is found in Appendix F, but it so happened that in that case the sum of costs, though it had been ascertained and the taxing master had given his certificate or allocatur, had never been written into the order. The Divisional Court took the view that this could not, therefore, be a proper debt on which a petition in bankruptcy could be founded since the sum, never having been put into the order, was not capable of being recovered by court process and no execution could have been issued in respect of it. Thus is to be found in the report the note:

“At the request of the court Master POLLOCK attended and informed the court that execution could not be issued on such a judgment and the allocatur. The practice was always to fill up the judgment. It might happen that in certain cases the clerk might take the judgment and the allocatur from the solicitor, but before execution could be issued the practice was always to fill up the judgment first.”

On that view, the court expressed the opinion that the appeal must be allowed and the receiving order must be discharged. It seems to me that the argument in that case is in line with the view I have formed myself in the present case, and supports my conclusion that since these costs had not been finally taxed and the amount had not been inserted in the order until on or after July 17, 1953, it was impossible for the petitioning creditor to say that the whole of the debt on which she founded her claim had existed as a debt available for bankruptcy purposes under s. 4 at the time of the act of bankruptcy.

In these circumstances, I arrive at the conclusion that this debtor is entitled to succeed and that the appeal must be allowed, and the receiving order discharged.

JENKINS, L.J.: I agree, and find nothing I can usefully add to the reasons which my Lord has given for holding that this appeal should be allowed.

HODSON, L.J.: I also agree.

Appeal allowed. Receiving order rescinded.

Solicitors: *John T. Lewis & Woods* (for the debtor); *Piesse & Sons* (for the petitioning creditor).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Re LEVEN (EARL) (*deceased*). INLAND REVENUE
COMMISSIONERS v. WILLIAMS DEACON'S BANK, LTD.
AND OTHERS.

[CHANCERY DIVISION (Wynn-Parry, J.), July 26, 30, 1954.]

Estate Duty—Debt—Full consideration—Disposition in favour of relatives—Disposition in favour of class including relatives and others—Date of ascertainment of objects—Extinguishment of liability of deceased—Finance Act, 1940 (c. 29), s. 44 (1).

By his will dated Aug. 27, 1909, a testator who died on June 11, 1913, devised his K. estate to the use of his brother A and his assigns during his life with remainder to the use of his first and every other son successively in remainder one after the other according to their respective seniorities in tail male with remainders successively to his brothers B and C and their male issue in similar terms to that in favour of A and his male issue, with remainder to the use of the person who at the time of the failure or determination of the preceding uses and when this present ultimate limitation took effect in possession should be or become entitled to the title and dignity of the Earldom of L. and his heirs and assigns absolutely. The testator by his said will also constituted a settled legacy which he directed his trustees to hold for a specified period on trust to pay the income thereof to the "person who shall for the time being be entitled to the title and dignity of the Earldom" of L. The testator further by his will imposed on each of his brothers who should become entitled to the earldom the obligation to provide for the death duties estimated to be payable on his death by taking out a policy or policies of insurance on his life and assigning it or them to the trustees of the will. On the testator's death A succeeded to the earldom and, in compliance with the will, effected four policies in the names of the trustees on his life for the aggregate sum of £150,000 at the total annual premiums of £3,050. A also executed a deed dated Apr. 29, 1914, whereby he covenanted with the trustees that he would pay the premiums, and he irrevocably authorised the trustees to pay the premiums out of the income of the settled legacy, and he charged that income with such payment. The K. estate was sold and the proceeds invested and subsequently, on June 8, 1942, the trustees were authorised by order of the court to accept an offer by the insurance company with which the policies had been effected to convert the policies into fully paid-up whole life policies securing the aggregate sum of £172,566. The order further provided that A should enter into a covenant with the trustees that at his death his estate should bear any duty payable on his death in respect of the proceeds of sale of the K. estate. A executed a deed dated July 16, 1942, by which he entered into a covenant with the trustees as required by the order. On Aug. 21, 1945, A's eldest son with A's consent executed a disentailing deed relating to the K. estate, and A released his life interest to his son. On Jan. 15, 1947, A died and estate duty amounting to some £68,000 became payable on the funds formerly settled by reason of the Finance Act, 1940, s. 43. It was agreed that on July 16, 1942, there had been a disposition of property by A within the initial words of the Finance Act, 1940, s. 44 (1), "where a person . . . has made a disposition of property . . ." but not within the subsequent words of sub-s. (1), which refer to the disposition which is consideration for the former disposition, viz., "the creation or disposition in favour of the deceased . . ." i.e., in favour of A. In deciding that A's executors were entitled to an allowance of the amount of such duty in determining the value of A's free estate for the purposes of estate duty, on the footing that it was a debt incurred for full consideration within the Finance Act, 1894, s. 7 (1),

HELD: the disposition by A within s. 44 (1) of the Act of 1940 was, on the date on which it was effected, made by A in favour of a class which included

persons not falling within the definition of "relative" in s. 44 (2), and, therefore, s. 44 did not preclude the creation in A's favour of "an annuity or other interest" being treated as consideration for A's disposition.

Held, further, the extinguishment (pursuant to the order of 1942) of A's liability to pay the premiums did not constitute the creation or disposition in favour of A of an annuity or other interest within s. 44 (1) and was not precluded by that enactment from constituting consideration for the covenant by A to pay the duty to the trustees.

FOR THE FINANCE ACT, 1940, s. 44, see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 472.

ACTION. The Inland Revenue Commissioners claimed against the executors of the Right Honourable Archibald Alexander, 13th Earl of Leven and 12th Earl of Melville, deceased, on declaration that in determining the value of the estate of the deceased for assessment to estate duty no allowance was to be made for a debt of £68,384 13s. 2d. incurred by the deceased under a deed of July 16, 1942. The facts are stated in the judgment.

Cross, Q.C., and J. H. Stamp for the plaintiffs, the Crown.
Sir Andrew Clark, Q.C., and Goulding for the defendants.

Cur. adv. vult.

July 30. **WYNN-PARRY, J.**, read the following judgment. By cl. 3 of his will dated Aug. 27, 1909, the 12th Earl of Leven and the 11th Earl of Melville (to whom I will refer as "the testator") devised his Kirtlington estate in the county of Oxford to the use of his brother Archibald Alexander Lester Melville and his assigns during his life with remainder to the use of his first and every other son successively in remainder one after the other according to their respective seniorities in tail male with remainder to the use of his brother David William Leslie Melville and his assigns during his life with remainder to the use of his first and every other son successively in remainder one after the other according to their respective seniorities in tail male with remainder to the use of his brother Ian Leslie Melville and his assigns during his life with remainder to the use of his first and every other son successively in remainder one after the other according to their respective seniorities in tail male with remainder to the use of the person who at the time of the failure or determination of the preceding uses and when this present ultimate limitation should take effect in possession should be or become entitled to the title and dignity of the Earldom of Leven and his heirs and assigns absolutely.

By cl. 5 of his will, the testator constituted a settled legacy of £200,000, directing his trustees to hold it and the investments for the time being representing it for the period specified in the clause on trust to pay the income thereof "to the person who shall for the time being be entitled to the title and dignity of the Earldom of Leven", and at the end of the period to stand possessed of the settled legacy in trust for the person who should then be entitled to such title or dignity. By cl. 8, the testator laid on each of his brothers and any sons born in the testator's lifetime of his brothers, who should become entitled to the title and dignity of the Earldom of Leven, the obligation, by means of a forfeiture provision, to provide for the death duties estimated to be payable on his death by taking out a policy or policies of insurance on his life and assigning it or them to the trustees of the will.

The testator died on June 11, 1913. He was succeeded as Earl of Leven by his brother Archibald Alexander Lester Melville, to whom I will refer as "the Earl", who in due course complied with the conditions of cl. 8 of the will of the testator by effecting on his own life and in the names of the trustees of the will four policies of insurance for the aggregate sum of £150,000 at the total annual premiums of £3,050, and by executing a deed dated Apr. 29, 1914, expressed to be made between the trustees of the one part and the Earl of the other part. By

A this deed the Earl covenanted as follows. First, that he would not do or suffer anything whereby the policies might become void or voidable or the trustees be hindered from receiving all or any of the policy moneys. Secondly, that if the policies or any of them should become void he would immediately effect a new policy or policies on his life in the name of the said trustees for a sum or sums not less in the whole than the sum of £150,000. And thirdly, that he would from time to time duly pay the premiums for the time being necessary for keeping the policies on foot. Further, the Earl irrevocably authorised the trustees to pay the premiums out of the income of the settled legacy, and charged that income with the payment thereof.

B On some date prior to June, 1942, the Kirtlington estate was sold, and the proceeds of sale were invested. On June 8, 1942, FARWELL, J., at chambers made an order under the Trustee Act, 1925, s. 57, by which the trustees were authorised to accept an offer by the insurance company with which the policies had been effected to convert the policies into fully paid-up whole life policies securing the aggregate sum of £172,566. The order further provided that the Earl should enter into a covenant with the trustees that at his death his estate should bear any duty payable on his death in respect of the proceeds of sale of the estate. In pursuance of the order, the Earl executed a deed dated July 16, 1942, by which he entered into a covenant with the trustees as required by the order of FARWELL, J.

C On Aug. 21, 1945, the eldest son of the Earl, who had attained his majority, executed a disentailing assurance, and the Earl released his life estate to his son. The Earl died on Jan. 15, 1947, and, as his death occurred within five years of the release of his life interest, estate duty became payable in respect of his interest in the property settled by the will of the testator. Duty to the amount of £68,000 was paid out of the free estate of the Earl.

D The question which now arises is whether or not, having regard to the provisions of the Finance Act, 1940, s. 44, the £68,000 is properly to be treated as a deduction for the purpose of calculating the estate duty payable in respect of the Earl's free estate. The Finance Act, 1940, s. 44, so far as material, reads as follows:

E “ (1) Where a person dying after the commencement of this Act has made a disposition of property in favour of a relative of his, the creation or disposition in favour of the deceased of an annuity or other interest limited to cease on the death of the deceased or of any other person shall not be treated for the purposes of s. 3, or of s. 7 (1), of the Finance Act, 1894, as consideration for the disposition made by the deceased. (2) In this section the expression ‘relative’ means, in relation to the deceased—(a) the wife or husband of the deceased; (b) the father, mother, children, uncles and aunts, of the deceased; and (c) any issue of any person falling within either of the preceding paragraphs and the other party to a marriage with any such person or issue; and references to ‘children’ and ‘issue’ include references to illegitimate children and to adopted children. (3) In this section the expression ‘annuity’ includes any series of payments, whether inter-connected or not, whether of the same or of varying amounts, and whether payable at regular intervals or otherwise, and payments of dividends or interest on shares in or debentures of a company shall be treated for the purposes of this section as a series of payments constituting an annuity limited to cease on a death if the payments are liable to cease on the death, or the amounts thereof are liable to be reduced on the death, by reason directly or indirectly of the extinguishment or any alteration of rights attaching to, or of the issue of, any shares in or debentures of a company. (4) If the deceased has made in favour of a company to which this section applies a disposition which, if it had been made in favour of a relative of his, would have fallen within sub-s. (1) of this section, this section shall have

effect in like manner as if the disposition had been made in favour of a relative of his, unless it is shown to the satisfaction of the commissioners that no relative of the deceased was, at the time of the disposition or subsequently during the life of the deceased, a member of the company."

On the facts which I have detailed, it is agreed that there has been a "disposition of property" within the meaning of that phrase as used in s. 44 (1), so that the first condition of that sub-section is fulfilled. The next condition is that the disposition should have been made "in favour of a relative". Here the parties are at variance. The first question is whether the effect of the disposition is to be determined as at the date of the disposition, or as at the date of the death of the deceased. In my view, the answer is as at the date of the disposition. I can see no justification for choosing the date of death. The choice of any date other than that of the disposition might well lead to great uncertainty and confusion, and cases might well be postulated in which it would be impossible to resolve the matter either at the date of death or for some considerable time thereafter. On the other hand, if the question is to be answered by reference to the position obtaining at the date of the disposition, no such doubt or confusion can arise.

The next question then is, taking one's stand at the date of the disposition—in this case July 16, 1942—can the disposition be said to have been made in favour of a relative of the Earl? In view of the language of cl. 3 of the will of the testator, it is impossible to say that at the date of the disposition, only a relative could have benefited. If the ultimate limitation took effect, the disposition would favour a person who was not a relative. Now the object of the section is to provide that in the case, but only in the case, of a disposition in favour of a relative is the creation of or disposition of the annuity mentioned in sub-s. (1) not to be regarded as consideration for the purposes of the Finance Act, 1894. If the relevant date for testing the nature of the disposition (so far as its objects are concerned) is the date thereof, then it is impossible to say as at the date of the disposition, whether a relative or a stranger will enjoy the benefit of the disposition, and it is accordingly impossible to say whether or not there was consideration for the purposes of the Finance Act, 1894. I think that a disposition in favour of one of a class, all the members of which were "relatives", would satisfy the condition of the section; but where, as here, the class includes a person or persons who do not come within the definition of "relative" in sub-s. (2), and the person who actually enjoys the benefit is not ascertainable at the date of the disposition, the section has no application.

It was argued that a disposition of property in favour of a class which included relatives, though it did not consist exclusively of relatives—all the interests being, of course, contingent at the date of the disposition—must be a disposition in favour of a relative as being in favour of every member of the class. My answer to that is that that view is only tenable, if at all, until one reads the rest of sub-s. (1), because when it is appreciated that the object of the section is to determine whether or not the "annuity or other interest" is to be treated as consideration, and that that matter must be tested as at the date of the disposition, it is then seen that it is impossible to say whether or not the annuity or other interest is good consideration, because it is impossible to say who will benefit.

My attention was directed to s. 44 (4), but, in my view, this sub-section does not affect the construction of sub-s. (1). It is a sub-section designed to strike at attempts to avoid coming within the mischief of sub-s. (1) by making the disposition in favour of a company to which the section applies.

The view which I have expressed is, of course, sufficient to dispose of the action; but as a further point was argued, and as the case may be taken to a higher court, I ought perhaps to express my present view on this further point.

The third condition of sub-s. (1) is that there should be shown the creation

A or disposition in favour of the deceased of an annuity or other interest. The word "annuity" is given a very wide meaning by sub-s. (3). It includes "any series of payments". It cannot be disputed that, prior to the order of FARWELL, J., and the acceptance of the offer of the insurance company pursuant thereto, the Earl was under an obligation to make "a series of payments", viz., the annual premiums. The result of the order was to extinguish the liability to make those payments, and that order operated in favour of the Earl. On this basis it was argued for the Crown that the word "disposition" in sub-s. (1) included "extinguishment", and, therefore, it followed that there had been a disposition in favour of the Earl of an annuity, with the result that s. 44 applies.

B The word "disposition", taken by itself, and using it in its most extended meaning, is no doubt wide enough to include the act of extinguishment. To talk of disposing of one's enemy, no doubt, indicates his extinguishment; but the primary meaning of the word, at any rate in relation to property, is to deal with the property in one of a number of ways, the property remaining in existence. Looking only, in the first instance, at sub-s. (1) I should have thought that the word "disposition" denoted some dealing with an annuity, as used in the section, so that the annuity continued in existence during the lifetime of the deceased, conferring on him over that period a benefit. On the language of sub-s. (1), it would, to me, be a quite unexpected result that the sub-section should apply to a liability of the deceased. Some light is, I think, thrown on the problem by a reference to s. 45 (2), where it is expressly provided that the extinguishment, at the expense of the deceased, of a debt or other right shall be deemed for the purposes of the Finance Act, 1894, to have been a disposition made by the deceased in favour of the person for whose benefit the debt or right was extinguished, and that in relation to such a disposition the expression "property" in the Finance Act, 1894, shall include the benefit conferred by the extinguishment of the debt or right. From this sub-section, it is clear that where the legislature intended that, as against the subject, "disposition" should include "extinguishment", it was at pains to make express provision. Again, in s. 59, the definition section, the word "extinguishment" is used in connection with the word "disposition", but only in a limited sense. These two pointers serve, in my view, to underline the conclusion to which I have already come on the wording of sub-s. (1), viz., that in that sub-section the word "disposition" does not, in its context, include "extinguishment".

E In my judgment, therefore, the action fails, and must be dismissed with costs.

Judgment for the defendants.

Solicitors: *Solicitor of Inland Revenue; Lee & Pembertons* (for the defendants).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

NOTE.

BAMBRIDGE v. INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Harman, J.), May 21, 24, June 16, 1954.]

Income Tax—Avoidance—Transfer of assets to company in Canada—"Associated operations"—Whether in relation to any transfer of assets—Residuary bequest in will—Finance Act, 1936 (c. 34), s. 18 (1), (2).

FOR THE FINANCE ACT, 1936, s. 18, see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 354; see now the INCOME TAX ACT, 1952, s. 412, *ibid.*, Vol. 31, p. 390.

CASE STATED by the Special Commissioners of Income Tax.

The taxpayer appealed against assessments to income tax and surtax for 1948-49 and 1949-50 on the ground that the assessments, made under Case VI of sched. D to the Income Tax Act, 1918, and s. 18 of the Finance Act, 1936, in respect of the income of a company resident abroad were not competent and the amounts ought not to be included in her total income for surtax purposes. In or about 1934 the taxpayer's parents, Mr. and Mrs. J. Rudyard Kipling, who were ordinarily resident in the United Kingdom, had transferred certain shares and debentures to Kamouraska Investments, Ltd., a company incorporated in Prince Edward Island, Canada, and resident or domiciled there. The parents had acquired shares and debentures in Kamouraska Investments, Ltd. Each parent had then executed a settlement transferring the shares and debentures in Kamouraska Investments, Ltd., to Canadian trustees. The settlement by the taxpayer's mother was subsequently revoked by her. The settlement by the taxpayer's father was admittedly an associated operation and the transfers to Kamouraska Investments, Ltd., were admittedly transfers of assets within s. 18 of the Finance Act, 1936. Having revoked her settlement, the taxpayer's mother made a will conferring a life estate on the taxpayer in the testatrix's residuary estate. The taxpayer's father died in January, 1936, and her mother died in December, 1939. On the death of her father the taxpayer's mother became entitled to the income for life of the fund settled by her father, and on her mother's death the taxpayer became entitled to that income for life. On the death of her mother the taxpayer became entitled also to a life interest in her residuary estate, which included shares and debentures in Kamouraska Investments, Ltd. The taxpayer contended that s. 18 of the Finance Act, 1936, did not apply in either case: because (i) in the case of her father's settlement she acquired her rights by virtue, not only of the transfers* and her father's settlement, but also of the death of her father, and (ii), in the case of her mother's property, the taxpayer acquired her rights by virtue not only of the transfers, but also of her mother's will and death, and (iii) that deaths and the making of the will were not "transfers of assets" or "associated operations" within the meaning of the section. The Crown contended that all the transactions were transfers of assets or associated operations and that the deaths were the occasions or points of time when these operations affected the taxpayer. The taxpayer having appealed to the Special Commissioners they held that all the transactions, including the will, were transfers of assets or associated operations within the section, and that the deaths of the father and mother, though not associated operations, were points in time in which previously associated operations had affected the taxpayer and brought her within the section. They dismissed the appeal. The taxpayer appealed.

*In view of the decision of the House of Lords in *Congreve v. Inland Revenue Comrs.* ([1948] 1 All E.R. 948), it could not be argued that the mere fact that she was not party to the transferring of the assets prevented rights acquired by her from being within s. 18 of the Finance Act, 1936.

Borneman, Q.C., and R. A. Watson for the taxpayer.

Pennycuik, Q.C., Sir Reginald Hills and J. H. Stamp for the Crown.

Cur. adv. vult.

June 16. **HARMAN, J.**, held that the two deaths were merely events which happened, bringing the interest of the taxpayer into possession, and not means by which the taxpayer acquired the rights. She was, therefore, liable in respect of the income from her father's settlement. The position of the mother's securities seemed quite different. The mother's settlement, though an associated operation, was revoked and so was out of the picture, and the only means by which the taxpayer acquired rights to her mother's securities was by her mother's will. No doubt the will might be an associated operation, having regard to the definition in s. 18 (2) of the Finance Act, 1936, but to be such the will must be "an operation of any kind effected by any person in relation to any of the assets transferred". His LORDSHIP did not think that the will was made "in relation to any of the assets transferred". If it had contained a specific bequest of the securities that would no doubt have been made in relation to them, but a more general bequest did not seem to be properly described as made "in relation to" any assets that happened to fall within it because they belonged to the testator at his death. If the Crown were right, a will made before the date of the original transfer must needs be classed as an associated operation, which seemed absurd. In His LORDSHIP's judgment, therefore, so far as the taxpayer's enjoyment of the securities was derived from her mother's will, she was not taxable on the income of them by virtue of s. 18 of the Act of 1936. The appeal would be dismissed as to property emanating from the father, but allowed as to the mother's securities.

Solicitors : *Field, Roscoe & Co.* (for the taxpayer); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

BRITISH NYLON SPINNERS, LTD. v. IMPERIAL CHEMICAL INDUSTRIES, LTD.

[CHANCERY DIVISION (Danckwerts, J.), June 23, 24, July 9, 1954.]

Conflict of Laws—Foreign judgment—Recognition by English courts—Judgment of American court affecting rights of English company in regard to English patents—English company neither subject to jurisdiction of American court nor party to proceedings therein—Specific performance of agreement to grant patent licences.

By an agreement, dated Dec. 31, 1946, the defendant company, which was incorporated and domiciled in England, acquired from a company incorporated in the United States of America certain English patents relating to the manufacture of nylon. By a contract made in England in March, 1947, the defendant company agreed to grant exclusive licences under the patents to the plaintiff company, which was incorporated and domiciled in England. In reliance on this agreement, and without any objection on the part of the defendant company, the plaintiff company carried on the manufacture of nylon as though the licences had been granted, and on July 24, 1952, it issued a writ in an action for specific performance of the agreement of March, 1947. On July 30, 1952, in an action brought in the United States of America against the American company, the defendant company and others, at the suit of the government of the United States under the anti-trust laws, a federal judge of a district court of New York made an order whereby, inter alia, the agreement of Dec. 31, 1946, was to be cancelled and the defendant company was to re-convey to the American company, within ninety days, all the patent rights assigned to the defendant company under the agreement. Pending the hearing of its action for specific performance against the defendant company, the plaintiff company, which was not a party to the American proceedings, obtained an interlocutory injunction to restrain the defendant company from parting with any of the patent rights acquired by it under the agreement. In the action for specific performance,

Held: the contract of March, 1947, was regulated by English law, and, the subject-matter of the contract being in this case English patents, an order of an American court which would destroy or qualify the statutory rights in respect of such patents of an English national who was not subject to the jurisdiction of the American court was an assertion of extra-territorial jurisdiction which English courts did not recognise: dictum of SIR RAYMOND EVERSHED, M.R., in *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.* ([1952] 2 All E.R. 783), followed; and, therefore, there being no evidence that the object of the contract of March, 1947, was to do anything contrary to the law of the United States of America or that the plaintiff company was party to or had knowledge of any conspiracy contrary to the law of the United States when the contract was entered into, the defendant company, notwithstanding the judgment of the United States court dated July 30, 1952, was bound by English law to carry out the contract, and the plaintiff company was entitled to specific performance thereof.

Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Akt. & Hungarian General Creditbank ([1939] 3 All E.R. 38), applied.

Foster v. Driscoll ([1929] 1 K.B. 470), distinguished.

EDITORIAL NOTE. On Oct. 16, 1952, the Court of Appeal affirmed an order of UPJOHN, J., granting to the plaintiff company an interlocutory injunction, and held, inter alia, that prima facie the plaintiff company had acquired under the contract of March, 1947, an enforceable right to the patent licences: *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.* ([1952] 2 All E.R. 780).

The present case shows the conclusion of the substantive claim in the action and the application, in relation to a claim of a more permanent character, of the principles of the judgment of the Court of Appeal.

AS TO RECOGNITION OF FOREIGN JUDGMENTS, see HALSBURY, Hailsham Edn., Vol. 6, pp. 324-333, paras. 380-388; and FOR CASES, see DIGEST, Replacement Vol. 11, pp. 502-506, Nos. 1198-1237.

A Cases referred to:

(1) *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.*, [1952] 2 All E.R. 780; [1953] Ch. 19; 11 Digest, Replacement, 505, 1219.

(2) *Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Akt. & Hungarian General Creditbank*, [1939] 3 All E.R. 38; [1939] 2 K.B. 678; 108 L.J.K.B. 861; 160 L.T. 615; 11 Digest, Replacement, 428, 746.

B

(3) *Foster v. Driscoll, Lindsay v. Attfield, Lindsay v. Driscoll*, [1929] 1 K.B. 470; 98 L.J.K.B. 282; 140 L.T. 479; 11 Digest, Replacement, 441, 832.

C

ACTION for, inter alia, (i) a declaration that the plaintiff company, British Nylon Spinners, Ltd., had the right to be granted by the defendant company, Imperial Chemical Industries, Ltd., exclusive licences within the plaintiff company's licence field (as defined in an agreement, dated Jan. 5, 1940, and made between the plaintiff company and the defendant company) under all the patents and patent rights transferred to the plaintiff company pursuant to an agreement, dated Dec. 31, 1946, and made between the defendant company and E. I. du Pont de Nemours Incorporated (a corporation incorporated in the United States of America, and referred to hereinafter as "the American company"); (ii) specific performance (a) of an agreement made in March, 1947, between the plaintiff company and the defendant company, whereby it was agreed, inter alia, that the defendant company would grant to the plaintiff company an exclusive licence within the plaintiff company's field under all the patents and patent rights which they had or might acquire from the American company for Great Britain and certain specified countries, or, alternatively, (b) of the agreement dated Jan. 5, 1940, as modified by the agreement of March, 1947, and, in particular, an order that the defendant company should execute licences in favour of the plaintiff company in accordance with the declaration contained under (i); (iii) an injunction restraining the defendant company from assigning or parting with any of the patents or patent rights assigned to the defendant company by the American company pursuant to the agreement of Dec. 31, 1946, until such time as the defendant company should have granted the licences to the plaintiff company and until the licences had been registered; and (iv) rectification of the register of patents accordingly.

E

The American company had from time to time obtained patents in the United States of America and other countries covering inventions relating to the manufacture of nylon. By an agreement, dated Mar. 30, 1939, and made between the American company and the defendant company, which was incorporated and domiciled in England, the American company granted to the defendant company licences to exercise and practise all such inventions in certain specified countries, the licences for England and certain other parts of the British Commonwealth being exclusive. Under the agreement the defendant company had the right to grant sub-licences to persons within the licensed territory. On Jan. 1, 1940, the plaintiff company was incorporated in England to carry out a joint venture of the defendant company and another English company, Courtaulds, Ltd. By the articles of the plaintiff company, the defendant company and Courtaulds, Ltd., were to own the share capital in equal shares, and, of the board of ten directors, five were to be nominees of the defendant company and five of Courtaulds, Ltd. By modifications made at a later date three additional directors were appointed who were to be nominees of the defendant company and Courtaulds jointly, and, in consequence, neither the defendant company nor Courtaulds could control absolutely the affairs of the

company. By the agreement of Jan. 5, 1940, between the defendant company and the plaintiff company, the defendant company granted exclusive sub-licences to the plaintiff company to practise the inventions, subject to a certain limitation, in England and the other Commonwealth countries in respect of which the defendant company had the exclusive licences.

On Jan. 6, 1944, the government of the United States of America commenced an action in the United States District Court for the Southern District of New York, under the Sherman Anti-Trust Act, against the American company, the defendant company and others (but not against the plaintiff company or Courtaulds). By the agreement of Dec. 31, 1946, between the American company and the defendant company, the agreement of Mar. 30, 1939, was cancelled, and a new agreement was made whereby the defendant company, instead of being licensees, became the owner of the patents set out in the schedule to the agreement, which included the English and certain Commonwealth patents in regard to the inventions. By a letter, dated Mar. 5, 1947, the defendant company informed the plaintiff company of the new arrangement and stated that in future the plaintiff company would be direct licensees of the defendant company under these patents. The terms of this letter were never expressly accepted in writing, but they were acted on and accepted by conduct on behalf of the plaintiff company, and the contract made by the letter was the contract which the plaintiff company now sought to enforce. No licences were, in fact, granted, but the plaintiff company carried on the manufacture of nylon without any objection on the part of the defendant company. In June, 1952, the plaintiff company required licences to be granted by the defendant company so that they could be registered in respect of the patents, and on July 24, 1952, the plaintiff company issued the writ in the present action.

By an order of His Honour JUDGE SYLVESTER J. RYAN, district judge, made in the United States Federal Court, being the District Court for the Southern District of New York, on July 30, 1952, in the action brought by the United States of America under the Sherman Anti-Trust Act, it was ordered, inter alia, that the agreement of Dec. 31, 1946, should be cancelled and that the defendant company should reconvey to the American company within ninety days all the patent rights assigned to the American company thereunder.

On Aug. 13, 1952, on an application by the plaintiff company, UPHOHN, J., made an order whereby he granted an injunction restraining the defendant company, until judgment in the action between the parties, or further order, from assigning or parting with any patent rights acquired by the defendant company from the American company under the agreement of Dec. 31, 1946. On Nov. 6, 1952, the Court of Appeal dismissed an appeal by the defendant company from the order of UPHOHN, J. The judgment of the Court of Appeal is reported [1952] 2 All E.R. 780. The order of UPHOHN, J., was varied by consent, in an immaterial respect, by an order made by VASEY, J., on Nov. 15, 1953. The action now came on for trial.

Russell, Q.C., and T. G. Roche for the plaintiff company.

Sir Andrew Clark, Q.C., Tookey, Q.C., and Winn for the defendant company.

Cur. adv. vult.

July 9. **DANCKWERTS, J.**, read the following judgment. This is an action brought by British Nylon Spinners, Ltd. against Imperial Chemical Industries, Ltd. Each of the parties is an English corporation, formed under the provisions of the Companies Acts. The object of the action is to compel the defendant company to grant licences in respect of certain British patents, relating (among other things) to nylon yarn, which are now owned by the defendant company. The contract which it is sought to enforce is a contract made by a letter written on behalf of the defendant company and dated Mar. 5, 1947, by which an earlier agreement in writing between the parties and dated Jan. 5, 1940, was modified or superseded. The parties, therefore, are both English

corporations and the contract on which their rights depend is a contract made in England and regulated by English law, as the proper law of that contract. [His Lordship stated the facts and reviewed the history of the case in detail, and referred to the opinions and judgment of His Honour JUDGE SYLVESTER RYAN in the proceedings in the United States District Court, and continued:] The question, therefore, is whether the judgment of the United States Federal Court provides a defence for the defendant company, Imperial Chemical Industries, Ltd., in the present action for specific performance, and whether by reason of that judgment I should refuse to grant specific performance of the contract which has admittedly been made between the plaintiff company and the defendant company. The matter was, of course, considered by URMON, J., and the Court of Appeal on the application for an interlocutory injunction [see *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.* (1)], and the view taken by the Court of Appeal is expressed by the following passage in the judgment of SIR RAYMOND EVERSHED, M.R. ([1952] 2 All E.R. 783):

" . . . the subject-matter of the contract of December, 1946, is a number of English and Commonwealth patents. An English patent is a species of English property of the nature of a chose in action and peculiar in character. By English law it confers on its proprietor certain monopoly rights, exercisable in England. A person who has an enforceable right to a licence under an English patent appears, therefore, to me to have, at least, some kind of proprietary interest which it is the duty of our courts to protect. And, certainly, so far as the English patents are concerned, it seems to me, with all deference to the judgment of the district judge, to be an assertion of an extra-territorial jurisdiction which we do not recognise for the American courts to make orders which would destroy or qualify those statutory rights belonging to an English national who is not subject to the jurisdiction of the American courts."

The view thus asserted by the Master of the Rolls seems to me to be entirely in accordance with the decision of the Court of Appeal in *Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Akt. & Hungarian General Creditbank* (2), in which DU PARCQ, L.J., said ([1939] 3 All E.R. 44):

" One starts with the rule that English law is the law which governs the performance of this contract. An elementary principle of English law is that people should keep their contracts and carry them out."

In that case, the Court of Appeal gave judgment against a Hungarian bank on a claim by London bankers to recover a sum of money from the Hungarian bank, notwithstanding that legislation in Hungary made it illegal for Hungarian subjects to pay money outside Hungary without the consent of the Hungarian National Bank. In the case before me there is no doubt that English law is the law which governs the performance of the contract made by the plaintiff company and the defendant company. Furthermore, in this case, both the parties are British nationals, and, therefore, in this respect the situation is easier than in the *Kleinwort* case (2), in which the defendant was a Hungarian bank.

It was argued on behalf of the defendant company that this court would not enforce a contract which involved the deliberate violation of the laws of a friendly country, and I was referred to DICEY'S *CONFLICT OF LAWS*, 6th ed., p. 607, and to *Foster v. Driscoll* (3), which was a case of a contract, the object of which was the illegal importation of whisky into the United States of America. There is no evidence before me that the object of the contract of Mar. 5, 1947, was to do anything contrary to the law of the United States of America and no evidence that the plaintiff company was party to or had knowledge of any conspiracy contrary to the law of the United States when that contract was entered into. It is impossible for me to accept the conclusions of the United States court as findings of fact binding in this action against the plaintiff company which was not

a party to the American proceedings. Consequently, it seems to me that *Foster v. Driscoll* (3) is in no way applicable to the present case, and that I should apply the principle laid down by the Court of Appeal in the *Kleinwort* case (2).

There are, however, further considerations which also lead to the same result. I had the advantage of the evidence of Mr. Marshall Konopak Skadden, a member of the Bar of the State of New York, practising in the relevant United States courts. His evidence was that the British court would be accepted under the law of the United States as an appropriate court having jurisdiction for the enforcement of the contract under consideration in the present case. Further, his evidence was that, if the defendant company, though prohibited from doing so by a judgment of a court in the United States, complied with an order of a British court and executed a licence, this would not be treated by an American court as a contempt of court. Mr. Skadden referred to a number of decisions of American courts in support of those propositions. This evidence indicates to me that the American courts would not regard a judgment of this court in the present circumstances enforcing against the defendant company the contract of Mar. 5, 1947, as in any way inappropriate, and there does not appear, therefore, to be any difficulty in regard to comity between the courts of the two countries in this case.

Furthermore, it would appear that the judgments of His Honour JUDGE SYLVESTER RYAN recognised this principle and were intended to provide for and limit his own judgment in this very respect. This appears to be the intention of art. IV, para. 3, of the judgment of July 30, 1952:

"No provision of this judgment shall operate against [the defendant company] for action taken in compliance with any law of the United States Government, or of any foreign government or instrumentality thereof, to which [the defendant company] is at the time being subject, and concerning matters over which, under the law of the United States, such foreign government or instrumentality thereof has jurisdiction."

"Instrumentality" of a government is an inaccurate, and, indeed, repellent, description of an English court; but it appears, none the less, that the learned judge was using the word in this manner from his observations on the occasions of further applications which were made to him. On Oct. 27, 1952, His Honour said:

"The court understands that and expects [the defendant company] to obey all orders and regulations that I have enumerated, of all government agencies and of the courts having jurisdiction over the matter on which they seek a ruling . . . And that is provided for in another section of the decree, I forget which one."

On counsel referring him to art. IV, para. 3, he added: "I think that provision covers this situation". On the same occasion His Honour said:

"Suppose they did, it was a suit in the nature of a declaratory action and I would not see anything contemptuous about such an act. Both [the defendant company] and [the plaintiff company], I think, are well within their rights to have it judicially determined by the courts of Great Britain and as to just what effect will be given to the provisions of the decree of this court which affect the British patents. I do not find anything wrong with that at all."

A further instance is, I think, to be found in the limitation contained in art. IX, para. 4 [of the judgment of July 30, 1952], in which

"Until June 30, 1977, to the extent they have the legal right to do so . . ." the American company and the defendant company are directed to make certain

A grants of immunities.* It was argued by counsel for the defendant company that this limitation of the order could not apply to the plaintiff company's rights under the agreement of Mar. 5, 1947, because these rights were only equitable and not legal. I do not, however, read the language of the judgment in that way. I regard the words "to the extent they have the legal right to do so" as equivalent to "so far as they may lawfully do so", that is, not in breach of their obligations, including the equitable as well as the legal rights of other persons, as long as such rights are enforceable in a court of appropriate jurisdiction. Consequently, the prohibition, in art. IX, para. 13 (b) [of the judgment of July 30, 1952] of dispositions of foreign patents or rights thereunder, which deprive them of the power or authority to issue the grants of immunity required by the judgment, is similarly limited, as the judgment does not require the issue of grants of immunity which du Pont and the defendant company may not lawfully grant.

B These passages indicate to me that His Honour JUDGE SYLVESTER RYAN has been careful so to limit his judgment that neither his judgment, nor any judgment of mine which the law of England requires me to give, will disturb the comity which the courts of the United States and the courts of England are so anxious and careful to observe. I would only add that counsel for the defendant company C fully carried out to the best of his ability, in somewhat difficult circumstances, the desire expressed by His Honour that the considerations which led the American court to reach the conclusions and make the order that it did should be before this court.

D In the result, my conclusion is that, notwithstanding the judgment of the United States court of July 30, 1952, the defendant company is bound by English law to carry out the agreement of Mar. 5, 1947, and I ought to make the declaration which is asked by the amended statement of claim, and grant specific performance of the contract.

Judgment for the plaintiffs.

Solicitors: *Bristows, Cooke & Carpmael* (for the plaintiff company); *J. W. Ridsdale* (for the defendant company).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

*Article IX, para. 4, reads: "Until June 30, 1977, to the extent they have the legal right to do so, du Pont and I.C.I. shall : (a) grant to any person (including du Pont and I.C.I.), making written request therefor, in consideration of a reasonable royalty, an unrestricted, non-exclusive immunity under any foreign counterpart of any existing or new patent to import into any foreign country any common chemical product lawfully manufactured in the United States."

BOCCK v. ENFIELD ROLLING MILLS, LTD.

[COURT OF APPEAL (Singleton, Denning and Morris, L.J.J.), July 12, 1954.]

Court of Appeal—Damages—Assessment by jury—Test for intervention by appellate court.

When damages have been assessed by a jury an appellate court will not intervene unless the verdict is out of all proportion to the facts. The question is not whether the verdict appears to the appellate court to be right, but whether it is such as to show that the jury have failed to perform their duty.

Mechanical & General Inventions Co., Ltd. & Lehewess v. Austin & Austin Motor Co., Ltd. ([1935] A.C. 346), and dictum of LORD WRIGHT in *Davies v. Powell Duffryn Associated Collieries, Ltd.* (No. 2) ([1942] 1 All E.R. 664), applied.

Motion dismissed.

AS TO REVIEW OF ASSESSMENT OF DAMAGES, see HALSBURY, Hailsham Edn., Vol. 10, p. 154, para. 197; and FOR CASES, see DIGEST, Vol. 17, p. 164, Nos. 648-650.

AS TO NEW TRIAL GRANTED BY REASON OF MISCONDUCT OF JURY, see HALSBURY, Hailsham Edn., Vol. 26, p. 125, para. 246; and FOR CASES, see DIGEST, Practice, pp. 599, 600, Nos. 2390-2414, and Vol. 17, pp. 167-179, Nos. 680-832.

Cases referred to:

- (1) *Mechanical & General Inventions Co., Ltd. & Lehewess v. Austin & Austin Motor Co., Ltd.*, [1935] A.C. 346; 104 L.J.K.B. 403; 153 L.T. 153; Digest Supp.
- (2) *Wood v. Gunston*, (1655), Sty. 462; 82 E.R. 863; 32 Digest 105, 1358.
- (3) *Metropolitan Ry. Co. v. Wright*, (1886), 11 App. Cas. 152; 55 L.J.Q.B. 401; 54 L.T. 658; 8 Digest 84, 578.
- (4) *Davies v. Powell Duffryn Associated Collieries, Ltd.* (No. 2), [1942] 1 All E.R. 657; [1942] A.C. 601; 111 L.J.K.B. 418; 167 L.T. 74; 2nd Digest Supp.

MOTION by the plaintiff for a new trial in an action tried by McNAIR, J., with a jury, on Apr. 29, 1954.

The plaintiff was employed by the defendants as a "catcher". His work, which required agility and skill, consisted of securing with a pair of tongs red-hot copper rods as they issued from a series of rollers on to a slope, and feeding them into a further set of rollers. On June 4, 1952, a red-hot rod jumped from the rollers and came into contact with the plaintiff's left ankle. He suffered serious injury, and the Achilles tendon was rendered practically useless. The plaintiff was aged twenty-five years at the time of the accident and was earning nearly £18 a week. At the time of the hearing of the action (nearly two years after the occurrence) he was employed by the defendants as a check-weighman at £8 15s. a week. He would never be fit to return to his former work, and could not live the active life that he had formerly enjoyed. He now walked with the aid of a stick, and, as a result of skin grafting operations, his right ankle had become infected, and he was likely to suffer from osteoarthritis in that ankle.

The plaintiff's out-of-pocket expenses (including loss of wages) up to the time of the trial of the action were £1,100. The action was heard by McNAIR, J., with a jury and the only issue was the quantum of damages. The jury assessed the total damages at £3,850 (including out-of-pocket expenses). Before the Court of Appeal it was argued on behalf of the plaintiff that the judge had misdirected the jury and that the damages were so low, having regard to the nature of the plaintiff's injuries, that the court should direct a new trial.

Croom-Johnson for the plaintiff.

Caulfield for the defendant.

SINGLETON, L.J. (having stated the facts and having held that the jury had not been misdirected by the learned judge): I come to the question whether the damages, £3,850, are so low in relation to the injuries which this man suffered that this court ought to direct a new trial. Let me say that I think the damages are low; I feel that if I had been sitting alone as a judge of first instance I should have given considerably more. At the same time it has been said more than once that, where damages have to be assessed, a judge sitting by himself is not in as good a position as are twelve members of a jury. They have an opportunity of discussing the matter among themselves, and, though they may not have great experience in the matter, twelve heads should be better than one. When a trial is by jury issues of fact are for the jury. The amount of damages to which an injured person is entitled is a question of fact, and it is a serious question of fact, most difficult for judge or for jury. Appeals against damages awarded by a judge sitting alone come quite often to this court. In such cases it is the duty of the court to remember that the judge sees and hears the witnesses, and his decision on facts ought not to be lightly interfered with. Cases nevertheless occur in which the court thinks it right to adjust the matter, and in such cases it says what in its opinion the damages should be.

The position is different when the trial is by jury. It has always been so regarded, and this court ought to take care not to do anything to lessen the importance with which verdicts of juries are regarded. The *ANNUAL PRACTICE*, 1954, p. 1254, in the notes under R.S.C., Ord. 58, r. 4* sets out the practice clearly and accurately:

“The Court of Appeal will not set aside the verdict of a jury as to the amount of damages unless satisfied that it is out of all proportion to the facts”;

and the authority cited in support is *Mechanical & General Inventions Co., Ltd., & Lehwess v. Austin & Austin Motor Co., Ltd.* (1). Towards the end of the headnote to that report appear these words ([1935] A.C. 347):

“When it is decided that a case is to be tried by a jury, that tribunal is the only judge of the facts, and no appellate tribunal can substitute its finding for that of the jury. The appellate court has a revising function to see, first, whether there is any evidence in support of the issue found by the jury; and, secondly, whether the verdict can stand as being one which reasonable men might have come to.”

The House of Lords reversed the judgment of the Court of Appeal and restored the verdict of the jury on one part of the case. *VISCOUNT SANKEY, L.C.*, said (*ibid.*, 358):

“The jury were the proper constitutional tribunal to assess the damages and it is impossible to say they have gone so wrong that their assessment must be set aside. It is not a case merely for nominal, but for substantial damages of which the jury were the judges.”

LORD WRIGHT said (*ibid.*, 374):

“The objection in *Wood v. Gunston* (2) was that the damages were excessive, and a new trial was there ordered. The use of the phrase ‘miscarriage of juries’ is significant. It indicates what there must be to justify the appellate court in interfering with or controlling the verdicts of juries.”

Later, **LORD WRIGHT** referred (*ibid.*, 375) to some words of **LORD HALSBURY** in *Metropolitan Ry. Co. v. Wright* (3) (11 App. Cas. 156) on juries’ verdicts:

“If their finding is absolutely unreasonable, a court may consider that that shows that they have not really performed the judicial duty cast upon them;

*See also the *ANNUAL PRACTICE*, 1954, p. 700, notes to R.S.C., Ord. 39, r. 6; the motion in this case was for a new trial under R.S.C., Ord. 39.

but the principle must be that the judgment upon the facts is to be the judgment of the jury and not the judgment of any other tribunal."

LORD WRIGHT himself added ([1935] A.C. 375):

" LORD HALSBURY in these valuable observations is, I think, going back to the test applied in *Wood v. Gunst* (2), which was whether there was a miscarriage of the jury. Thus the question in truth is not whether the verdict appears to the appellate court to be right, but whether it is such as to show that the jury have failed to perform their duty. An appellate court must always be on guard against the tendency to set aside a verdict because the court feels it would have come to a different conclusion."

In *Davies v. Powell Duffryn Associated Collieries, Ltd.* (No. 2) (4), LORD WRIGHT considered cases in which the Court of Appeal should, or ought to, interfere with a judgment on damages of a judge sitting by himself, and he said ([1942] 1 All E.R. 664):

" There is an obvious difference between cases tried with a jury and cases tried by a judge alone. Where the verdict is that of a jury, it will only be set aside if the appellate court is satisfied that the verdict on damages is such that it is out of all proportion to the circumstances of the case . . ."

Though I think the damages given in this case were low, I am not able to say that the verdict was out of all proportion to the facts. It was for the jury and not for this court to assess the damages. If a plaintiff in a case of this kind asks for and obtains a jury, he may expect to have some advantages or he would not ask for a jury. There may be disadvantages also, though I am far from saying that a jury is not a proper tribunal for a case of this kind. Counsel told this court that the plaintiff desired a jury on the issue of liability, i.e., on whether or not there was negligence at common law in the defendants' system of work. I should have thought that a judge would be every bit as good as a jury for a plaintiff on such a matter. In fact the issue of liability was not fought, the only issue before judge and jury being the amount of damages. The jury were properly directed, and they assessed the damages. They might have given more, but, if a party chooses to have a jury, he ought to be bound by the jury's assessment of the damages unless it can be said that the verdict is out of all proportion to the facts. I find it quite impossible to say that that was the position in this case, and though I could wish that the damages had been more, I feel that it is the duty of this court to say that the motion should be dismissed.

DENNING, L.J. : I agree.

MORRIS, L.J. : I agree.

Motion dismissed.

Solicitors: *Amphlett & Co.* (for the plaintiff); *Hair & Co.* (for the defendant).
[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

RICHMOND AND OTHERS v. McGANN.

[QUEEN'S BENCH DIVISION (Pileher, J.), July 20, 21, 1954.]

Landlord and Tenant—Repair—Damages for failure to repair at end of tenancy—Allegation that tenancy of dwelling-house notionally continued by statute—Whether daughter residing in house “in right of the tenancy”—Leasehold Property (Temporary Provisions) Act, 1951 (c. 38), s. 2 (1) (a), s. 5 (1) (a).

By the terms of a lease, dated Oct. 9, 1851, and expiring on Mar. 25, 1950, the lessee was responsible for repairs to the premises, which comprised a dwelling-house. In 1946 the lease was agreed to be assigned to the defendant, who allowed her daughter to occupy the house on payment of a rent of £2 1s. a week, which was an economic rent for the premises. The defendant herself never lived in the house. The daughter continued to occupy the house after the lease had expired. In an action commenced on Apr. 28, 1952, the freeholders of the premises claimed damages against the defendant for dilapidations to the premises. The defendant, being estopped from maintaining that she was not a legal assignee of the lease, claimed the protection of the Leasehold Property (Temporary Provisions) Act, 1951, s. 5 (1) (a).

HELD: the defendant's daughter was an under-tenant and was not a member of the defendant's family residing in the dwelling-house “in right of the tenancy” within the meaning of s. 2 (1) (a) of the Act of 1951, and, therefore, as the requirement of s. 2 (1) (a) was not satisfied, the tenancy did not continue by virtue of s. 2, and the defendant was not protected by s. 5 (1) (a).

EDITORIAL NOTE. The Leasehold Property (Temporary Provisions) Act, 1951, extended until June 23, 1953, certain long leases which expired before June 24, 1951, but comprised dwelling-houses where tenants or members of their families had been residing since the expiration of the terms of the leases and were residing on June 24, 1951. This period of extension was continued until Dec. 24, 1954, by s. 1 of the Leasehold Property Act and Long Leases (Scotland) Act Extension Act, 1953: HALSBURY'S STATUTES, 2nd ed., vol. 33, p. 319. As this action was begun in April, 1952, and tried in July, 1954, the extension by the Act of 1953 is material in preserving the legal position unchanged until after the date of judgment. The Landlord and Tenant Act, 1954, has subsequently repealed s. 5 of the Leasehold Property (Temporary Provisions) Act, 1951, as from Oct. 1, 1954, but has not amended or repealed s. 2 of that Act.

FOR THE LEASEHOLD PROPERTY (TEMPORARY PROVISIONS) ACT, 1951, see HALSBURY'S STATUTES, Second Edn., Vol. 30, p. 194.

ACTION by the landlords of premises known as 65 Gloucester Crescent, London, N.W.1, for the sum of £967 2s. 7d., as damages for dilapidations to the premises.

On Oct. 9, 1851, the then freeholders of the premises granted to lessees a lease of the premises for a term of ninety-nine years from Mar. 25, 1851, at a yearly rent of £7 4s. On June 23, 1883, the head lessees granted a sub-lease from Mar. 25, 1880, for seventy years less three days at a rent of £10 a year. In 1940 the defendant, Mrs. McGann, who kept a boarding-house near 65 Gloucester Crescent, acquired the upper part of the premises to lodge some of her guests. In 1942 the defendant's daughter, Mrs. Lewis, commenced to live in the upper part of the premises, paying to the defendant a rent of 30s. a week. By April, 1945, the holders of the sub-lease had acquired the head lease. On Nov. 7, 1946, Messrs. Waters and Waters, a firm of house agents, sold, or purported to sell, to the defendant the residue, about three and a half years, of the long lease of the premises. From Nov. 9, 1946, Mrs. Lewis had the use of the whole house and paid to the defendant a rent of £2 1s. a week. In July, 1947, the plaintiff's predecessors in title sent a schedule of dilapidations to the person whom they

thought to be the head lessee. Receiving no reply, they found that Mrs. Lewis was in occupation of the premises, and, through her, they got into touch with the defendant. From a conversation between the defendant and their agent, they concluded that the defendant had acquired the residue of the term granted by the head lease. From that time the defendant paid to the plaintiffs' predecessors in title the rent due under the head lease. On Mar. 25, 1950, the head lease expired. On Mar. 29, 1950, the plaintiffs, who were trustees, bought the freehold of the premises, and on Aug. 22, 1950, they took proceedings against Mrs. Lewis for possession and obtained judgment against her which they had not executed. On Apr. 25, 1952, they sent a schedule of dilapidations to the defendant, and on Apr. 28, 1952, they issued the writ in the present action. By her defence the defendant pleaded, *inter alia*, that she would rely on the Leasehold Property (Temporary Provisions) Act, 1951, s. 5.

HIS LORDSHIP found as facts (i) that there had been an equitable assignment of the head lease to the defendant; (ii) that the defendant in good faith had told the agent of the plaintiffs' predecessors in title, and he had honestly believed, that she was the lessee under a lease having three and a half years to run, but that she had never in fact received the lease itself; and (iii) that the plaintiffs' predecessors in title had acted on faith of the representation and to their detriment. The plaintiffs contended that, in the circumstances, the defendant was estopped from denying that she was a legal assignee of the head lease.

F. Whitworth for the plaintiffs.

Plume for the defendant.

PILCHER, J., having stated the facts and reviewed the evidence relevant to the estoppel, continued: I have come to the conclusion on the evidence that the contention of counsel for the plaintiffs is right, viz., that, there being admittedly an equitable assignment of the lease to the defendant, she is precluded and estopped from alleging as against the plaintiffs that she had not, in fact, got a legal assignment which would carry with it the liability to pay the amount due in respect of dilapidations at the end of the lease.

I have, therefore, to consider the provisions of the Leasehold Property (Temporary Provisions) Act, 1951, which I have not found easy to understand. The Act makes temporary provision for the protection of occupiers of residential property against the coming to an end of long leases. Section 1 deals with the continuation of an expiring long tenancy where the tenant himself is in occupation. Section 2 makes provision for a tenant holding over after the expiry of a long tenancy. Section 5 provides as follows:

"(1) While a tenancy continues by virtue of s. 1 or s. 2 of this Act, or while before the date of expiry the tenant under a tenancy granted for such a term as is mentioned in the said s. 1, or a member of the tenant's family, is residing in a dwelling-house comprised in the property in right of the tenancy, then—(a) the landlord shall not be entitled, by action or otherwise, to enforce any right of forfeiture or re-entry in respect of any failure to comply with a term or condition of the tenancy, or to bring any action against the tenant for damages in respect of such a failure . . ."

On the assumption, then, that the defendant has a legal assignment of the balance of the long lease which expired on Mar. 25, 1950, I have to consider whether or not, on the facts of this case, this particular lease has been extended by the Act of 1951 so that it has not yet come to an end, and the defendant's liability to pay dilapidations has not yet arisen. The Act also governs the position of the defendant's daughter, Mrs. Lewis, to some extent, because the plaintiffs obtained a judgment against her giving them possession of the house. That judgment has not yet been executed, and, of course, if the defendant's

lease has been extended by the Act it cannot be executed. The section with which I am concerned is s. 2 of the Act of 1951, which is in the following terms:

"(1) Where a tenancy was granted for a term of years certain, being a term exceeding twenty-one years and expiring on a date (hereinafter referred to as 'the date of continuation') before the commencement of this Act*, and—(a) immediately before the date of continuation the tenant or a member of his family was residing in a dwelling-house comprised in the property in right of the tenancy, and (b) at all times during the period beginning with the date of continuation and ending with the commencement of this Act there was residing in the dwelling-house in question some person being either the former tenant or a member of the former tenant's family, and (c) at all times during the period mentioned in the last foregoing paragraph at which any such person was residing in the dwelling-house in question he was residing there either not in right of any tenancy or agreement or in right of a tenancy or agreement (whether express or implied) which [fulfilled certain conditions] . . ."

I do not propose to read the rest of para. (c) because it is clear that, if the daughter was a tenant of the premises, it was not at the type of rent which is envisaged by that paragraph. Paragraph (d) is, for my purposes, immaterial. Then s. 2 (1) goes on

" . . . the next following sub-section shall have effect.

(2) The tenancy shall be deemed not to have expired on the date of continuation but to have continued until the commencement of this Act, and subject to the provisions of this Part of this Act shall continue thereafter, as if it had been granted for a term expiring at the end of the period of two years beginning with the commencement of this Act† but otherwise (save as hereinafter provided) on the terms and subject to the conditions of the tenancy."

Therefore, if the defendant can satisfy me that, on the facts of this case, her daughter was occupying the house at all material times in right of the defendant's tenancy, then she has gone some way towards establishing that her tenancy has not expired, but has been extended, and that, under s. 5 (1) (a) of the Act, the plaintiffs are not entitled, at the moment, at any rate, to claim from her the sum in respect of dilapidations which is the subject-matter of this action. The material words from my point of view are contained in s. 2 (1) (a). The defendant, who was the tenant, was not herself residing in the premises. Her daughter was residing in the premises, and was residing there throughout the material period. Was the daughter residing in the house "in right of the tenancy", which must mean in right of the defendant's tenancy? The first thing to be remembered is that at all material times the daughter was, to put it in ordinary language, the defendant's tenant. She held a rent book and was paying £2 1s. a week rent, which was quite a reasonably substantial rent. In those circumstances, can it be said that the daughter was a member of the defendant's family residing in the defendant's dwelling-house in right of the defendant's tenancy? At first glance, I should have thought it was very difficult to say so. She was, so it would seem, the defendant's tenant, and was not a member of the defendant's family residing in the defendant's house in right of

*The Act came into operation on June 24, 1951: see s. 21 (2).

†This period was extended by the Leasehold Property Act and Long Leases (Scotland) Act Extension Act, 1953, s. 1 (1), for which see HALSBURY'S STATUTES, 2nd ed., vol. 33, p. 319.

the defendant's tenancy. Section 7 of the Act deals with the rights and liabilities of sub-tenants and protects them from being turned out in certain circumstances. I find it quite impossible to say that the defendant's daughter, who held the rent book of the house under an oral agreement with the defendant and lived in the house for years paying an economic rent to the defendant, was residing in the house in right of the defendant's tenancy. I think that s. 2 (1) (a) finds its place in the Act of 1951 to protect persons like the wife or children or, it may be, A other relatives of the tenant, who are permitted by the tenant to live in the tenant's own premises when the tenant himself is absent, and not to protect persons like the defendant's daughter who is paying to the defendant (who for this purpose is the legal assignee of the lease) an economic rent, under a rent book, for the occupation of the defendant's premises.

Consequently I have come to the conclusion, without proceeding any further B with the requirements of s. 2, that in the present case the defendant fails in limine on sub-s. (1) (a). Not only does the defendant have to satisfy me that she comes within sub-s. (1) (a), but she also has to satisfy me that the requirements of para. (b), para. (c) and para. (d) of sub-s. (1) are fulfilled. Admittedly the requirement of para. (b) is fulfilled, and, probably, that of para. (d). I feel very C grave doubt, however, whether the defendant would not fail to satisfy me that she comes within para. (c), and for very much the same reason that she does not come within para. (a).

I have, therefore, come to the conclusion that the defendant is not protected in respect of this lease by the provisions of the Act of 1951, and, accordingly, the plaintiffs are entitled to claim from her the amount in respect of the D dilapidations.

Judgment for the plaintiffs.

Solicitors: Wigram & Co. (for the plaintiffs); Woodham Smith, Borradaile & Martin (for the defendant).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

HEASMAN v. JORDAN (INSPECTOR OF TAXES).

[CHANCERY DIVISION (Roxburgh, J.), July 23, 27, 1954.]

Income Tax—Assessment—Bonus salary—Years to which attributable—Income Tax Act, 1918 (c. 40), sched. E, r. 1, r. 5.

A During the war a company was under pressure to produce aircraft and all its employees worked long hours for approximately six and a half days a week and sacrificed their normal holidays. Employees paid weekly received overtime pay at premium rates together with cost-of-living bonuses but staff paid monthly received no additional remuneration for their additional work. After representations from the staff paid monthly that they were suffering financially by comparison with the employees paid weekly, and B assurances to the monthly staff that the matter would not be overlooked, the directors on June 27, 1945, resolved to pay a bonus to members of the monthly staff not exceeding in all £50,000. This sum was apportioned among the monthly staff, taking into consideration salaries and the period of paid monthly service during the war (excluding any service paid for weekly) on the basis that they had been paid for ordinary working hours and that the bonus C was for something outside their normal work. Employees who had left before June, 1945, were not paid. The taxpayer, who had been appointed a member of the staff in 1941, and had received a bonus in July, 1945, under this decision, was assessed to income tax on the whole sum paid him for 1945-46.

HELD: tax charged on taxpayers under r. 1 of the Rules Applicable to sched. E to the Income Tax Act, 1918, in respect of salaries or profits from D an employment of profit "for the year of assessment" was charged in regard to services rendered, and not for sums paid, in that year, and on the facts the bonus was a reward for services rendered from 1941 to 1945 and should be treated as paid in respect of all those years.

M'Keown v. Roe ([1928] I.R. 195) and *Dracup v. Radcliffe* (1946) (27 Tax Cas. 188), applied.

E Appeal allowed.

AS TO THE BASIS OF ASSESSMENT OF INCOME TAX UNDER SCHED. E TO THE INCOME TAX ACT, 1918, see HALSBURY, Hailsham Edn., Vol. 17, pp. 217-220, paras. 439-443; and FOR CASES, see DIGEST, Vol. 28, p. 88, Nos. 508-512.

FOR r. 1 AND r. 5 OF THE RULES APPLICABLE TO SCHED. E TO THE INCOME TAX ACT, 1918, see HALSBURY'S STATUTES, Second Edn., Vol. 12, pp. 177, 178; compare, now, INCOME TAX ACT, 1952, sched. IX, paras. 1, 4: *ibid.*, Vol. 31, pp. 522, 523.

Cases referred to:

(1) *M'Keown v. Roe*, [1928] I.R. 195; Digest Supp.

(2) *Dracup v. Radcliffe*, (1946), 27 Tax Cas. 188; 2nd Digest Supp.

G CASE STATED by the General Commissioners of Income Tax for Kingston and Elmbridge.

The appellant taxpayer appealed against assessments of £1,000 (additional) and £2,128 for the years 1944-45 and 1945-46 respectively under sched. E to the Income Tax Act, 1918, in respect of the emoluments of his employment as H financial accountant to Hawker Aircraft, Ltd. Each of the assessments included the whole or part of the sum of £1,250, a special bonus paid to the taxpayer in July, 1945, following a resolution of the board of directors passed on June 27, 1945. The taxpayer contended that the bonus was in respect of his extra work and effort during the war years and constituted remuneration of and for those years, that it did not constitute an emolument of his employment for 1945-46 and, accordingly, that it should be spread over the period from May, 1941, when he was appointed assistant accountant of the company, to the date of payment.

The Crown contended that the bonus was not paid in respect of the extra work and effort during the war period, though such work and effort might have provided the motive for payment; that it was not expressed to be paid in respect of any specific earlier period and was not attributable to any such period and there was no scheme by which it could be so attributed; and that it was income of the year in which it was paid, 1945-46, and, accordingly, the assessment for that year should be confirmed and that for 1944-45 discharged. The commissioners found as a fact that the bonus was an emolument of the year in which the taxpayer received it, and they confirmed the assessment for 1945-46 and discharged the assessment for 1944-45. The taxpayer appealed.

Heyworth Talbot, Q.C., and H.M. Allen for the taxpayer.

Sir Lynn Ungood-Thomas, Q.C., and Sir Reginald Hills for the Crown.

ROXBURGH, J. : At a meeting of the General Commissioners for the division of Kingston and Elmbridge on June 16, 1953, the taxpayer appealed against an assessment for 1945-46 under sched. E to the Income Tax Act, 1918, in the sum of £2,128 in respect of the emoluments of his employment as financial accountant to Hawker Aircraft, Ltd. The assessment included a sum of £1,250, which was a special bonus paid to the taxpayer by the company in July, 1945, i.e., during the tax year 1945-46. This appeal relates to that sum. The taxpayer did not dispute that the special bonus constituted a taxable emolument. The question is whether the whole of it was assessable as income of the year in which it was received or whether it should be spread over a number of years.

The taxpayer entered the employment of the company in 1941 and continued in that employment throughout the relevant period. His basic salary in 1945-46 was £800 per annum, but he was entitled to certain bonuses immaterial to this case and quite different from the bonus to which this appeal relates. During the war, and in particular the early years, the company was under pressure to produce aircraft, for instance the well-known Hurricane fighter, as rapidly and in as great numbers as possible. As a result it was necessary for all the company's employees in all departments to work long hours for approximately six and a half days per week and to sacrifice their normal holidays. The exact period during which these long hours were worked varied from one department to another. Consequent on agreements with trade unions and staff associations, the weekly paid employees of the company—and I emphasise weekly—received overtime pay at premium rates for hours worked above the normal peace-time average, together with cost-of-living bonuses from time to time; but the monthly paid staff, of whom the taxpayer was one, did not receive similar additional remuneration to compensate them for their additional work. On June 27, 1945, the board of directors of the company resolved that a bonus be paid to monthly servants, and that the distribution be settled by the local directors on the understanding that the total amount paid should not exceed £50,000 without reference to the full board. As a result, the taxpayer received in July, 1945, a bonus of £1,250 which is the subject-matter of this appeal.

Mr. Lidbury, who was assistant secretary and personnel manager in June, 1945, having been appointed to that position in 1942, gave evidence, which was accepted by the general commissioners, to the following effect. On many occasions from 1942 onwards members of the monthly paid staff of the company had indicated to him that they were suffering financially by comparison with the weekly paid staff, since the latter were receiving overtime pay for Saturday and Sunday work as well as for overtime work in the evenings and on bank holidays, and, in some cases, cost-of-living payments, while the former were receiving no such payments, although they were working similar hours. The witness reported the position to the directors and thereafter told the monthly staff not to worry and that it would not be overlooked. I am being careful not to read such parts of the case as do not appear to me to be admissible evidence.

A The actual splitting up of the £50,000 among the monthly staff was worked out by Mr. Lidbury. He obtained a list of the monthly staff, broke it down to the four main departments and graded the staff in each, taking into consideration the period of paid monthly service and salaries, but not bonuses, so as to get a common line through them, and based his recommendations on the principle that the monthly staff had been paid for their ordinary working hours and that the special bonus was for something outside their normal work. He discussed the merits of each case with the chiefs of the departments concerned and altered the grading as a result. He then took the four lists with recommended special bonuses to the board, who approved them. No attempt was made to apportion each special bonus to separate years of meritorious service. Cheques were drawn and handed to the directors responsible for each section for personal distribution. B Mr. Lidbury himself distributed cheques to some members of the monthly staff. He told some that in the envelope was a cheque which was to put right what they called being "hard-done-by" during the war. He told others that it was to reimburse them for long hours for which they had not received overtime. With the exception of the works' nurses, who were paid monthly for convenience, and staff who had newly joined the company, each member of the monthly paid staff received a bonus payment, but no member of the weekly paid staff received such a payment. C None of the monthly staff who had been in the employment of the company during the whole or part of the war years but had left before June, 1945, received the special bonus.

D Included among the monthly paid staff who were recipients of the special bonus were some who had been recently transferred from the weekly paid staff. In their case the amount of special bonus was comparatively small, being calculated by reference only to the period during which they had been paid monthly, since, so long as they had been paid weekly, they had been in receipt of overtime payments and cost-of-living bonuses. Generally speaking, however, the amount of the special bonus received by a monthly paid employee was substantial, in many cases being the equivalent of not less than six months of current salary, and in some cases being in excess of a full year's salary. E Apart from directors and certain other senior members of the staff who were aware of the circumstances, all the recipients of the special bonus received a letter drafted by Mr. Lidbury and approved by the local board in the following terms:

F "At a recent meeting, the directors of the company decided to mark their appreciation of the loyalty and industry of the monthly staff during the war years in the form of a gratuity. You have accordingly been allotted by them the sum of ——— and I have pleasure in enclosing a cheque for ——— representing the above amount after deduction of tax."

G Mr. John Firman Robertson, a chartered accountant and a director and group treasurer of Hawker Siddeley Group, Ltd. (of which the company was a subsidiary) gave evidence which was accepted by the general commissioners to the effect that during the war years, and as treasurer of the group, he visited the company's premises about once a fortnight. During those visits he was conscious that the senior staff were disturbed that, while the weekly paid staff were receiving overtime payments, no corresponding payment was being made to them to compensate either for the increased cost of living or for the extra work and effort they were putting in. H The taxpayer himself gave evidence which was accepted by the commissioners. He said that he joined the company on May 21, 1941, as assistant accountant and was appointed financial accountant very soon afterwards. The senior staff were dissatisfied that the weekly paid staff were receiving a cost-of-living bonus and overtime pay, whereas the monthly paid staff, working the same or longer hours, did not receive additional remuneration. He himself felt that this was an anomaly about which something ought to be

done, and he made representations to this effect to his immediate chiefs. As a result, he definitely understood the senior staff were going to be looked after in due course.

Rule 1 of the Rules Applicable to sched. E provides:

"Tax under this schedule shall be annually charged on every person having or exercising an office or employment of profit mentioned in this schedule, or to whom any annuity, pension, or stipend, as described in this schedule, is payable in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment . . ."

There is no doubt the taxpayer comes within the description in this rule. Rule 5 provides:

"If at any time, either during the year of assessment or in respect of that year, a person becomes entitled to any additional salary, fees, or emoluments beyond the amount for which an assessment has been made upon him, or for which at the commencement of that year he was liable to be charged, an additional assessment shall, as often as the case may require, be made upon him in respect of any such additional salary, fees or emoluments, so that he may be charged in respect of the full amount of his salary, fees or emoluments for that year."

In my judgment, "for the year of assessment" in r. 1 means "in respect of the year of assessment", and, where reward for services is in question, means "in respect of services rendered during the year of assessment". Counsel for the Crown first submitted that the words "for the year of assessment" meant "paid during the year of assessment"; but that is, in my judgment, in conflict with two decided cases and would, moreover, have surprising consequences. Supposing that a quarter's salary due on Apr. 1, 1945, was paid on Apr. 10, 1945, and that the four quarterly instalments of salary for the tax year 1945-46 were paid on the due dates, on counsel's interpretation it would appear that three-quarters of the total salary would be assessed in one year of assessment and five quarters of the total salary in another year of assessment, which would seem to be an impossible conclusion. Moreover, having regard to r. 5, on counsel's first interpretation I think there would in some cases be double assessments. But I do not think that I need pause further on this, because, in my judgment, it is concluded by authority.

In the Irish case of *McKeown v. Roe* (1) the headnote reads ([1928] I.R. 195):

"The respondent was employed as solicitor to a harbour board . . . and he was to be paid such costs in respect of work done as were taxed and certified by the taxing master of the High Court. For work done during the period of his appointment (i.e., from Dec. 2, 1924, to May 29, 1925), he furnished two bills of costs which were not taxed until after Apr. 5, 1925. The total amount of his fees or profits for the period of his appointment was £617, of which £422 was, on the basis of work done, allocated to the year of assessment 1924-25, the balance being allocated to the following year. From Dec. 2, 1924 (the date of his appointment), until Apr. 5, 1925, he did not receive any payment in respect of his bills of costs except a sum to cover certain disbursements made by him on behalf of the harbour board. Held that he was chargeable to income tax for the year of assessment 1924-25, under sched. E of the Income Tax Act, 1918, in respect of the sum of £422, notwithstanding that the bills of costs which included this sum were not taxed or paid within the year of assessment."

SULLIVAN, P., towards the end of his judgment said (*ibid.*, 201):

"The argument on behalf of Mr. Roe is that, as the £422 was not received

by him during the year 1924-25, it cannot be taken into account in the assessment for that year. I do not take that view. The effect of r. 5 is that where a person subsequent to the year of assessment becomes entitled to additions to his salary for that year, these additions are to be taken into account as part of the salary for the year of assessment, 'so that he may be charged in respect of the full amount of his salary, fees, or emoluments for that year'. This seems to me to afford a clear indication that in taxing the profits of an office under sched. E, such profits are not confined to the amount actually received in the year of assessment, but include fees or emoluments which were earned by the holder of the office during that year, and subsequently paid."

O'BYRNE, J., said (*ibid.*, 203):

"All the rules point to the conclusion that, where a person holds an office, the amount which he earns during any particular year of assessment is the amount on which he is liable to be assessed for the tax for that year."

In *Dracup v. Radcliffe* (2) the headnote reads (27 Tax Cas. 188):

"The appellant was appointed director of a company on May 18, 1942, and an assessment was raised for the year 1942-43 on remuneration voted to her on July 28, 1942, in respect of her services from date of appointment to the end of the company's year on June 30, 1942, and on the proportion to Apr. 5, 1943, of the remuneration for the year to June 30, 1943, voted to her on July 27, 1943. The appellant contended that the assessment should be based on the remuneration voted on July 28, 1942, and no more. Held, that the assessment was correct."

MACNAGHTEN, J., said (*ibid.*, 190):

"The point made on behalf of the appellant is that when the tax year 1942-43 terminated at midnight on Apr. 5, 1943, she was not entitled to any remuneration for her services during the preceding nine months. It is true there was a hope that the company in general meeting, in exercise of the powers conferred upon it by art. 69 of the articles of association, would be pleased to vote some remuneration for the directors, but they had not done so, and they did not do so until July 27. It is true that they then voted £1,500 free of tax, as they had done the previous year, and it is true that the directors decided that they would each of them take one-quarter of that sum; but she was not entitled, when Apr. 5, 1943, ended, to anything, and therefore, it is said that, although in fact she has been paid for her services as a director during those nine months, she cannot be assessed to income tax in respect thereof for the tax year 1942-43."

Then, after referring to the rule, MACNAGHTEN, J., said (*ibid.*, 191):

"It seems to me that the case is a very plain one. It is made plainer by r. 5 . . . It is obvious that where, after the end of a tax year, the salary of the holder of an office is increased as from an antecedent date, say from Jan. 1, the person to whom the additional salary is given would be liable to have an additional assessment. The case decided in the Irish courts, *M'Keown v. Roe* (1) is clear authority in favour of the view that has been put forward on behalf of the Crown, although that, of course, is not a decision binding upon me."

Counsel for the Crown next submitted that the words "for the year of assessment" were to bear alternative constructions, varying according to circumstances, but this seems to me to be an impossible burden to throw on the single word "for" which, in my judgment, is not really ambiguous. It was next

contended that there was a presumption that a payment for services rendered was for services rendered in the year in which the payment was made; but I can find no statutory presumption of any sort. The question seems to me to be a pure question of fact.

Now, what are the facts here? The bonus was not calculated with reference to output in the year of assessment, nor were all members of the staff in one salary group paid equal amounts. The bonus was correlated with the length of service of the particular member of the staff during the war years, and it was limited to the monthly staff to the exclusion of the weekly staff. Where a particular member of the staff had been transferred during the war period from weekly payment to monthly payment of remuneration, only his monthly service was taken into consideration. The bonus was given in pursuance of a promise which had been reiterated in many directions over many years. The very terms of the letter which accompanied the payment seem to me clearly to show that the bonus was not intended to be a reward for services rendered in that particular year of assessment only.

The commissioners, having found these facts and certain others which seem to me to be of less importance, concluded from them that the bonus of £1,250 paid to the taxpayer in July, 1945, was an emolument of the year in which he received it. I understand this to be a conclusion that it was a reward in respect of services rendered in that year only. I cannot agree with that conclusion. I feel driven to the conclusion that it was a reward for services rendered between May 21, 1941, and either June 27, 1945, or the date in July when it was paid—I ask whether there is any point about that—and cannot be treated as paid wholly for the year in which it was assessed. The appeal must, therefore, be allowed.

Appeal allowed. Case remitted to commissioners to adjust the assessment in accordance with the judgment.

Solicitors: *Simmons & Simmons* (for the taxpayer); *Solicitor of Inland Revenue* (for the Crown).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

BARCLAYS BANK, LTD. v. ROBERTS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.J.J.),
July 22, 30, 1954.]

Execution—Wrongful and irregular execution—Writ of possession—Judgment in respect of whole premises—Sub-tenant protected by Rent Restrictions Acts—Ejection of sub-tenant—Liability of landlord—R.S.C., Ord. 47, r. 1.

A A landlord obtained a judgment against a tenant for possession of premises, part of which was sub-let to a sub-tenant who was not a party to the ejectment proceedings. The landlord informed all persons in occupation of the premises of the judgment obtained, and advised them that, if any of them remained in occupation, he would apply for a writ of possession. B The sub-tenant protested against any attempt to evict him on the ground that he was a lawful sub-tenant protected by the Rent Restrictions Acts, but he did not apply to the court for relief, although it is contemplated by R.S.C., Ord. 47, r. 1 (2), that persons in possession of the land may so apply. C The landlord proceeded under R.S.C., Ord. 47, r. 1, and a writ of possession was issued. The sheriff's officers, having notice of the dispute between the parties on the question whether the Rent Restrictions Acts applied, asked the landlord's solicitors whether they should execute the writ in the circumstances and were advised to execute it. In pursuance of that advice the sub-tenant was ejected. On the same day he was permitted to re-enter the premises, the landlord not then admitting his rights. The landlord D subsequently accepted that the sub-tenancy was lawful and that the sub-tenant was protected by the Rent Restrictions Acts. The sub-tenant, having become a defendant in the landlord's action for possession, counter-claimed against the landlord for damages for trespass.

E HELD: the sheriff's officers had acted in accordance with the writ of possession and did nothing beyond what they were thus authorised to do by the court; the advice given to them by the landlord's solicitors did not make the sheriff's officers the agents of the landlord; and, therefore, the landlord was not responsible for the wrongful ejectment, and the sub-tenant's counterclaim must be dismissed.

Williams v. Williams & Nathan ([1937] 2 All E.R. 559), applied.

F Quaere whether, if the sheriff and his officers had received notice of facts sufficient to show that the sub-tenant was protected by the Rent Restrictions Acts, he or they would have been liable in damages.

R.S.C., Ord. 47, r. 1, criticised and the need for its revision indicated.

Appeal dismissed.

G AS TO WRONGFUL EXECUTIONS WHICH ARE NOT VOID, see HALSBURY, Hailsham Edn., Vol. 14, p. 35, para. 64; and FOR CASES, see DIGEST, Vol. 21, p. 456, No. 384 et seq.

Cases referred to:

- (1) *Williams v. Williams & Nathan*, [1937] 2 All E.R. 559; Digest Supp.
- (2) *Howard v. Gosset*, *Gosset v. Howard*, (1847), 10 Q.B. 359; 16 L.J.Q.B. 345; 10 L.T.O.S. 51; 11 J.P. 457; 116 E.R. 139; 38 Digest 62, 375.
- (3) *Woollen v. Wright*, (1862), 1 H. & C. 554; 31 L.J.Ex. 513; 158 E.R. 1005; sub nom. *Wright v. Woollen*, 7 L.T. 73; 21 Digest 550, 1244.
- (4) *Huskins v. Lewis*, [1931] 2 K.B. 1; 100 L.J.K.B. 180; 144 L.T. 378; 95 J.P. 57; Digest Supp.
- (5) *Lewis v. Gunter-Jones*, [1949] L.J.R. 769; 31 Digest, Replacement, 616, 7320.

H APPEAL by the defendant, George Roberts, from an order of His Honour

JUDGE BENSLEY WELLS, at Marylebone County Court, dated Apr. 27, 1954, dismissing the defendant's counterclaim for damages for trespass.

On Dec. 9, 1953, the plaintiffs as landlords issued a specially indorsed writ in the Queen's Bench Division against one Eliza Amelia Winnearls, claiming, inter alia, possession of premises known as 17, Castellain Road, Maida Vale, in the county of London, on the ground of forfeiture of the lease for non-payment of rent and breaches of covenant. On Dec. 29, 1953, the plaintiffs obtained a judgment in default of appearance. On Jan. 22, 1954, letters were sent to all persons in occupation of the premises, including the defendant, giving particulars of the judgment obtained against the said Mrs. Winnearls, and advising them that in default of their vacating the said premises or of any application by them to the court for relief the plaintiffs would proceed to recover possession on the said judgment without further notice. The defendant, through his solicitor, claimed that he was a lawful sub-tenant, but the plaintiffs rejected that contention on the ground that the sub-letting was without the consent of the landlord. The plaintiffs applied under R.S.C., Ord. 47, r. 1, ex parte for a writ of possession and filed an affidavit sworn by one of the partners of the plaintiffs' solicitors setting out the relevant facts. On Feb. 8, 1954, they obtained a writ of possession. On Feb. 15, 1954, the sheriff's officers evicted the defendant. On the same day SELLERS, J., granted a stay of execution in the action between the plaintiffs and Mrs. Winnearls, so far as it related to the judgment for possession, to enable the defendant to apply for leave to appear and to defend the said action or to apply for relief. On Feb. 22, 1954, Master LAWRENCE ordered that the defendant be at liberty to enter an appearance and to defend the said action and that, after appearance and notice thereof to the plaintiffs, the action be remitted to the Marylebone County Court. By his defence the defendant stated that the rooms situate on the first floor of the premises in question were let to him unfurnished as a dwelling-house on Jan. 1, 1954, by the then lessee of the said premises, and that the then lessor consented to that under-letting. He claimed to be a lawful sub-tenant protected by the Rent Restrictions Acts. By way of counterclaim he alleged that on Feb. 15, 1954, the plaintiffs by their servants or agents broke and entered his dwelling-house and evicted him. He claimed as special damage the costs of the application for a stay of execution and of the application to the master. The plaintiffs in their defence to the counterclaim admitted that on Feb. 15, 1954, the sheriff's officers took possession of the said dwelling-house in pursuance of a judgment of the High Court and under the authority and in execution of a writ of possession issued on Feb. 8, 1954, pursuant to an order of Master BURNAND which order was regularly and properly obtained under the provisions of R.S.C., Ord. 47, r. 1. They further admitted that their agent received possession of the said dwelling-house from the sheriff's officers on Feb. 15, 1954, at about 1.30 p.m., and alleged that at about 5.30 p.m. on the same day possession was restored to the defendant. At the hearing the plaintiffs abandoned the action. The counterclaim was heard and dismissed on the ground that the present case was indistinguishable from *Williams v. Williams & Nathan* (1).

C. L. Collymore for the defendant.

Jellinek for the plaintiffs.

Cur. adv. vult. H

July 30. SIR RAYMOND EVERSLED, M.R.: The respondents, Barclays Bank, Ltd. (hereinafter called the bank), have at all material times been, in their capacity of executors and trustees of a deceased testator, proprietors for a term of years of premises No. 17, Castellain Road, Maida Vale, London. The premises had been sub-leased, and at the time of the commencement of the proceedings next mentioned the sub-lease had become vested in one Mrs. Eliza Amelia

Winnearls. The bank, alleging that Mrs. Winnearls was seriously in arrears with her rent, and also in breach of covenants in her lease, on Dec. 9, 1953, issued a specially indorsed writ against her claiming, on the basis of having validly forfeited the lease, possession of the premises and other relief. Mrs. Winnearls did not defend the proceedings, and on Dec. 29, 1953, the bank obtained judgment in default of appearance for possession of the premises and for arrears of rent, damages, and costs.

Various persons appear to have been in occupation of parts of the house. Among these persons was the present defendant, the appellant, Mr. George Roberts. The bank's solicitors, claiming that any under-letting by Mrs. Winnearls or her predecessors in title had been in breach of covenant and that none of the persons I have mentioned had accordingly any right to remain in occupation, wrote to them all on Jan. 22, 1954, informing them of the bank's judgment, and that they proposed, if any of them remained in occupation after Jan. 30, to apply for a writ of possession. The defendant by his solicitor wrote to the bank's solicitors on Jan. 29, 1954, claiming that the defendant was (contrary to the bank's contention) a lawful sub-tenant within the meaning and subject to the protection of the Rent Restrictions Acts, and at an interview on Feb. 2, 1954, between the solicitors for the defendant and the bank the former contended that any irregularity in the under-letting to the defendant had long since been waived. The bank's advisers did not then accept the validity of the defendant's contention, and on Feb. 8, 1954, they applied for and obtained a writ of possession pursuant to R.S.C., Ord. 47, r. 1. That rule is in the following terms:

"(1) A judgment or order that a party do recover possession of any land may by leave obtained on ex parte application to the court or a judge supported by affidavit, be enforced by writ of possession in manner immediately before Nov. 1, 1875, used in actions of ejectment in the superior courts of common law. (2) Such leave shall not be given unless it is shown that all persons in actual possession of the whole or any part of the land have received such notice of the proceedings as may be considered sufficient to enable them to apply to the court for relief or otherwise."

The reference to Nov. 1, 1875, will be noted. The bank duly complied with the second paragraph of the rule, since they proved the sending by their solicitors to all persons in occupation of parts of the house of the letter of Jan. 22, 1954, above referred to. The actual writ was not in evidence, but we have assumed that it took the form set out in Appendix H to the Rules of the Supreme Court, i.e., it was addressed to the sheriff, and after reciting the judgment for possession, commanded the sheriff to enter the premises and cause the plaintiffs in the action to have possession thereof.

On Feb. 9, 1954, the defendant's solicitor wrote to Messrs. Nathan & Co., the sheriff's officers, asserting again that the defendant was a lawful under-tenant. He added that the defendant was no party to the action between the bank and Mrs. Winnearls, and "has not been served with notice thereof", a statement of which the bank later complained as neglecting their solicitors' letter of Jan. 22, 1954, which I have mentioned. The result, however, was that a telephone conversation took place between the bank's solicitors and Messrs. Nathan & Co. As no evidence was called in the court below, and as we have been required to decide the case on the inference properly to be drawn from this telephone conversation, it is necessary to set out in full the only record of it, which consists of the diary entry of the bank's solicitors. That entry is as follows:

"Attending Nathan & Co. when they telephoned with regard to a letter they had received from Roberts' solicitors; advising them that notice of proceedings had been given and that no application had been made to the

court and in the circumstances as our instructions were that the sub-letting was unlawful they should continue with the ejectment on the 15th."

Messrs. Nathan & Co. proceeded, following this conversation, to execute their writ on Feb. 15, 1954. The events of that day, according to the pleadings and a further entry in the diary of the bank's solicitors, are briefly that the sheriff's officers effected entry about 1.30 p.m. In the meantime the defendant had applied for an injunction (as I understand, in the *Winnearls* action) and obtained in the afternoon a stay of execution. At 5.30 p.m. the bank permitted the defendant to re-enter, though they still denied all the defendant's claims of right. On Feb. 22 an order was made in the *Winnearls* action giving the defendant liberty to enter appearance in the action and to defend, at the same time remitting the action to the Marylebone County Court. The defendant then put in a defence to the bank's claim to possession based on his being a lawful under-tenant within the meaning of the Rent Restrictions Acts. By way of counterclaim he alleged:

"On Feb. 15, 1954, the plaintiffs [the bank] their servants and agents broke and entered the [defendant's] said dwelling-house and evicted the [defendant] therefrom."

He claimed damages accordingly, his particulars of damage referring to the cost of his applications to the court, for an injunction and otherwise.

When the cause came for trial before His Honour JUDGE BENSLEY WELLS, the bank for the first time admitted the validity of the defendant's claim to be a lawful under-tenant. They assented, accordingly, to the dismissal of their action against the defendant with costs. The bank resisted, however, the defendant's counterclaim, and this was tried without oral evidence being given, both sides conceding that the facts were as they appeared in the pleadings and the correspondence and as I have stated them. The learned county court judge was of opinion that on such facts the case was governed by the decision in this court in *Williams v. Williams & Nathan* (1), and he dismissed the defendant's counterclaim with costs.

The defendant now appeals against that judgment, the sole ground of his appeal being that the bank must be treated, as a consequence of the telephone conversation between their solicitors and Nathan & Co. (according to the true interpretation of the diary entry which I have read) as having become the principal of the sheriff's officers when the latter evicted the defendant and took possession of his dwelling-house. If this view is right, then it appears to be conceded by the bank that the damages claimed flowed naturally from the wrongful act of trespass which had been committed. I emphasise that this point has been the only point argued on the defendant's behalf. I am not to be taken as doubting the wisdom in this respect of the defendant's advisers, but it is the fact that, according to the pleadings, the bank's own agent did take possession of the defendant's premises after his eviction therefrom by the sheriff's officers.

I have come to the conclusion, not without hesitation and not without some feeling of dissatisfaction, that the county court judge rightly held the case to be covered by *Williams v. Williams & Nathan* (1), and that the present appeal, therefore, fails. In the cited case, the landlord had, as in the present case, brought an action and obtained a judgment against the head tenant alone, and had also (as in the present case), after giving notice to the occupying sub-tenant, applied for and obtained, by way of execution of his judgment, a writ of possession. The sheriff's officers, Messrs. Nathan & Co., thereupon executed the writ and evicted the sub-tenant, who was, in truth, protected by the Rent Restrictions Acts, and who thereupon brought an action for damages against both the landlord and Nathan & Co. The sub-tenant succeeded in the county court, but the judgment was set aside in this court. As regards the sheriff's officers, this court, following a decision of PARKE, B., in 1847 in *Howard v. Gosset*, *Gosset v. Howard* (2) (10 Q.B. 453), held ([1937] 2 All E.R. 563)

"that the sheriff and his officers executing a judgment, however wrong the judgment may be, or however mistaken they may be as to the effect of the judgment, are not liable to have an action brought against them for damages for what they have done."

As I follow the facts of the case now being cited, the sheriff's officers had, in fact, no knowledge of the sub-tenant's rights. They acted in strict accordance with the terms of the writ of possession and in the belief that they were entitled to evict the plaintiff. As regards the landlord, the only evidence of his participation in the sheriff's officers' proceedings was that he was personally present as a silent spectator at the eviction. It was held that such presence did not suffice to make the sheriff's officers, who were acting as officers of the court, the agents of the landlord. GREER, L.J., who delivered the leading judgment with which SCOTT, L.J., and FINLAY, J., were content merely to concur, said ([1937] 2 All E.R. 561):

"First of all, with regard to the case of the defendant Williams, the landlord, I think it is clear to demonstration, from the case that has been cited of *Woollen v. Wright* (3) and other cases, and from a well-known rule of law, that a sheriff and a sheriff's officer, executing a judgment of the court, are acting, as one may say, on behalf of the court. Each is doing his duty as an officer of the court, and is not a servant or agent of the plaintiff who has recovered judgment in the action. Of course, there may be circumstances which show that the plaintiff by intervention had made the sheriff his agent to do something which was not covered by the judgment, or by the writ of execution. If I had thought that what happened in this case amounted to that, or that the county court judge had found as a fact that the landlord Williams interfered, and requested the sheriff's officer to execute the judgment on property upon which he was not entitled to execute the judgment, then the judge would have been right. But, in my view, there is no evidence justifying any finding as to the special direction given to the sheriff or the sheriff's officer which might make the sheriff or the sheriff's officer the agent of the defendant Williams, the landlord. That is enough to dispose of the case as regards the defendant Williams. It seems to me that, with all respect to the very forcible argument of Mr. Weitzman, the cases he has cited have nothing to do with the matter. They are cases in which the agent of the judgment creditor, the man who has obtained judgment, has requested the officer to execute judgment against somebody who was not a party to the judgment at all, and was not a party to, or included within, the writ of fi. fa. Of course, if a plaintiff who has recovered judgment against Jones says to the sheriff's officer, who is about to issue execution and writ of fi. fa. on the judgment against Jones: 'Issue execution against Williams', he would be liable for the consequences of having so instructed the sheriff's officer. But in this case there is no evidence of any such instructions. The only evidence before the judge on which Mr. Weitzman relies is that the defendant Williams, being present, did not say to the officer: 'You must not execute judgment on the three rooms which are alleged to have been controlled premises.' But that is quite different from saying that the appellant Williams instructed the officer to execute the judgment otherwise than in the manner in which in law it had to be executed. In addition to that, one has to remember that the judgment given by the master in this case was intended by the master to bind everybody on the premises, as in form it does."

It was the argument of counsel for the defendant in this court that the bank's participation in the present case had not been of a merely passive character; that they had here actively intervened in the defendant's eviction; that they had instructed Nathan & Co., to evict the defendant; and that Nathan & Co., having acted on those instructions, must be treated as having been the bank's

agents in the doing of a wrongful act, viz., trespass on the defendant's dwelling-house. In my judgment, the terms of the telephone conversation between the bank's solicitors and Nathan & Co., as recorded by the former, cannot fairly lead to the inference alleged. It is clear that Nathan & Co., having heard from the defendant, sought and obtained the advice of the bank's solicitors and thereupon chose to act on it. There is no question here, as it seems to me, such as was in the mind of GREER, L.J., of the sheriff or his officers departing, at the instance of a judgment creditor, from the terms of the writ of execution. The sheriff's officers adhered throughout to the strict terms and command of the writ of possession and, having done so, must *prima facie* at any rate, on the authority of *Williams v. Williams & Nathan* (1), be treated as having acted independently of the landlord and as officers of the court. As a matter of principle, it seems to me impossible that the character and quality of their actions were entirely altered because they sought advice and then chose to act on that advice (as it was, no doubt, expected that they would). The responsibility for acting on the advice they sought and received was their responsibility. They cannot, in my judgment, be converted into the agents of the persons on whose behalf the advisers were acting—whether that person was the landlord or a stranger to the property in question—unless, at the very least, it were shown that the sheriff's officers made it plain that their subsequent actions were only undertaken on the basis of that other person assuming responsibility therefor. Nothing of that kind, in my judgment, is established in the present case. Whether in a case in which the sheriff and his officers received notice of facts sufficient to show that an occupier was protected by the Rent Restrictions Acts, but, nevertheless, proceeded to evict him, he or they would be liable in damages to the occupier, notwithstanding the decision in *Williams v. Williams & Nathan* (1) (in which, as I have said, no such notice appears to have been received by the sheriff's officers) it is unnecessary in the present case to decide.

I have said that I have reached my conclusion with some feeling of dissatisfaction. The whole of the costs of these proceedings have been occasioned by the mistaken view of the defendant's rights persisted in by the bank until the case came before the county court judge. The bank's counsel also contended that the defendant could at any time after his receipt of the letter of Jan. 22, 1954, and should, have applied for "relief" in the *Winnearls* action, but my sympathies are with the defendant, who, no doubt, shared the reluctance common to most men towards embarking in litigation unless compelled so to do.

This consideration brings me to a matter of some general significance. The terms of R.S.C., Ord. 47, r. 1, reflect the state of the law before the impact of the rent restriction legislation. At that time the determination on forfeiture of a lease necessarily and automatically put an end to the rights of all occupiers derived out of the lease, subject only to the statutory right of such an occupier to apply to the court for relief from the forfeiture. It is, however, fundamental to the rent restriction legislation that no order for possession may be made against a protected tenant save in accordance with the conditions laid down in the Acts: see, for example, s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. So, in *Haskins v. Lewis* (4), SCRUTTON, L.J., appears to lay it down that a writ of possession obtained at the suit of a landlord in an action in which the head tenant only has been joined as a defendant does not entitle the bailiff to evict a sub-tenant protected by the Acts. He said ([1931] 2 K.B. 15):

"... I think an order for recovery of possession of the whole premises can be made in favour of the landlord against the tenant which will result in determining the tenant's interest in the whole of the dwelling-house, and that any suggestion that the order for possession will entitle the bailiff to turn the sub-tenants out of the part of the premises they occupy is met by the provision that as they are tenants of the landlord under the Act [of 1920],

and not tenants of the original tenant, by reason of s. 15 (3), the bailiff will not be able to have such power "

—a view which GREER, L.J., who dissented in *Haskins v. Lewis* (4), accepted in *Williams v. Williams & Nathan* (1) ([1937] 2 All E.R. 561) as being the view of the majority of the Court of Appeal. We were also referred to *Lewis v. Gunter-Jones* (5), but that was a case which arose out of the Small Tenements Recovery Act, 1838, and depended on the special terms of that Act, and it does not appear to carry the matter any further.

I do not think that these citations can affect the validity or effect in the present case, as regards the liability of the bank, of the decision in *Williams v. Williams & Nathan* (1). I venture, however, to suggest that on some convenient occasion the terms of Ord. 47, r. 1, might usefully be reviewed by the appropriate authority. For the reasons which I have stated I think that this appeal must be dismissed.

JENKINS, L.J.: I agree that this appeal fails. The judgment for possession extended to the whole of the premises, and I understand the writ of possession to have been in the usual form directing the sheriff to cause the bank to have possession of the whole of the premises. Accordingly, the sheriff, in ejecting the defendant, was acting within the authority with which the court had invested him by the writ of possession, and the intervention of the bank's solicitors did not result in anything being done by the sheriff or his officers beyond what they were authorised, and, indeed, directed, to do by the court. In these circumstances, I am not prepared to hold that the sheriff's officers, in ejecting the defendant, were acting not as agents of the court, but as agents for the bank so as to make the bank liable in damages to the defendant for his wrongful eviction. It is no doubt true that the eviction of the defendant was wrongful in the sense that the judgment could not affect his rights as a lawful sub-tenant entitled to the protection of the Rent Restrictions Acts ; but it was regular in the sense that it was authorised by the terms of the judgment and writ of possession. The wrong done to the defendant was thus, in my view, attributable to a defect in the practice of the court for which neither the sheriff or his officers, nor the bank can be held liable. The court appears to have acted correctly in accordance with R.S.C., Ord. 47, r. 1, and the injustice which has resulted suggests that a revision of this rule to meet cases where there are protected sub-tenants might well be considered.

HODSON, L.J.: I agree. The wrong done to the defendant was done, I think, due to a defect in the court's procedure which may result in the eviction of a tenant protected by the Rent Restrictions Acts without the landlord being called on to satisfy the court that the provisions of s. 3 of the Act of 1933 have been complied with. Order 47, r. 1, puts the burden on the tenant to apply for relief in cases where application is made for recovery of land. The defendant was given notice of the proceedings and the writ of possession was regularly issued after notice had been given to him, and no relief had been sought by him with the consequence that he was evicted. It was thought that in such a case as the present where persons in possession of part of the premises had become tenants of the landlord by virtue of the operation of s. 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, eviction would not take place: see *Haskins v. Lewis* (4) ([1931] 2 K.B. 15), the passage which Sir RAYMOND EVERSHED, M.R., has read.

It is plain, as this case shows, that eviction may occur when no reply is made to the notice given under Ord. 47, r. 1, for the court is not then informed that persons in possession of part of the premises are protected. This procedure, therefore, runs counter to s. 3 of the Act of 1933 which places restrictions on the right to an order for possession in cases to which the Acts apply and puts a burden on the landlord to satisfy the court that it is reasonable to make an order and that

the other conditions therein contained are satisfied. A revision of the rule would, therefore, appear to be desirable.

Appeal dismissed.

Solicitors: *Alban P. B. Gould* (for the defendant); *Wainwright & Co.* (for the plaintiffs).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

A

B

SWYMER v. SWYMER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Mr. Commissioner Grazebrook, Q.C.), May 31, June 1, July 30, 1954.]

Divorce—Insanity—Incurable unsoundness of mind—Care and treatment for five years—Not “continuously”—Absence from institution to undergo treatment for fractured leg—Matrimonial Causes Act, 1950 (c. 25), s. 1 (1) (d), s. 1 (2) (d).

C

The parties were married in 1918. On Dec. 3, 1925, the husband was admitted to a mental hospital pursuant to a reception order dated Nov. 28, 1925. On Dec. 27, 1951, the husband was discharged “relieved” and re-admitted as a voluntary patient to the same hospital. The husband remained thereafter continuously at the mental hospital except that from Jan. 10, 1953 until May 11, 1953, he was an in-patient of another hospital for treatment to a fractured leg. The other hospital was not an institution within the Mental Treatment Act, 1930, or approved for the purposes of s. 1 of that Act. On a petition by the wife, dated Oct. 21, 1953, for a dissolution of the marriage on the ground that the husband was incurably of unsound mind and had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition,

D

E

Held: as, while the husband was at the hospital where he received treatment for his fractured leg, he was not in an institution approved or designated for the purposes of the Mental Treatment Act, 1930, and was not receiving treatment for mental illness, he had not been continuously under care and treatment for the requisite period of five years, and the petition would be dismissed.

F

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 1 (1) (d), s. 1 (2) (a) (d), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 390; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 368-372, Nos. 3048-3068.

G

PETITION by the wife for dissolution of the marriage.

By her petition dated Oct. 21, 1953, the wife sought a dissolution of the marriage on the ground that the husband was incurably of unsound mind and had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. The husband, by his guardian ad litem, denied the allegation.

H

Tolstoy for the wife.

Horner for the husband.

Cur. adv. vult.

July 30. MR. COMMISSIONER GRAZEBROOK, Q.C. : The parties were married on May 18, 1918, and there is one child, a girl, born on Oct. 4, 1924.

A On Dec. 3, 1925, the husband was admitted to Bexley Hospital in Kent, pursuant to a reception order dated Nov. 28, 1925. Thereafter, according to the evidence, he remained under care and treatment without leave of absence, except that from May 8 to 14, 1950, and from June 18 to 24, 1951, he was on holiday at the Mental After-Care Association Home, as part of his treatment. On Dec. 27, 1951, he was discharged "relieved", and on the same date he was re-admitted as a voluntary patient to the same hospital. He remained at that hospital under care and treatment thereafter, except that from Jan. 10 to May 11, 1953, he was an in-patient at the Southern Hospital, Dartford, Kent, for treatment of a fractured leg. According to the medical superintendent, the husband went to that hospital with the approval of him, the medical superintendent, and for the purpose which I have stated, and the medical superintendent stated that he arranged for reports to be made to him from time to time. After the husband was cured of his fractured leg he returned to Bexley Hospital, where his name had been kept on the books, and he has remained there ever since under care and treatment. The medical superintendent also stated that when he examined the husband on Feb. 10, 1954, he was still suffering from general paralysis of the insane and that he was incurable.

B
C The present case is brought under s. 1 (1) of the Matrimonial Causes Act, 1950, which states that a petition for divorce may be presented on the ground that

"the respondent . . . (d) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition."

D Section 1 (2) of the Act of 1950 provides:

"For the purposes of this section a person of unsound mind shall be deemed to be under care and treatment—

(a) while he is detained in pursuance of any order or inquisition under the Lunacy and Mental Treatment Acts, 1890 to 1930 . . .

E (d) while he is receiving treatment as a voluntary patient under the Mental Treatment Act, 1930 . . . being treatment which follows without any interval a period during which he was detained as mentioned in para

(a) . . . of this sub-section;
and not otherwise."

F On the evidence I am satisfied, and, in fact, it was not disputed, that the husband was detained as required by s. 1 (2) (a) of the Matrimonial Causes Act, 1950. I am also satisfied, and, again, it is not disputed, that the husband received treatment as a voluntary patient under the Mental Treatment Act, 1930, following without any interval a period during which he was so detained.* I am also satisfied that the husband is incurably of unsound mind.

G The question which arises for determination is whether by reason of the time from Jan. 10 to May 11, 1953, which he spent as an in-patient at the Southern Hospital, Dartford, Kent, for treatment to a fractured leg, he can be said to have been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. It is clear there can be no detention in the case of a voluntary patient. This is apparent from s. 1 (1) of the Mental Treatment Act, 1930, which refers to a person "voluntarily submitting himself to treatment"; from s. 1 (5), which provides for a patient leaving "upon giving . . . seventy-two hours' notice" of such intention; and, further, by s. 2 (3), which provides for the discharge of a voluntary patient on the expiration of twenty-eight days after he became incapable of expressing himself as willing or unwilling to continue to receive treatment. The reference to the patient giving notice of his intention to leave the hospital is a reference to

*See s. 1 (2) (d) of the Act of 1950 quoted above.

a final departure by the patient from the hospital or institution. There are no provisions in the Act of 1930 for absences on leave or trial, or escapes of voluntary patients. The Southern Hospital, Dartford, where the husband was sent for treatment to his fractured leg, is not an institution as defined by s. 21 (1) of the Mental Treatment Act, 1930, and it has not been approved by the Minister of Health as a "hospital, nursing home or place . . . for the purposes of" s. 1 (1) of the Act. Various authorities were cited to me in the course of the argument, to which I think it is unnecessary for me to refer because they seem to give no assistance in the determination of the matter which arises in this case. While at the Southern Hospital, Dartford, the husband was not in a prescribed institution and was not and cannot be said to have been receiving treatment for mental illness. That seems clear on the facts of the present case. In those circumstances, the husband, in my view, cannot be said to have been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. The petition, therefore, fails and must be dismissed.

Petition dismissed.

Solicitors: *L. H. Whitlamsmith* (for the wife); *Official Solicitor.*

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

CHAPMAN v. CHAPMAN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Mr. Commissioner Grazebrook, Q.C.), May 31, July 30, 1954.]

Divorce—Insanity—Incurable unsoundness of mind—Care and treatment for five years—Urgency order—Matrimonial Causes Act, 1950 (c. 25), s. 1 (1) (d), s. 1 (2) (a) (d)—Lunacy Act, 1890 (c. 5), s. 11 (1).

The parties were married in 1922. On July 30, 1948, the wife was admitted into a mental hospital by virtue of an urgency order made under the Lunacy Act, 1890, s. 11 (1), which by s. 11 (6) remained in force for seven days. On Aug. 5, 1948, that order was discharged and the wife was immediately re-admitted as, and had ever since remained, a voluntary patient under the Mental Treatment Act, 1930, s. 1 (1). By his petition dated Nov. 17, 1953, the husband sought a dissolution of the marriage on the ground that the wife was incurably of unsound mind and had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. It was contended for the wife that she had never been detained "under any order or inquisition under the Lunacy and Mental Treatment Acts, 1890 to 1930" within the meaning of the Matrimonial Causes Act, 1950, s. 1 (2) (a).

HELD: an urgency order under s. 11 (1) of the Act of 1890 was an "order under the Lunacy and Mental Treatment Acts, 1890 to 1930" within the meaning of that phrase in the Matrimonial Causes Act, 1950, s. 1 (2) (a); the treatment which the wife received as a voluntary patient followed without any interval the period during which she was detained in pursuance of that order; accordingly, she had by virtue of s. 1 (2) (d) of the Matrimonial Causes Act, 1950, been "under care and treatment for . . . five years" as required by s. 1 (1) (d) of that Act, and in the circumstances a decree nisi should be pronounced.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 1 (1) (d), s. 1 (2) (a) (d), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 390; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 368-372, Nos. 3048-3068.

FOR THE LUNACY ACT, 1890, s. 11 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 17, p. 1065.

FOR THE MENTAL TREATMENT ACT, 1930, s. 1 (1), s. 17, see *ibid.*, Vol. 17, pp. 1230, 1241.

FOR THE NATIONAL HEALTH SERVICE ACT, 1946, s. 50 (1) and sched. IX, see *ibid.*, Vol. 15, pp. 383 and 415.

Cases referred to:

- (1) *Crutchfield v. Crutchfield*, [1946] 2 All E.R. 730n.; [1948] L.J.R. 99; 27 Digest, Replacement, 371, 3066.
- (2) *Whitley v. Whitley*, [1946] 2 All E.R. 726; *affd.* C.A., [1947] 1 All E.R. 667; 177 L.T. 360; 27 Digest, Replacement, 371, 3067.
- (3) *Benson v. Benson*, [1941] 2 All E.R. 335; [1941] P. 90; 110 L.J.P. 43; 165 L.T. 172; 27 Digest, Replacement, 371, 3065.

PETITION by the husband for dissolution of the marriage.

By his petition dated Nov. 17, 1953, the husband alleged:

" 5. That the [wife] is incurably of unsound mind and has been continuously under care and treatment* for a period of at least five years immediately preceding the presentation of this petition. 6. That on July 30, 1948, the [wife] while suffering from senile dementia was admitted to . . . hospital . . . under an urgency order made in compliance with the Lunacy Act, 1890, s. 11, and was there detained for care and treatment. That on Aug. 5, 1948, the [wife] while still detained at the said hospital was regraded a voluntary patient within the meaning of the Mental Treatment Act, 1930, s. 1, and has ever since July 30, 1948, remained at the said hospital under continuous care and treatment . . . Wherefore the [husband] prays . . . that his . . . marriage may be dissolved."

The wife by her guardian ad litem denied that she was incurably of unsound mind or that she had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition, and alleged:

" The [wife] was never detained under any order or inquisition under the Lunacy and Mental Treatment Acts, 1890 to 1930."

R.M.A.C. Talbot for the husband.

Horner for the wife.

Cur. adv. vult.

July 30. MR. COMMISSIONER GRAZEBROOK, Q.C.: The parties were married on Apr. 4, 1922, and there are no children of the marriage. On

*The ground for divorce stated in s. 1 (1) (d) of the Matrimonial Causes Act, 1950, is that the respondent "is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition." By s. 1 (2) (d) of the Matrimonial Causes Act, 1950 (HALSBURY'S STATUTES, 2nd ed., vol. 29, p. 390), a person of unsound mind is deemed to be under care and treatment while receiving "treatment as a voluntary patient under the Mental Treatment Act, 1930 . . . being treatment which follows without any interval a period during which he was detained as mentioned in para. (a) . . . of this subsection." Paragraph (a) provides that a person of unsound mind is deemed to be under care and treatment "while he is detained in pursuance of any order . . . under the Lunacy and Mental Treatment Acts, 1890 to 1930 . . ." Thus, in the present case, the period of voluntary treatment could be added to the period of detention for the purpose of making an aggregate of at least five years under care and treatment, if the short initial period of detention was pursuant to an "order" under the Acts of 1890 to 1930.

Jan. 10, 1935, the husband went to California and it was arranged that the wife was to follow him there. The wife never, in fact, followed him there, although the husband stated that he tried to persuade her to do so. In May, 1945, the husband returned to England (which was, by reason of circumstances at the time, the earliest time at which he could return) and, he stated, when he joined his wife on his return to this country he noticed that there was a change in her. He instanced as a change that he noticed that she seemed to want to be by herself. In July, 1947, with the wife's consent (according to the husband), he went to the United States of America. While there he was taken ill, and was ill, I gather, for about two years; he returned to this country in April, 1951. On his return he ascertained that his wife, pursuant to an urgency order issued under s. 11 (1) of the Lunacy Act, 1890, had been admitted to a hospital in Surrey, on July 30, 1948. She was then suffering, apparently, from arterio-sclerotic-dementia and has been continuously under care and treatment, according to the evidence, without leave of absence, and on Aug. 5, 1948, she was regraded as a voluntary patient under s. 1 (1) of the Mental Treatment Act, 1930. On the evidence I am satisfied that the wife is incurably of unsound mind, and it is quite clear that she is receiving treatment as a voluntary patient under the Mental Treatment Act, 1930, and has been receiving such treatment since Aug. 5, 1948.

The matter which I have to determine is whether the detention under the urgency order dated July 30, 1948, is detention under an order within s. 1 (2) (a) of the Matrimonial Causes Act, 1950. By the Lunacy Act, 1890, s. 11 (1)*:

"In cases of urgency where it is expedient, either for the welfare of a person . . . alleged to be . . . of unsound mind, or for the public safety, that the alleged person of unsound mind should be forthwith placed under care and treatment, he may be received and detained in an institution for persons of unsound mind . . . upon an urgency order, made (if possible) by the husband or wife or by a relative of the alleged person of unsound mind, accompanied by one medical certificate."

By the Lunacy Act, 1890, s. 341, a reception order is stated to include an urgency order. An urgency order is clearly a temporary order, and by s. 11 (6) of the Act of 1890 it can only remain in force for seven days. In the present case the urgency order was discharged by operation of law when it was about to expire—the wife having expressed her willingness to sign the form necessary for her admission as a voluntary patient—and she was, on the discharge of the urgency order, immediately re-admitted as a voluntary patient at the hospital, where she has remained ever since.

There appears to be no authority on the question which I have to determine. Certain cases were cited to me in the course of the argument. *Crutchfield v. Crutchfield* (1) concerned s. 20 of the Act of 1890, which deals with the reception and detention of a pauper alleged to be of unsound mind, and is parallel with s. 11 which is the section applicable in the present case. *JONES, J.*, held in *Crutchfield v. Crutchfield* (1) that the wife was not detained in a mental hospital or institution pursuant to an order or inquisition under the Lunacy and Mental Treatment Acts, 1890 to 1930. *Whitley v. Whitley* (2) also dealt with s. 20 of the Act of 1890†. In that case *BARNARD, J.*, held that the wife was not detained pursuant to an order or inquisition under the Lunacy and Mental Treatment Acts, 1890 to 1930, and in the course of his judgment *BARNARD, J.*, did refer ([1946] 2 All E.R. 728) to an urgency order as being an order under the Lunacy and Mental Treatment Acts, 1890 to 1930. That reference by the learned judge was not necessary for the purposes of his decision and it is not binding on me in

*As amended by the Mental Treatment Act, 1930, s. 17, s. 22 (2) and sched. IV.

†A new s. 20 of the Act of 1890 was substituted by the National Health Service Act, 1946, s. 50, sched. IX, Part I, as from July 5, 1948.

the present case. *Whitley v. Whitley* (2) was taken to the Court of Appeal but the appeal was dismissed on the fact (as it turned out on further investigation at the instance of the Court of Appeal) that certain requisite provisions had not been complied with, and the ground on which BARNARD, J., dealt with the case was not dealt with by the Court of Appeal. I was also referred to *Benson v. Benson* (3) which was a case under s. 5 of the Mental Treatment Act, 1930, dealing with temporary treatment of certain persons for a period not exceeding six months. LORD MERRIMAN, P., held that an order made by the Board of Control under s. 5 (13) of the Mental Treatment Act, 1930, extending the period of six months, was an order under s. 3 (a) of the Matrimonial Causes Act, 1937, which at that time was the equivalent of the present enactment, viz., s. 1 (2) (a) of the Matrimonial Causes Act, 1950.

Although *Crutchfield v. Crutchfield* (1) and *Whitley v. Whitley* (2) related to detention of a temporary nature or of short duration, the decisions were based on the fact that there was no detention under an order under the Lunacy and Mental Treatment Acts, 1890 to 1930. Section 1 (2) (a) of the Matrimonial Causes Act, 1950*, refers to "any order . . . under the Lunacy and Mental Treatment Acts, 1890 to 1930," as being required to bring the parties seeking a divorce within s. 1 (1) (d) of the Act of 1950; and although, clearly, an urgency order is of a temporary nature and of very short duration, it is, in fact, an order under the Lunacy and Mental Treatment Acts, 1890 to 1930. In those circumstances I am satisfied that the wife was detained due to an order, and that the husband has proved his case in accordance with s. 1 (1) (d) of the Matrimonial Causes Act, 1950, and I pronounce a decree nisi.

Decree nisi.

Solicitors: *Peacock & Goddard*, agents for *Arthur F. Clark & Son*, Reading (for the husband); *Official Solicitor*.

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

*See the footnote at p. 117, ante, where the relevant provisions of s. 1 (2) (a) and s. 1 (2) (d) of the Matrimonial Causes Act, 1950, are stated.

INLAND REVENUE COMMISSIONERS *v.* BROADWAY
COTTAGES TRUST.
INLAND REVENUE COMMISSIONERS *v.* SUNNYLANDS
TRUST.

[COURT OF APPEAL (Singleton, Jenkins and Hodson, L.JJ.), June 29, 30, July 1, 2, 26, 1954.]

Settlement—Trust—Discretionary trust—Uncertainty Unascertainable class of beneficiaries—Certain members of class ascertainable—Invalidity of trust. Income Tax—Settlement—Discretionary trust to pay income among unascertainable class—Certain members, including charities, ascertainable—Payments of income made to charities—Trust invalid but payments deemed to be authorised by settlor—Income not exempt from tax—Income Tax Act, 1918 (c. 40), s. 37 (b).

By a settlement dated July 14, 1950, a trust fund was to be held during a defined period on trust to apply the income thereof for the benefit of all or any of certain persons, described as the donor's wife and "the beneficiaries", in such manner as the trustees in their discretion should from time to time think fit, and the discretion of the trustees was declared to be absolute and uncontrolled. It was not possible at any given moment to ascertain all the persons who might come within the description "the beneficiaries", but it was possible to determine with certainty whether a particular individual was a member of the class. Payments of income were made by the trustees of the Sunnylands Trust and the Broadway Cottages Trust, which were institutions established for charitable purposes only and were objects of the discretionary trust of income declared by the settlement. Exemption from income tax for these payments was claimed by the institutions for the tax years 1950-51 and 1951-52.

HELD: (i) as, in accordance with the principle stated in *Morice v. Bishop of Durham* (1805) (10 Ves. 539, 540), if a trust were to be valid it must be one which the court could control and execute, a trust of income for such members of a class as the trustees should select was, if the whole range of members of the class were not ascertainable, void for uncertainty, although certain members of the class were ascertainable.

Re Ogden ([1933] Ch. 678), approved.

(ii) if under such a void trust income were applied for the benefit of a charitable institution which was a member of the class, the income was not income of the charitable institution for the purposes of s. 37 (b) of the Income Tax Act, 1918, so as to be exempt from income tax under that section and render tax deducted recoverable, but in the circumstances must be regarded as having been income of the settlor under a resulting trust paid to the charitable institutions by his authority.

Decision of WYNN-PARRY, J. ([1954] 1 All E.R. 878), affirmed.

AS TO DISCRETIONARY TRUSTS AND UNCERTAINTY, see HALSBURY, Hailsham Edn., Vol. 33, pp. 112, 113, paras. 198, 199; and FOR CASES, see DIGEST, Vol. 43, pp. 581-583, Nos. 300-321.

FOR THE INCOME TAX ACT, 1918, s. 37, see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 31; compare, now, INCOME TAX ACT, 1952, s. 447, *ibid.*, Vol. 31, p. 427.

Cases referred to:

(1) *Morice v. Durham (Bp.)*, (1805), 10 Ves. 522; 32 E.R. 947; 8 Digest 293, 705.

(2) *Re Gestetner*, [1953] 1 All E.R. 1150; [1953] Ch. 672; 3rd Digest Supp.

(3) *Re Park*, [1932] 1 Ch. 580; 101 L.J.Ch. 295; 147 L.T. 118; Digest Supp.

(4) *Re Jones*, [1945] Ch. 105; 115 L.J.Ch. 33; 173 L.T. 357; 2nd Digest Supp.

- (5) *Re Ogden*, [1933] Ch. 678; 102 L.J.Ch. 226; 149 L.T. 162; Digest Supp.
- (6) *Houston v. Burns*, [1918] A.C. 337; 87 L.J.P.C. 99; 118 L.T. 462; 8 Digest 297, 739.
- (7) *Grant v. Lyman*, (1828), 4 Russ. 292; 6 L.J.O.S.Ch. 129; 38 E.R. 815; 37 Digest 458, 594.
- (8) *Harding v. Glyn*, (1739), 1 Atk. 469 (26 E.R. 299); cited in 5 Ves. 501 (31 E.R. 703); 37 Digest 528, 1192.
- (9) *Salisbury v. Denton*, (1857), 3 K. & J. 529; 26 L.J.Ch. 851; 30 L.T.O.S. 63; 21 J.P. 726; 69 E.R. 1219; 8 Digest 277, 472.
- (10) *Wilson v. Duguid*, (1883), 24 Ch.D. 244; 53 L.J.Ch. 52; 49 L.T. 124; 37 Digest 532, 1232.
- (11) *Re Scarisbrick*, [1951] 1 All E.R. 822; [1951] Ch. 622; 2nd Digest Supp.

APPEALS by the taxpayers from orders of WYNN-PARRY, J., dated Mar. 11, 1954, and reported [1954] 1 All E.R. 878, allowing appeals by way of Cases Stated from decisions of the Special Commissioners of Income Tax.

The taxpayers were two institutions established for charitable purposes only, who had received sums paid out of the income of a settlement dated July 14, 1950, made between a Mr. Alan Geoffrey Timpson, the settlor, and trustees. They applied to the commissioners to hear and determine their claims for exemption from income tax for 1950-51 and (the first trust only) 1951-52, relating to these sums, which they contended were their income. It was agreed that the class of beneficiaries as defined in cl. 1 of, and the schedule to, the settlement was a class the whole range of members of which it was not possible to ascertain at any given moment, and that, on the other hand, the qualifications for inclusion in the class of beneficiaries were precise enough to enable it to be ascertained whether any particular person was a member of the class at any time. The taxpayers contended that the provisions of the settlement created a valid trust of income in favour of them among other objects, and the Crown contended that they created no such valid trust. The commissioners held that the discretionary trust of income was not void for uncertainty, but the trustees had a power of selection and there was a valid and effective trust of the income of the trust fund, with the attendant consequence that the sums of money were income of the taxpayers and were exempt from income tax. On appeal, WYNN-PARRY, J., held that the clause as to trust income (cl. 8) was void for uncertainty and a payment to a charity under it was, therefore, not income of the charity exempt from income tax under s. 37 (b) of the Income Tax Act, 1918. The taxpayers appealed.

Cross, Q.C., J. H. Stamp and Sir Reginald Hills for the Crown.
Pennycuik, Q.C., and Brennan for the respondent taxpayers.

Cur. adv. vult.

July 26. JENKINS, L.J., read the following judgment of the court. These are appeals by two charitable institutions, known respectively as the Sunnylands Trust and Broadway Cottages Trust, from two orders of WYNN-PARRY, J., both dated Mar. 11, 1954, allowing appeals by the Inland Revenue Commissioners from decisions of the Special Commissioners to the effect that the taxpayers, the Sunnylands Trust in the one case and Broadway Cottages Trust in the other case, were entitled to exemption from income tax for the years 1950-51 and 1951-52 under the provisions of s. 37 (b) of the Income Tax Act, 1918, in respect of certain sums of money received by them respectively from the trustees of a settlement dated July 14, 1950, and made between Alan Geoffrey Timpson (hereinafter called "the settlor") of the one part and the settlor, William Drake Lee, and Peter Thomas Matthew Wilson (hereinafter called "the trustees") of the other part. The charitable character of the two taxpayers and their consequent right to exemption from tax on their income under the provisions of s. 37 (b) are not in dispute. The sole question in each of the two

appeals is whether the sums of money received by the taxpayers from the trustees, and admittedly paid by the trustees out of the income of the fund comprised in the settlement, were income of the charitable institution. The answer to that question depends wholly on the further question whether the relevant provisions of the settlement had the effect contended for by the taxpayers of creating a valid trust of income in favour of those institutions among other objects, in which case the appeals must succeed, or, as contended by the Inland Revenue Commissioners, and held by WYNN-PARRY, J., created no such valid trust, in which case the appeals must fail.

The settlement comprised a sum of £80,000 made over to the trustees by the settlor, and in addition to administrative clauses as to investment and so forth it included the following provisions:

" (1) In this settlement the following expressions shall where the context so admits have the following respective meanings and shall be construed in the following manner, viz.: . . . (c) 'The appointed period' means a period beginning on the date hereof and continuing until terminated under the power hereinafter contained or if not so terminated until twenty years after the death of the last survivor now living of the issue of his late Majesty King George V. (d) 'The beneficiaries' mean the persons specified in the schedule hereto and 'beneficiary' means one of the beneficiaries. (4) The trustees shall hold all such investments as aforesaid and the varied investments and property and interests in property from time to time representing the same and all other investments and property and interests in property (if any) from time to time subject to the trusts hereof (all of which are hereinafter included in the expression 'the trust fund') upon trust for such of the beneficiaries as shall be living or (being a charitable trust) existing at the termination of the appointed period and if more than one in equal shares. (5) The interest to be taken under the last preceding clause hereof by any beneficiary at the termination of the appointed period shall be absolute interest. (6) Provided always that the trustees at any time or times not being less than six years after the said day of declaration . . . if in their discretion they think fit so to do may by deed declare the appointed period to be terminated either as to the whole of the trust fund or as to any aliquot or specific part thereof to the intent that the trust fund or (as the case may be) the part thereof to which such declaration relates and the income of the same may be held upon the trusts and subject to the powers and provisions upon and subject to which the same would at the date of such declaration be held if the appointed period had then been terminated by effluxion of time and such declaration shall be effectual. (7) And if all the beneficial trusts hereinbefore declared shall fail . . . then the trust fund and the income thereof shall be held upon charitable trusts to be declared by the trustees . . . to the intent that neither the donor or any wife or widow of his shall in any event whatsoever take any interest by way of resulting trust or otherwise in the trust fund or the income thereof or any accretions thereto or in any part of the same. (8) During the appointed period the trustees shall hold the income of the trust fund from the date or respective dates from which the trustees shall become entitled to such income upon trust to apply the same for the benefit of all or any one or more of the donor's said wife and the beneficiaries in such shares proportions and manner as the trustees in their discretion from time to time think fit (and so that such moneys as the trustees may from time to time think fit to apply for the benefit of any of the beneficiaries who shall have attained the age of twenty-one years be paid to him or to her on his or her receipt which shall be a complete discharge to the trustees). (9) Provided always that the trustees shall have the power from time to time at their discretion to capitalise the said income or any part thereof either by investing the same and treating such

investments as part of the capital of the trust fund or in any other mode of capitalisation which may appear to the trustees to be expedient and pending such application as aforesaid of such income the trustees may temporarily invest or place on deposit the same and all income thereby produced shall be treated as the income of the trust fund. (10) The trustees shall also have power during the appointed period to apply the whole or any part of the capital of the trust fund in their discretion for the benefit of all or any one or more of the beneficiaries either by way of advancement on account of his or her or their share or shares or not as the trustees may in their discretion think fit and notwithstanding in the case of any beneficiary that the total amount so applied for the benefit of such beneficiary may exceed the share to which he or she is contingently entitled to any share in the capital of the trust fund . . . (15) Every discretion hereby conferred on the trustees shall be an absolute and uncontrolled discretion and may (if and so far as circumstances permit) be exercised from time to time.

The Schedule: 1. All persons (other than the settlor and any wife of his and any infant child of his) who have been in the past or (as the case may be) at the date of these presents or subsequently thereto at any time during the period ending on Dec. 31, 1980, or during the appointed period whichever shall be the shorter employed by :—(a) the settlor (b) the wife of the settlor (c) William Timpson deceased (father of the settlor and who died on Jan. 20, 1929) (d) Katherine Chapman Timpson deceased (mother of the settlor and who died on Dec. 16, 1940) (e) William Timpson, Ltd., or by any other limited company which may succeed to the business of William Timpson, Ltd. (f) Any other limited company of which the settlor is a director at the date of these presents. 2. The wives and widows of any such persons as is specified in cl. 1 of this schedule.”

Then follow the further paragraphs 3 to 12, but I will not take up time by reading them in detail. They include the issue, however remote, of the settlor's father and of the father of the settlor's wife, and a number of named persons, including in some cases their spouses and issue. Finally, in para. 12 there is

“Broadway Cottages Trust and Sunnylands Trusts (both being charitable foundations).”

It will be seen that the operative provisions of the settlement as regards capital comprise (in cl. 4) a trust for such of the beneficiaries as shall be living or (being a charitable trust) existing at the termination of the appointed period and if more than one in equal shares; (in cl. 6) a power to the trustees to declare the appointed period to be terminated as regards the whole or any part of the trust fund so as to bring into immediate operation the trust declared by cl. 4 as if the appointed period had terminated by effluxion of time; and (in cl. 10) a power to the trustees during the trust period to apply capital for the benefit of beneficiaries or any of them. It is further to be observed that cl. 7, which precedes the trust of income declared by cl. 8, contains a gift over upon charitable trusts “if all the beneficial trusts *hereinbefore* declared shall fail”. It is common ground that this clause, preceding as it does the trust of income during the appointed period, has no application to the failure of that trust.

It should next be noted that the only disposition of income during the settlement period (apart from the power of capitalising income contained in cl. 9) consists of the trust declared by cl. 8, under which the trustees are to apply the same for the benefit of all or any one or more of the settlor's wife and the beneficiaries in such shares, proportions and manner as the trustees in their discretion from time to time think fit. Lastly, it is to be remarked that the class of beneficiaries described in the schedule includes (in para. 1) persons employed in the past or at the date of the settlement or at any time thereafter during the period until Dec. 31, 1980, or the end of the appointed period, whichever is the shorter,

not only by the settlor and his wife but by his father who died in 1929, his mother who died in 1940, the company William Timpson, Ltd., which according to the Stated Case is a public company formed in 1929 to take over the business of a private company of the same name formed in 1912 to take over the business founded in 1870 by the settlor's father, any other limited company which may succeed to the business of William Timpson, Ltd., or any other limited company of which the settlor was a director at the date of the settlement: and in para. 2 the wives and widows of any such persons as are specified in para. 1.

In view of the wide scope of para. 1 and para. 2 of the schedule, it is conceded on the part of the taxpayers that the persons who, according to the terms of the schedule, constitute "the beneficiaries" for the purposes of the settlement comprise an aggregate of objects which is incapable of ascertainment in the sense that it would be impossible at any given time to achieve a complete and exhaustive enumeration of all the persons then qualified for inclusion in the class of beneficiaries under the terms of the schedule. On the other hand, it is conceded on the part of the Crown that the qualifications for inclusion in the class of "beneficiaries" prescribed by the schedule are sufficiently precise to make it possible to determine with certainty whether any particular individual is or is not a member of the class.

It must, we think, follow from the taxpayers' concession to the effect that the class of "beneficiaries" is incapable of ascertainment, and we understand them not to dispute, that the trust of the capital of the settled fund for all the beneficiaries living or existing at the termination of the appointed period, and if more than one in equal shares, must be void for uncertainty, inasmuch as there can be no division in equal shares amongst a class of persons unless all the members of the class are known. We think it must also follow that a trust to divide the income of the trust fund during the appointed period among a class consisting of the settlor's wife and all the beneficiaries for the time being living or in existence, and if more than one in equal shares, would equally have been void for uncertainty.

The trust of income during the appointed period as actually declared by cl. 8 is not in those terms, but is a trust to apply such income for the benefit of all or such one or more of the settlor's wife and the beneficiaries as the trustees in their discretion think fit, and the question in the Case is, in effect, whether the power of selection thus conferred on the trustees saves the trust from uncertainty having regard to the concession made by the Crown to the effect that, while the trustees can never discover all the beneficiaries, they can always tell whether a given individual is or is not one of the beneficiaries, and can, therefore, with certainty confine any payments they think fit to make to persons qualified as beneficiaries according to the terms of the schedule.

In approaching this question both sides accept the principle stated by LORD ELDON, L.C., in *Morice v. Bishop of Durham* (1), where he said (10 Ves. 539, 540):

"As it is a maxim, that the execution of a trust shall be under the control of the court, it must be of such a nature, that it can be under that control: so that the administration of it can be reviewed by the court: or, if the trustee dies, the court itself can execute the trust: a trust therefore, which, in case of maladministration could be reformed: and a due administration directed: and then, unless the subject and the objects can be ascertained, upon principles, familiar in other cases, it must be decided, that the court can neither reform maladministration, nor direct a due administration."

The principle can be concisely stated by saying that, in order to be valid, a trust must be one which the court can control and execute. Counsel for the taxpayers contends that it is satisfied by the trust now before the court. Counsel for the Crown contends that it is not.

The arguments in support of the Crown's claim that the trust is invalid are to this effect. First, the court could not compel the trustees to make any distribution of income under cl. 8 of the settlement, for that clause purports to confer on the trustees an uncontrolled discretion to determine the person or persons falling within the class of beneficiaries to whom any distribution is to be made, and the shares in which those persons, if more than one, are to take; and it would be beyond the power of the court to make or enforce an order on the trustees to exercise that discretion. Nor could the court itself exercise the trustees' discretion in the event of their failing or refusing to do so, for the discretion is conferred on, and exerciseable by, the trustees alone. Secondly, if the class of beneficiaries was an ascertainable class, it would or might be possible to imply a trust in default of distribution by the trustees for all the members of the class in equal shares, and that would be a trust which the court could control and execute. But as the class is unascertainable, no such trust can be implied.

Thirdly, again, if the class was ascertainable, it would or might be possible for all the beneficiaries to join in a demand for the execution of the trust by the distribution of the whole income among themselves in equal shares, and proper for the court to recognise and enforce that demand as made by all the persons beneficially interested in the subject-matter of the trust. But, as the class is unascertainable, no such demand is possible. Short of the whole class, no beneficiary or collection of beneficiaries can claim execution of the trust, for the trustees are under no duty to any particular beneficiary or beneficiaries, short of the whole class, to make any distribution to him or them of the whole or any part of the income; and such duty as the trust purports to impose on them towards the class as a whole is illusory, since the whole class can never be ascertained.

Fourthly, the validity of the trust must be tested by considering its terms and asking oneself whether the court would be able to control and execute the trust if called on to do so. That question must be answered by reference to what might happen, and not merely by reference to what would be likely to happen. That is to say, the charge of invalidity cannot be met by making the assumption (in itself reasonable enough) that trustees undertaking a trust such as this would in all probability carry it out, by distributing the income among persons falling within the class of beneficiaries as defined by the settlement. On the contrary, it must be assumed that the trustees for some reason or other might fail or refuse to make any distribution, and see whether the court could execute the trust in that event. Consideration of the case on that assumption shows that the most the court could do would be to remove the inert or recalcitrant trustees and appoint others in their place. That, however, would not be execution of the trust by the court, but a mere substitution for one set of trustees invested with an uncontrollable discretion of another set of trustees similarly invested, who might be equally inert or recalcitrant.

Fifthly, there is a distinction between a trust for distribution among all or any one or more exclusively of the others or other of an unascertainable class, with no other disposition (which is this case), and a power to distribute among all or any one or more exclusively of the others or other of an unascertainable class with a trust in default of appointment for an ascertainable class. In the latter case (at all events if the qualification for membership of the unascertainable class is such as to make it possible to decide with certainty whether a given individual is or is not a member of it) there is a valid disposition of the beneficial interest which the court can control and execute in the shape of the trust in default of appointment, and although the execution of the power is beyond the control of the court except in the negative sense that it can prevent any purported exercise of the power in favour of non-objects, it will, nevertheless, be a valid power operating, if and so far as exercised, as a defeasance in favour of the appointee or appointees of the interests given in default of appointment. This

is illustrated by the decision of HARMAN, J., in *Re Gestetner* (2) (where the class of objects of the power was comparable to the class of objects of the trust in the present case), that of CLAUSON, J., in *Re Park* (3) (where there was a power to appoint to anyone other than the donee of the power herself), and that of VAISEY, J., in *Re Jones* (4) (where there was a provision construed by VAISEY, J., as a power to appoint to any natural person (as distinct from a corporation) living at the death of the donee of the power). In the former case (of which the trust now before the court is an example) no trust which the court can control and execute, or in other words no valid trust at all, is created, for there can be no trust in favour of the unascertainable class as a whole, no beneficial interest is conferred on any particular member or members of the class unless and until the trustees think fit to make some distribution to him or them, and the making or withholding of any such distribution rests on the uncontrolled discretion of the trustees, which the court can neither exercise nor compel to be exercised. In *Re Ogden* (5) LORD TOMLIN rightly took the view that it was essential to the validity of a trust for such of a given class of objects as the trustee should select that the trustee should know, or be able to ascertain, all the objects from which he was enjoined to select by the terms of the trust. The trust in that case was contained in a gift by will of a share in the testator's residuary estate to Sir Herbert Samuel (we quote the summary of the terms of the bequest given in the headnote) ([1933] Ch. 678):

"to be by him distributed amongst such political federations or bodies in the United Kingdom having as their objects or one of their objects the promotion of Liberal principles in politics as he shall in his absolute discretion select and in such shares and proportions as he shall in the like discretion think fit."

LORD TOMLIN said ([1933] Ch. 682):

"... all that I have to consider is, whether there is such uncertainty in the field of selection that it is impossible for the selector to determine from which institutions he is to select. If so, the bequest is bad on the ground of uncertainty. The question is one of degree in each case, whether, having regard to the language of the will, and the circumstances of the case, there is such uncertainty as to justify the court in coming to the conclusion that the gift is bad. Now, it is to be observed that in the present case the field of selection is: 'Political federations or associations or bodies in the United Kingdom, having as their objects or one of their objects the promotion of Liberal principles'. I have the evidence of Sir Herbert Samuel, who has referred to a number of bodies which come within the description, and who states that, in fact, he can ascertain by inquiry all the bodies that can come within that description, and I take the view that upon that evidence, and the language of the will, and having regard to the principles laid down from time to time, there is certainty here in the field of selection. It comes within the words of LORD ATKINSON in *Houston v. Burns* (6) ([1918] A.C. 345): 'I do not think that this case has the slightest resemblance to those in which property is vested in trustees to be applied for the support or benefit of such institutions of a particular class as may be in existence, or in the course of creation, in any given town or area at the time at which the will speaks. There is no vagueness or uncertainty in such cases at all.' Now, it seems to me that here you have a class capable of ascertainment, and in a specified area, and in my view the bequest is not void on the ground that the field is too vague. I hold that the gift is not void for uncertainty."

Sixthly, the court cannot mend the invalidity of the trust by imposing an arbitrary distribution among some only of the whole unascertainable class. The line of cases referred to in argument as the "relations" cases: see *Grant v. Lyman* (7) (4 Russ. 293, 294), *Harding v. Glynn* (8), cited in *Grant v. Lyman* (7),

Salisbury v. Denton (9), *Wilson v. Duguid* (10), *Re Scarisbrick* (11); relied on by the taxpayers, may be regarded as further illustrations of the proposition, accepted above, that a power to appoint among an unascertainable class may be valid, but are sui generis in so far as they decide that a trust for such of the relations of a given person as the trustee may select, while enabling the trustee to select relations in any degree, operates in default of selection as a trust for the statutory next-of-kin of the propositus, a trust for relations in every degree, however remote, being admittedly void for uncertainty. No comparable contraction of the class in default of selection by the trustees is possible in the present case.

Seventhly, for these reasons the trust declared by cl. 8 of the settlement is invalid and the most the settlor has done by that clause is to confer on the trustees a revocable mandate to distribute the income among such persons or institutions selected by the trustees as fall within the class of beneficiaries as defined by the settlement, including the two appellant institutions, the taxpayers. But payments made to either of those institutions under such revocable mandate cannot be income of that institution so as to enable it to recover the tax paid thereon, any more than an uncovenanted subscription to its funds voluntarily made by the settlor himself would be part of its income for the purposes of such recovery.

On the taxpayers' side it is argued that there is no reason whatever to suppose that any difficulty would arise in practice in the implementation of the trust declared by cl. 8 of the settlement. The trustees, having undertaken the trust, must be assumed to be ready and willing to carry it out, and, as it is possible to decide with certainty whether any particular person is or is not qualified as a member of the class of "beneficiaries", they can carry it out by distributing the income among undoubted members of the class, selected by them. So far as misfeasance by the trustees is concerned, that is to say distribution otherwise than among members of the class, this could be restrained by the court at the suit of any member of the class. So far as non-feasance on the part of the trustees is concerned, the court could at the suit of any such member remove the offending trustees and appoint others in their place, and repeat the process as necessary until trustees who would duly carry out the terms of the trust were found. The possibility that, not only the original trustees, but every set of trustees appointed in their place would fail or refuse to do this is so remote that it can for practical purposes be disregarded. If necessary the court, acting on the analogy of the "relations" cases, could declare a trust in default of distribution by the trustees in favour of a modified class which could be completely ascertained. Alternatively, the court might, on the analogy of *Salisbury v. Denton* (9), hold the income divisible in specified proportions by reference to the classification of objects contained in the schedule, as, for example, by appropriating one share to the beneficiary or collection of beneficiaries described in each of the paragraphs of the schedule. Even if cl. 8 creates no valid trust, the settlor has by that clause at least conferred on the trustees an irrevocable power to distribute the income among such members of the class of beneficiaries (including the two appellant institutions, the taxpayers) as they think fit, with a resulting trust in favour of the settlor if and so far as the power is not exercised; and payments made to either of the appellant institutions (the taxpayers) in exercise of this irrevocable power are income of that institution for all purposes. *Re Odgen* (5) is not, in the taxpayers' submission, an authority against them. In that case the whole range of possible objects was on the evidence completely ascertained, and there was no need for the learned judge to decide what the position would have been if the whole range of objects had not been completely ascertained, and his observations on that matter were accordingly obiter. Further, it is not clear whether the learned judge was referring to uncertainty as regards the complete enumeration of all possible objects (which is the kind of uncertainty here in

question) or to uncertainty as regards the qualification for membership of the class. If and so far as the former kind of uncertainty was meant, the view he expressed was in the taxpayers' submission erroneous.

We confess to some sympathy for the taxpayers' argument, which has about it an attractive air of common sense, but we do not think it can be allowed to prevail. We think the submissions made on behalf of the Crown, to the effect that the trust is not one which the court could control or execute, and that this objection cannot be met by urging the improbability of assistance by the court ever becoming necessary, are well founded. We also agree with the further submission on the same side to the effect that the court would not be executing the trust merely by ordering a change in the trusteeship. We are satisfied that the "relations" cases are in a class by themselves and provide no assistance in the present case, and that it would not be possible here for the court to create an arbitrarily restricted trust to take effect in default of distribution by the trustees. There is nothing in this case comparable to the two possible meanings of the term "relations".

In our view, the construction placed on behalf of the Crown on the above-quoted observations of LORD TOMLIN in *Re Ogden* (5) is the right one, and we see no reason for questioning the correctness of those observations of that eminent judge. On the contrary, LORD TOMLIN's view, which we take to be that a trust for such members of a given class of objects as the trustees shall select is void for uncertainty unless the whole range of objects eligible for selection is ascertained or capable of ascertainment, seems to us to be based on sound reasoning and we accept it accordingly.

We cannot assent to the submission made for the taxpayers to the effect that the settlor in the present case at least succeeded in conferring on the trustees an irrevocable power (as distinct from a trust) to appoint income to any one or more of the "beneficiaries", including the two appellant institutions (the taxpayers), so that any sums appointed to them under such power became their income for the purpose of recovering tax. We do not think a valid power is to be spelt out of an invalid trust. If the trust declared by cl. 8 of the settlement is void for uncertainty, then the trustees do not hold the income in question on that trust but (by way of resulting trust) in trust for the settlor, with no power to dispose of it in any manner otherwise than by paying it to, or as directed by, the settlor. The settlor must be taken to have authorised any payments heretofore made by the trustees (of whom he himself is one) in purported execution of the invalid trust, but there the matter ends.

WYNN-PARRY, J., in our view rightly, held himself bound by *Re Ogden* (5) and *Re Gestetner* (2), to decide the case in favour of the Crown. Counsel for the taxpayers criticised his judgment for referring to the "relations" cases as instances of powers of distribution as distinct from trusts for distribution, and, therefore, irrelevant to the present case. This description of the "relations" cases was, perhaps, not quite accurate, but for the reasons we have endeavoured to state we agree with WYNN-PARRY, J., that they have no application here. We are, accordingly, of opinion that these appeals fail and should be dismissed.

Appeals dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue; Boxall & Boxall, agents for Wilson & Wilson, Kettering (for the taxpayers).*

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re MURRAY (deceased). MARTINS BANK, LTD. AND
ANOTHER v. DILL AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.J.J.),
July 28, 29, 30, 1954.]

Will—Condition—Certainty—Condition subsequent—Name and arms clause—
Tenant for life to “assume” testator’s surname “either alone or in
substitution of his . . . usual surname” and to “apply for proper authority
to bear and use” testator’s family arms—Interest to be determined on
refusal or neglect to assume surname or arms within one year of becoming
entitled.

Will—Words—Adding words or re-modelling clause—Unjustified for purpose of
assisting forfeiture.

A testator by his will and first codicil settled certain property, known as the C estate on a strict settlement and provided as follows—by cl. 8, “Every person who . . . becomes entitled as tenant for life . . . to the possession . . . of the [C estate] and also the husband of any female becoming so entitled shall unless prevented by death or accident assume the surname of Murray either alone or in substitution of his or her usual surname (yet so that the name of Murray shall be the last or usual name) and shall apply for proper authority to bear and use my family arms”; by cl. 9, “In case any person becoming so entitled or being a married woman her husband shall refuse or neglect to assume the surname of Murray and arms aforesaid or to make such application as aforesaid within one year after he or she shall so become entitled” then the interests of that person should absolutely determine; and by cl. 10, “It is my earnest wish and desire that every person becoming entitled as tenant for life . . . to the possession . . . of [the C estate] or in the case of a married woman her husband shall continue to use the surname of Murray as aforesaid and to bear my family arms so long as they are entitled to the possession of [the C estate] . . .” The testator having died, the question arose whether these provisions for the assumption of the surname of Murray and for applying to proper authority to bear and use the testator’s family arms were valid.

HELD: the court was not justified in reading words into or re-modelling the provisions for assumption of name and arms so as to assist a forfeiture, and accordingly the provisions were void for uncertainty because, if they were not re-modelled, the court could not see from the beginning (i.e., from the time when the first tenant for life entered into possession) precisely and distinctly on the happening of what event it was that the estate of the tenant for life was liable to be determined.

Dictum of LORD CRANWORTH in *Clavering v. Ellison* (1859) (7 H. L. Cas. 725), applied.

Appeal allowed.

AS TO NAME AND ARMS CLAUSES, see HALSBURY, Hailsham Edn., Vol. 29, pp. 789-792, paras. 1097, 1098; and FOR CASES, see DIGEST, Vol. 35, pp. 705-709, 711, 712, Nos. 55-80, 95-98.

AS TO ALTERING OR SUPPLYING WORDS IN A WILL, see HALSBURY, Hailsham Edn., Vol. 34, p. 215, para. 272; and FOR CASES, see DIGEST, Vol. 44, p. 597, No. 4214 et seq.

Cases referred to:

- (1) *Re Parrott*, [1946] 1 All E.R. 321; [1946] Ch. 183; 115 L.J.Ch. 211; 175 L.T. 190; 2nd Digest Supp.
- (2) *Re Lewis’s Will Trust*, [1951] W.N. 591; [1951] 2 T.L.R. 1032; 2nd Digest Supp.
- (3) *Re Bouverie*, [1952] 1 All E.R. 408; [1952] Ch. 400; 3rd Digest Supp.

- (4) *Re Wood's Will Trusts*, [1952] 1 All E.R. 740; [1952] Ch. 406; 3rd Digest Supp.
- (5) *Re Kersey*, [1952] W.N. 541; 3rd Digest Supp.
- (6) *Bromley v. Tryon*, [1951] 2 All E.R. 1058; [1952] A.C. 265; 3rd Digest Supp.
- (7) *Clavering v. Ellison*, (1859), 7 H.L. Cas. 707; 29 L.J.Ch. 761; 11 E.R. 282; 44 Digest 440, 2667.
- (8) *Sifton v. Sifton*, [1938] 3 All E.R. 435; [1938] A.C. 656; 107 L.J.P.C. 97; 159 L.T. 289; Digest Supp.
- (9) *Re Croxon*, [1904] 1 Ch. 252; 73 L.J.Ch. 170; 89 L.T. 733; 35 Digest 711, 93.

APPEAL by the first defendant, the tenant for life, from an order of UPJOHN, J., dated July 7, 1954, and made on an application by the testator's executors to the court by originating summons, declaring that, on the true construction of the will and codicils of John George Murray, deceased, the provisions contained in the first codicil in regard to the assumption of the surname of Murray and to the application for proper authority to bear and use the testator's family arms were valid.

R. W. Goff, Q.C., and *G. D. Johnston* for the first defendant, the tenant for life.

M. Albery for the second defendant, interested in the residuary estate in default of prior limitations.

B. S. Tatham for the plaintiffs, the trustees.

SIR RAYMOND EVERSLED, M.R.: The question which falls for determination in this case concerns the validity of certain provisions in the first codicil of the testator's will purporting to cause a divesting of a vested estate on failure to comply with conditions as to the adoption of the testator's name and arms. The relevant question is thus framed in the originating summons:

"Whether upon the true construction of the said will and codicils the provisions contained in the said codicil dated June 3, 1952, in regard to the assumption of the surname of Murray and the application for proper authority to bear and use the family arms of the said John George Murray are wholly or to some and what extent valid and binding or void on the ground of uncertainty or otherwise."

The relevant dates and other facts which should be stated are these. The testator was John George Murray, and by his will, dated Jan. 11, 1951, he strictly settled substantial property known as the Coles Park Estate. By his first codicil, dated June 3, 1952, he substituted for cl. 8, cl. 9 and cl. 10 in the will (which I may briefly refer to as name and arms clauses and which appear to have followed well-known precedents) name and arms clauses of a somewhat different character. The testator's second codicil was dated Oct. 4, 1952, and is immaterial. The testator died on Aug. 11, 1953. The will and codicil were proved on Oct. 1, 1953, the plaintiffs in the action being the executors and trustees. The effect of the strict settlement of the estate was that the first life interest thereunder was taken by the first defendant, Richard Patrick Gordon Dill (referred to as Major Dill). In the event of the failure or defeasance of his estate various other interests arise which are represented by the second defendant, Joseph Lumley Murray.

Before I read the relevant clauses in the first codicil, there are certain general observations which I should like to make. The first is this. I have read the summons and the only question which was raised by it, other than a question to which we have not been referred, as nothing turned on it for the purpose of this appeal. Counsel for the second defendant, at the end of his argument, indicated the possibility of an argument on behalf of the second defendant based on what is known as dependent relative revocation: that is to say, he might desire to

contend that, if the clauses substituted by the first codicil for cl. 8, cl. 9 and cl. 10 in the will are held to be invalid, then the revocation of the clauses in the original will would be ineffective and the original clauses would be, as it were, resurrected. That question was not raised in the summons, and, if it is open to the second defendant, nothing in this judgment will affect it. Further, at the end of the judgment in the court below, according to the shorthand note taken at the time, certain questions were raised by counsel for Major Dill (who was defeated) as to what he ought to do in order to comply with the terms of the relevant clauses. These questions were also not raised by the summons and I can see no reason why the learned judge should have been required to answer them. The discussion as recorded, however, did show, as I read it, that the learned judge had thought the case one of real difficulty and that he felt substantial doubts, by no means alleviated by the discussion, about the answer.

The second general observation is of a different character. In the course of the argument reference was made to a number of modern decisions on name and arms clauses. These included *Re Parrott* (1), *Re Lewis's Will Trust* (2), and *Re Bouverie* (3), all decisions of VAISEY, J., *Re Wood's Will Trusts* (4), a decision of WYNN-PARRY, J., and, finally, *Re Kersey* (5), a decision of DANCKWERTS, J. We were, indeed, told that these cases, or some of them, may have been the reason why the testator made his first codicil substituting in it for his original name and arms clauses those to be found in the first codicil. However that may be, the cases, especially the last one, raise some doubt whether even those name and arms clauses which follow substantially precedents of respectable antiquity would now be regarded as valid.

I should have liked to have taken time to consider the present case before delivering my judgment, not only out of respect to UPJOHN, J., but more particularly if it should be thought necessary or desirable for me to express any view on those modern cases. But the dates which I have already mentioned make it essential that the court should give its decision at once, for the time limit for compliance with the conditions in the codicil expires on Aug. 11, 1954. In the circumstances I have been able to reach my decision on the special (and they are very special) terms of the instrument which we have to construe. Though I have reached a different conclusion from that which appealed to UPJOHN, J., and have, therefore, done so with no little hesitation, I am comforted by the fact that, as I read his judgment and the transcript of the note of the discussion which followed it, it seems to me that the learned judge felt real doubt, as I have already indicated, in his own mind on this matter. I wish, however, to make it plain that, basing my decision as I do on the special terms of the first codicil, I express no opinion one way or the other on the validity of the recent decisions which I have briefly mentioned. I can understand the view that clauses of this character in the year 1954 are something of an anachronism. I can also understand the view, which found some expression in the note of the judgment of DANCKWERTS, J., in *Re Kersey* (5), that the emancipated status of a married woman today has a real bearing on questions whether, from the point of view of public policy, clauses are desirable which might make her capacity to enjoy in her own right substantial proprietary interests dependent on the willingness of her husband to change his name. Parliament has not legislated, however, on the subject and many of these clauses are derived from precedents settled very many years ago by skilled and careful conveyancers.

In *Bromley v. Tryon* (6) in the House of Lords, LORD SIMONDS, L.C., in the course of his speech, used these words ([1951] 2 All E.R. at p. 1065):

"If, indeed, on a consideration of the clause, I came to the clear conclusion that the words in question had no precise meaning, I should be bound to give effect to my opinion. A long course of conveyancing practice cannot, I think, even where titles may be founded on it, be given the same effect as a line of judicial authority. But at the lowest I should hesitate long

before I concluded that words which had for nearly a hundred years passed unchallenged by conveyancers, men often profoundly learned in the law of real property and apt to dwell on nice distinctions of language, were after all incapable of sufficiently precise definition."

The decision in *Bromley v. Tryon* (6) related to a different, but analogous, kind of clause, namely, an elaborate shifting clause, and, in my judgment, the language which I have quoted is by no means inapplicable to some, at any rate, of the types of name and arms clauses not uncommonly met with in practice.

Having made clear, as I hope, this reservation, I return to the particular case before us. Before I read the clause I desire to adopt once more the language of LORD SIMONDS, L.C., in *Bromley v. Tryon* (6). In approaching the construction of the clause in that case the Lord Chancellor said ([1951] 2 All E.R. at p. 1064):

"I come then to the point which was not argued before HARMAN, J., but was chiefly relied on in the Court of Appeal and in this House, viz., that the clause is altogether void for uncertainty. It is a question which I must approach with this familiar principle in the foreground of my mind: '... that where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine'."

LORD SIMONDS, L.C., was there citing, and, indeed, his own speech reflected closely, the language of LORD CRANWORTH in 1859 in *Clavering v. Ellison* (7) (7 H.L. Cas. at p. 725). Though *Clavering v. Ellison* (7) has been cited and applied in a number of modern cases (e.g., in *Sifton v. Sifton* (8) and in *Bromley v. Tryon* (6)) I find it unnecessary to add further citations from those cases.

Clavering v. Ellison (7) provides, as I think, the answer to one argument which counsel for the second defendant put forward, namely, that it is only necessary to look ex post facto (as it were), when forfeiture clauses are alleged to have operated, at what has occurred and then to ask: In fact, has the tenant for life complied or not complied with the obligations laid on him? I do not think that that is right. This being in the nature of a divesting clause, a condition subsequent, it is necessary in the language used by LORD CRANWORTH in *Clavering v. Ellison* (7) (7 H.L. Cas. at p. 725) that the court should see from the beginning—that is to say, from the time when the first tenant for life entered into possession—precisely and distinctly on the happening of what event it was that his vested estate was liable to be determined.

I now read so much of the three clauses, inserted in the will by the first codicil, as is material:

"8. Provided always that every person who under the trusts hereinbefore contained becomes entitled as tenant for life or in tail male or in tail by purchase to the possession or to the receipt of the rents and profits of the Coles Park Estate and also the husband of any female becoming so entitled shall unless prevented by death or accident assume the surname of Murray either alone or in substitution of his or her usual surname (yet so that the name of Murray shall be the last or usual name) and shall apply for proper authority to bear and use my family arms. 9. In case any person becoming so entitled or being a married woman her husband shall refuse or neglect to assume the surname of Murray and arms aforesaid or to make such application as aforesaid within one year after he or she shall so become entitled . . . 10. It is my earnest wish and desire that every person becoming entitled as tenant for life . . . to the possession . . . of the Coles Park Estate or in the case of a married woman her husband shall continue to use the surname of Murray as aforesaid and to bear my family arms so long as they are entitled to the possession of the Coles Park Estate . . ."

It appears from the cases, I think, that a distinction has to be drawn between

what I will call uncertainty in expression, on the one hand, and uncertainty in operation, on the other. Thus it may be that an instrument is drawn in language so obscure that the court is quite unable to discover from that language what was the intention of the testator or settlor. In another case the language itself may be quite unambiguous to the reader and seem, therefore, to show quite clearly the precise event contemplated, and yet, when the language is applied to the facts of the case, it then produces in fact a doubt or uncertainty how it operates. In some cases the distinction between uncertainty in expression and uncertainty in operation is much more clearly marked than in others. The present case appears, perhaps, to be one in which the distinction is not so clearly marked.

Counsel for the second defendant, in the course of his argument, said that it is the first duty of the court to construe the instrument, applying, so far as is proper in the case of a will, due liberality to the terms used, and, having done that and not before, it is then for the court to see how, in fact, the instrument operates or is liable to operate. One is not, says counsel for the second defendant, to observe obscurities in expression, to add them together without any real attempt at solving them, and then to say that the whole document is too obscure to enable one to determine with sufficient precision how it will operate in practice. I am prepared to accept that argument as well founded, but doing my best fairly to construe this instrument—and since this is a defeasance clause the construction must be rather strict than liberal—I am still left in three respects with such a doubt as to the operation of the clause as leads me to conclude that the test in *Clavering v. Ellison* (7) has not been satisfied in the present case.

The first doubt arises as to the exact significance in the particular context of this case of the word "assume", a point which, as appears from the shorthand note of the proceedings below, was not argued at the time before the learned judge, but which was raised afterwards in the course of the discussion. I observe first that cl. 10 in the codicil negatives continuing user of the name or the arms as a matter of obligation. On the other hand, it is, I think, clear that the word "assume" in reference to a surname necessarily imports some degree of user. Is it possible here to say with the certainty and precision which is required in this case what user short of continuous user is postulated for the assumption of the name? Put more particularly, is it possible to say with sufficient precision and certainty whether the assumption of the surname and subsequent discontinuance within the year would or would not cause a forfeiture? It would, obviously, be possible within the year for a life tenant to take all necessary steps to assume the name of Murray, to use it substantially and, in fact, for an appreciable time, and then, still within the year, to discontinue it. Counsel for the second defendant accepted the suggestion that such a procedure would involve compliance with the terms of the codicil. I must say I find that difficult to accept. I find it difficult to suppose that the testator could by his language have so intended. At any rate, I am left in real doubt on that matter. Had it not been for cl. 10, I should have been strongly moved to the conclusion, based on some, though slight, authority (see *Re Croxon* (9)), that the word "assume" involved both the notions of taking and of user, but the conjunction of the sole word "assume" (and not "take and use") and the provisions of cl. 10 seem to me to make this matter one of real substantial doubt.

I then come to the second matter of difficulty which arises from the extremely unusual and difficult phrase

... assume the surname of Murray either alone or in substitution of his or her usual surname . . .".

According to UPHOUN, J., that conjunction of words was hardly sensible, and, had he not felt able to read into the clause something which he thought had been omitted, I draw the inference that he would have felt unable to support the validity of the clause. He said:

"It was rightly pointed out that in cl. 8 there is an obvious confusion.

It is, of course, nonsense to lay down a condition that the donee must 'assume the surname of Murray either alone or in substitution of his or her usual surname'. That does not make sense. Still less does it make sense when you look at the following words in brackets: '(yet so that the name of Murray shall be the last or usual name)'. It seems to me, however, quite clear that some words must have dropped out, and I do not think there is any difficulty in supplying them. The sentence may read 'shall assume the surname of Murray either alone or in addition to or in substitution for his or her usual surname', or perhaps the same result is achieved if the words 'in substitution of' be struck out and be replaced by 'or in addition to'. Whichever be adopted, I cannot feel any doubt in my own mind that the testator was laying down quite clearly two conditions which a donee, on coming into possession of the estate, was to satisfy."

Of course, if, on the words as they stand and without guessing, a court is able to say that it is obvious that there has been a slip and it is obvious also what the slip is, it would, no doubt, be right to make the emendation. To take the example given by counsel for the second defendant: if you find in an instrument a reference to lending money "with or with security", nobody, I think, could possibly doubt that the second "with" was a mistake, a slip in writing or transcribing, for "without". I cannot, however, feel satisfied in this case what the slip was or that it is legitimate to insert something in, or to alter, the words which the testator used. I agree also with counsel for Major Dill that the results are not necessarily the same according as one puts in the words "or in addition to" or one strikes out "in substitution of" and replace those words by "in addition to". Moreover, as a matter of principle, unless the case is clear beyond doubt, I am not satisfied that the court is justified in reading words into, or otherwise re-modelling, the clause in order to assist a forfeiture. If I am so far right, then, it seems to me, there remains here again a real doubt as to what extent the name Murray might be made part of a surname either as the last word in the surname or otherwise.

I think that the point is probably sufficiently clear, once it is accepted that the substitution or re-modelling cannot be done, from the discussion in argument, but, in order to make the point again, let it be supposed that Major Dill thought fit to add the word "Murray" to his name and to call himself "Major Dill Murray". Would that be a substitution of "Murray" for his usual name of "Dill", because the word "Murray" is then his last name? Would it make any difference if Major Dill continued for some purposes (for example, the army records) to call himself "Major Dill" as before? What, if it be his last name, would be the significance of the words "or usual"? Counsel for the second defendant suggested that "last or usual" were merely synonymous, but of that again I am not by any means sure. Instances were again given. We all know of persons who may have professional names which might or might not be their "usual" names. I am thinking of authors or actors as obvious examples. Without, therefore, elaborating this point further, to my mind, rejecting as I do the temptation to re-model this clause, I am here faced with an absence of that precision which I think *Claverling v. Ellison* (7) requires.

I come to the third and last of my three difficulties, which arises out of the opening words of cl. 9 when read in relation to the final words of cl. 8, which are concerned with the assumption or bearing of arms. Clause 9 says:

"In case any person . . . shall refuse or neglect to assume the . . . arms aforesaid or to make such application as aforesaid . . ."

Those words carry one back to the concluding words of cl. 8, and it will be seen at once that they do not correspond, for the obligation at the end of cl. 8 was to assume the name of Murray and "shall apply for proper authority to bear and use my family arms". It is clear that the words "to bear and use" are

governed by "shall apply", so that the only obligation in cl. 8 is to apply to bear and use, whereas in cl. 9 the forfeiture may arise through any failure to use as distinct from making application. There, again, the learned judge was able to solve the difficulty by a re-modelling of the clause. Having noted the difficulty, he said:

"... putting it shortly, I think the clause can be read: 'If he shall refuse or neglect to assume the surname of Murray and the arms of Murray, if he receives authority to bear them, or, if he does not, if he refuses and neglects to make such application as aforesaid'..."

Again, I am not satisfied that it is legitimate to involve oneself in such a re-modelling for the purpose of assisting a forfeiture. Let it be supposed that Major Dill, bearing his own arms, then makes application to bear the arms of Murray and is told by the authority, whoever it might be, that certain conditions will have to be complied with by him; and let it be supposed that Major Dill then says that he is unwilling to comply with those conditions. Has he or has he not satisfied the obligation? He has made the application, but by continuing to use and bear his own arms he would, I presume, be held not to have borne or used the arms of Murray. It seems to me that there is here a confusion, and again I am not prepared so to re-model this clause for the purpose of avoiding a forfeiture.

These difficulties seem to me to produce the result that, once more using the words of LORD CRANWORTH (7 H.L. Cas. at p. 725) in *Clavering v. Ellison* (7), which were quoted by LORD SIMONDS, L.C. ([1951] 2 All E.R. at p. 1064) in *Bromley v. Tryon* (6), the court cannot here see

"... from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine."

For those reasons, and with respect to the learned judge below, I have come to the conclusion that the answer to the question in the summons ought to be that the provisions contained in the codicil of June 3, 1952, in regard to the assumption of the surname of Murray and the application for proper authority to bear and use the testator's family arms are void for uncertainty, and I would allow the appeal.

JENKINS, L.J.: For the reasons stated by my Lord, to which I cannot usefully add anything, I agree that this appeal should be allowed.

HODSON, L.J.: I also agree for the same reasons.

Appeal allowed.

Leave to appeal to the House of Lords refused.

Solicitors: *Oswald Hickson, Collier & Co.* (for the first defendant); *Crossman, Block & Co.* (for the second defendant and the trustees).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

MINSTER TRUST, LTD. v. TRAPS TRACTORS, LTD., AND OTHERS.

[QUEEN'S BENCH DIVISION (Devlin, J.), February 22, 23, 24, 25, 26, March 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, May 19, 1954.]

Sale of Goods—Condition—Re-conditioned machines—Sellers to supply certificate by third party that machines fully re-conditioned to third party's satisfaction—Meaning of "fully re-conditioned"—"Certificates in rem"—"Certificates in personam"—Whether implied warranty.

The first defendant, Traps Tractors, Ltd., owned tractor equipment which it let out on hire. The second defendant, Plant Sales and Exchange, Ltd., bought and sold such equipment. The third defendant was the substantial shareholder and sole active director of both companies. At the time of the sales mentioned below Traps Tractors, Ltd., was in voluntary liquidation.

In June, 1952, Traps Tractors, Ltd., owned six D.8 tractors and six scrapers, and four T.D.14 tractors and scrapers, which were being re-conditioned. In the course of that month the plaintiffs agreed at various times to buy from Traps Tractors, Ltd., in all, the six D.8 units and two T.D.14 units on terms which included a condition that "all these machines are to be supplied with the Hunt Engineering Certificate that they have been fully re-conditioned to their (i.e., Hunts') satisfaction". Hunts carried on a business of inspecting new and second-hand machines and reporting on their condition. Their method was to inspect the machinery, to issue periodical progress reports and a final report to their customer. Their reports were not described as certificates of quality or condition and were not intended to be such, although it was commonly understood in the engineering trade that they had a standard of full re-conditioning.

At the time of the sale the liquidator of Traps Tractors, Ltd., sent to the plaintiffs such progress reports on the re-conditioning of the machines as had been issued. In June and July, 1952, there were communications between the third defendant and Hunts regarding the re-conditioning. The third defendant drew attention to defects in the D.8 units and discrepancy in the description of condition and requested that Hunts' certificates should use the phraseology that "the machines have been satisfactorily overhauled on a fully re-conditioned basis". Hunts pointed out that the wording of the report already given had had to be moderated as, with the agreement of the third defendant, the tyres of some machines had been removed and re-fitted without Hunts' inspectors being given the opportunity of examining the tyres internally. On July 10 Hunts sent to the liquidator of Traps Tractors, Ltd., twelve documents, in similar form, one for each tractor and each scraper of the D.8 units. These documents were described as "Inspection Reports", not as certificates, and the tractors and scrapers were described therein as "used and fully re-conditioned". Each report stated, among other statements, that "the inspections made during the course of the re-conditioning . . . have proved that this unit has been overhauled" (in the case of the tractors, and "re-conditioned" in the case of the scrapers) "in a workmanlike and satisfactory manner and the completed unit is accepted as re-conditioned to the required standards". On July 16 the liquidator of Traps Tractors, Ltd., sent the reports to the plaintiffs. During July and August, 1952, some of the machines began to give trouble and it became apparent that further extensive repairs would be necessary to keep them in running order. The two T.D.14 units were never passed by Hunts as fully re-conditioned and nothing which could be called a certificate was issued in respect of them. On Apr. 24, 1953, the plaintiffs issued a writ against the three defendants claiming damages for breach of contract and for breach of warranty. The claim against the second defendant related only to a sale of

property other than the tractor units, and the claim against the third defendant failed on the ground that he did not undertake personal liability in respect of the sales. As regards the claim against Traps Tractors, Ltd.,

HELD: (i) expressed or implied in the contracts of sale, by reason of the inclusion therein of the provision that "all these machines are to be supplied with the Hunt Engineering Certificate that they have been fully re-conditioned to their satisfaction", were terms (a) that the machines were to be fully re-conditioned up to Hunts' standard, (b) that a valid certificate by Hunts in the terms prescribed would be conclusive that the machines had been fully re-conditioned up to that standard, and (c) that the sellers would supply such a certificate; and the certificate so required was a certificate of condition for the benefit of all persons who might be concerned with the machinery, i.e., a certificate in rem, as distinct from a certificate in personam, that is to say, a certificate based on standards required by a particular contract or customer.

(ii) the plaintiffs were entitled to damages for breach of contract (a) because the documents tendered by Traps Tractors, Ltd., to the plaintiffs were factual reports, not certificates of quality such as the contracts required, and (b) because the phrase in the reports "the completed unit is accepted as re-conditioned to the required standards" was ambiguous and thus did not comply with the contracts of sale, for the satisfying of which an unambiguous certificate that was readily understandable was required.

(iii) the measure of damages was the difference between the value of the machines fully re-conditioned in accordance with the contract and their value as delivered, and, as the market value could not be determined, the amount of the damages should be assessed by reference to the time (as hire would be lost) and cost of putting the machines into the contractual condition.

Quære, whether there was an implied warranty that, whatever sort of certificate was to be supplied under the contracts of sale, it must be the result of the uninfluenced and independent judgment of the certifier applying his own standards (see p. 153, letter B, post).

EDITORIAL NOTE. Hunts, whose business it was to examine and report on the condition of machines, were not arbitrators as there was no dispute which they were to determine; see 2 HALSBURY'S LAWS (3rd edn.) 5. If they had been determining a dispute judicially, as an arbitrator, action by one party to the dispute intended to influence the decision might have been a ground for setting aside the determination; see *ibid.*, at p. 59. Hunts were, however, in the position of certifiers, analogous to that which architects or engineers occupy when exercising their skill and judgment but not determining disputes judicially; see 3 HALSBURY'S LAWS (3rd edn.) 520. Hunts' obligations were owed to the person who employed them, not to the purchasers of the machines. On the further question whether a term should be implied in the contract of sale that the certifiers' certificate would be the result of an independent judgment no decision is reached, but, in general, terms are not to be implied in contracts merely because it would have been reasonable for the parties to have included them; see 8 HALSBURY'S LAWS (3rd edn.) 124.

Cases referred to:

- (1) *Ranger v. Great Western Ry. Co.*, (1854), 5 H.L. Cas. 72; 24 L.T.O.S. 22; 10 E.R. 824; 7 Digest 361, 113.
- (2) *Newton Abbot Development Co., Ltd. v. Stockman Bros.*, (1931), 47 T.L.R. 616; Digest Supp.
- (3) *Petrofina S.A. of Brussels v. Compagnia Italiana Trasporto Olii Minerali of Genoa*, (1937), 53 T.L.R. 650; 42 Com. Cas. 286; Digest Supp.
- (4) *Cammell Laird & Co., Ltd. v. Manganesse Bronze & Brass Co., Ltd.*, [1934] A.C. 402; 103 L.J.K.B. 289; 151 L.T. 142; Digest Supp.

- (5) *Hickman & Co. v. Roberts*, [1913] A.C. 229; 82 L.J.K.B. 678; 108 L.T. 436n.; 7 Digest 353, 84.
- (6) *Panamena Europea Navigacion (Compania Limitada) v. Frederick Leyland & Co., Ltd. (J. Russell & Co.)*, [1947] A.C. 428; [1947] L.J.R. 716; 176 L.T. 524; 2nd Digest Supp.
- (7) *Equitable Trust Co. of New York v. Dawson Partners, Ltd.*, (1927), 27 Lloyd's Rep. 49.
- (8) *Neale v. Richardson*, [1938] 1 All E.R. 753; 158 L.T. 308; Digest Supp.

A

ACTION for damages for breach of contract and/or warranty and/or duty in and about the sales by the first and second defendants to the plaintiffs of certain plant and machinery.

The plaintiffs, Minster Trust, Ltd., were investment bankers who had dealings in the commercial handling of earth-moving machinery. The first defendant, Traps Tractors, Ltd., owned earth-moving machinery which it let out on hire to contractors. The second defendant, Plant Sales and Exchange, Ltd., bought and sold such machinery. The first and second defendants were companies with a nominal capital of £32 each. The third defendant, Mr. Francis Gaster, owned substantially all the shareholding in the defendant companies and operated through them. In April, 1952, the third defendant put the first defendant into voluntary liquidation, his object being to sell all its plant and thus to make a capital profit. This plant was advertised for sale in the "Contract Journal" for June 4, 1952, and consisted, inter alia, of six D.8 caterpillar tractors, advertised as new 1950 complete with P.C.U. and Le Tourneau scrapers, and four T.D.14 tractors, also with Le Tourneau scrapers. The advertisement was put in by the second defendant, but that company owned only one item of plant advertised, viz., a 43 R.B. (Ruston Bueyrus) excavator, which was being re-sold in the ordinary course of business after being overhauled by the makers. All the plant was advertised as being "in the finest condition", and the tractors were also advertised as being sold with "Hunt 'A' Certificate", while the excavator was described as "overhauled and re-conditioned".

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The third defendant had bought the six D.8 tractors in the United States of America in 1949, but the scrapers which went with these tractors were bought second-hand and were of varying ages. In February, 1950, the third defendant handed the management of these machines to a firm called Joe Beaton, Ltd. (referred to hereinafter as "Beatons"), of Hatfield. In March, 1951, he made a contract with Richard Costain, Ltd. (referred to hereinafter as "Costains"), for the hire of these six tractors for a minimum period of fifty-four weeks. The contract provided that on completion of hire the machines should be overhauled and re-conditioned by Costains at their cost

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"under the supervision and to the satisfaction of the Hunt Engineering Co. and the hire will cease on the date of the issuance of their certificate that the machines have been satisfactorily overhauled on a fully re-conditioned basis."

The contract provided, inter alia, (i) that, if any fractures or breakages had been welded, before re-delivery the welded parts would be replaced with new parts, or with second-hand parts if such were acceptable to the Hunt Engineering Co.; (ii) that, in regard to new parts, only standard (American) parts would be fitted if available, and, if they were not available, British-made parts could be substituted, if acceptable to the Hunt Engineering Co.; and (iii) that the tyres fitted to the scrapers should be

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"passed by the Hunt Engineering Co. as not less than ninety per cent. new and free from gashes, which would lessen this percentage."

The "Hunt Engineering Co." mentioned in the contract was the Robert W. Hunt Co. (referred to hereinafter as "Hunts"), an American corporation carrying on business as consulting engineers, with their head office in Chicago.

They had a London branch under the management of a Mr. Lockwood. Their main business was the inspection and certification of new machinery in all parts of the world and in 1952 part of their business was the inspection of and the making of reports on second-hand machinery. Their system was for their inspectors to make a number of inspections and to issue to their customer progress reports from time to time. After the final inspection they issued an inspection report in which they stated their conclusions. On Apr. 13, 1951, the third defendant gave them his formal instructions to act on his behalf under the contract with Costains.

In March, 1952, when the hire contract with Costains came to an end, the work of re-conditioning the six D.8 units started. The third defendant insisted at first that there should be a renewal of all worn parts and no welding, but when it was pointed out to him that, under the contract with Costains, the special provision in regard to welding applied only to fractures and breakages, and not to worn parts, he withdrew his objection, and Hunts informed Costains that he had agreed to the building up of worn parts by welding

“ to a satisfactory standard for work to be carried out to our standards and approval ”.

During April Hunts made reports on two of the tractors and the accompanying scrapers, stating that the machinery

“ had been re-conditioned to the required standards and to our satisfaction ”.

But they also stated that it had not been re-painted, and they did not state that the tyres were ninety per cent. When the third defendant spoke to Mr. Lockwood about these matters, Mr. Lockwood said that final reports had not yet been issued, and that he would see that these things were done. Further progress reports were made during May but a final report had not been made by June 4, when the advertisement for sale was published.

The third defendant had bought the T.D.14 tractors and scrapers in March, 1947, as government surplus and had let them out on hire. In October, 1951, he decided that these machines needed to be re-conditioned and sent them to Beatons for that purpose. On Feb. 18, 1952, he wrote to Mr. Lockwood of Hunts:

“ We should like them [the T.D.14 units] to be re-conditioned to your standard so that your fully re-conditioned certificate can be issued on completion of the work ”.

Hunts issued two reports on these tractors, on Apr. 21 and 28 respectively.

The 43 R.B. excavator was a 1946 model which the third defendant had bought in May, 1951. In October, 1951, he sent it to a company called Stutley in Hertfordshire for overhaul under the supervision of a Mr. Chambers, a service engineer employed by Ruston Bucyrus, the manufacturers.

On June 4, 1952, Mr. Ferguson, the chairman of the directors of the plaintiff company, having seen the advertisement in the “ Contract Journal ”, telephoned to the third defendant and arranged a meeting for June 9, when they discussed all the advertised machinery. On June 10 they visited Beatons at Hatfield to arrange that, in the event of a purchase, Beatons should continue to manage the T.D.14 tractors on behalf of the plaintiffs. On June 11, at a meeting between the third defendant and Mr. Ferguson, Mr. Hill (a director of the plaintiff company), and Mr. Billingham (Mr. Hill's personal assistant), the plaintiffs agreed to buy two T.D.14 tractors, with their scrapers and other equipment, for £4,000 each, and three D.8 tractors, with scrapers and equipment, for £12,000 each (this sale being referred to in the statement of claim as “ the first contract ”). They also agreed to buy the 43 R.B. excavator for £12,000 (this sale being referred to in the statement of claim as “ the second contract ”). On June 12 letters were written confirming all the sales. The letter confirming the sale of the two T.D.14

units and the three D.8 units was written by the liquidator of Traps Tractors, Ltd. The letter relating to the excavator was written by the third defendant on behalf of the second defendant (Plant Sales and Exchange, Ltd.). The invoice accompanying the letter described the excavator as "as and where lying," but it did not specify that a Hunts' certificate would be supplied in respect of the 43 R.B. excavator. The letter relating to the T.D. 14 units and the D.8 units stated that they were sold "as and where lying", and that:

"All these machines are to be supplied with the Hunt Engineering Certificate that they have been fully re-conditioned to their satisfaction".

It also stated that the final reports had not yet been received from Hunts. Such reports as the third defendant had already received were inclosed and the balance promised "within the next week or so". On the same day Mr. Sheppard of Beatons, with the help of the third defendant, wrote summarising the arrangements he was prepared to make for managing the machines for the plaintiffs. On June 13 the liquidator of the first defendant wrote to Costains authorising them to release the three D.8 tractors to the order of Beatons.

On June 13, 19 and 23, further reports came in from Hunts to the third defendant covering the three D.8 tractors and scrapers already sold and one as yet unsold. The tractors were described as "used re-conditioned", and it was stated that they were

"considered to be satisfactorily re-conditioned for normal service with the usual care and maintenance . . ."

The scrapers were described as having been "re-conditioned under our inspector's supervision". It was stated that the tyres had been removed and examined for interior defects and re-fitted, and the conclusion in respect of each scraper was:

"The scope of the inspection made, limited owing to it not having been possible to give any load working trials, has proved to our satisfaction that this Le Tourneau scraper unit has been re-conditioned to a satisfactory standard and it is accepted as a unit suitable for immediate service."

On or about June 23 the third defendant heard that the blade of one of the scrapers which he had sold on June 12 needed a new cutting edge. He informed Hunts of the fact, and on June 24 he wrote to Mr. Lockwood asking that the inspector should make a particular note of the condition of all blades and cutting edges. On June 25, after reading the reports on the scrapers, the third defendant wrote again to Mr. Lockwood pointing out that

"the whole basis of the re-conditioning of these machines was that they would be ' . . . satisfactorily overhauled on a fully re-conditioned basis ', and if you are unable for any reason to give this certificate, then the supervision cannot have been carried out adequately as was agreed by you when accepting our instructions."

After referring to the inadequacy of the standard of certificate which had been given, and to the fact that Hunts could have made only a cursory examination not to have noticed the defective cutting edge, he concluded by saying:

"I would again emphasise that every final certificate of yours bears the stipulated wording ' . . . satisfactorily overhauled on a fully re-conditioned basis ', and if you are unable for any reason to give this certificate, then the supervision cannot have been carried out adequately as was agreed by you when accepting our instructions."

On June 26 Mr. Lockwood replied that there was the possibility of a mistake as to the number of the scraper and, after pointing out that the reports on these tractors and scrapers had to be moderated from a fully re-conditioned basis owing to an earlier agreement with the third defendant that the contractor was

to be allowed to remove, examine, and re-fit all tyres without Hunts' inspector being given the opportunity of examining them internally, he said:

"In view of this we so framed our final reports on these units so as to omit covering the inspection of any parts not actually examined by our inspector and for which we, of course, can accept no responsibility. We trust that this explanation makes clear to you the reason for the variation in phraseology mentioned in your letter."

Hunts' final reports, therefore, in respect of the three D.8 tractors and scrapers already sold were so framed as to omit covering the inspection of any parts not actually examined by their inspector.

The two T.D.14 tractors sold to the plaintiffs on June 12 had not gone out on hire, and Hunts had supplied no further reports in respect of them. The third defendant asked Hunts to send certificates for the two scrapers attached to the T.D.14 tractors, but owing to a misunderstanding this was never done. This was an admitted breach of contract, but the damages claimed in respect of this breach did not exceed £70.

On June 27, the third defendant offered the three remaining D.8 units to the plaintiffs for £10,000 each. The plaintiffs agreed to buy them, but the price at which they were actually sold (as stated in the confirmatory letter of June 30) was £8,000. The sale was on the same terms as before, viz., that the machines were to be supplied with the Hunt Engineering Certificate that they had been fully re-conditioned to their satisfaction. There was also a gentleman's agreement whereby the third defendant was to receive £6,000 in exchange (according to Mr. Ferguson) for his undertaking to see that the machines were kept on hire for twelve months. The three units first purchased were immediately let out on hire.

The third defendant said nothing to Mr. Ferguson about the difficulties which had arisen over the wording of the Hunt certificates. Of the three D.8 units sold on June 27, only one had been reported on by Hunts at the time of the sale and the third defendant had not supplied under either contract any documents which he tendered as certificates. On July 10, after an interview with the third defendant, Mr. Lockwood wrote inclosing twelve reports in similar form "duly revised"—a separate one for each D.8 tractor and scraper. They were all described as "revised" and as "inspection reports", not as certificates. A specimen report read as follows:

"ROBERT W. HUNT CO., Engineers. London, June 19, 1952.
L.O.41882. INSPECTION REPORT No. R.25186 (REVISED)
Clients. Messrs. Traps Tractors, Ltd.,

93 Lancaster Gate,
London, W.2.

Place of inspection. Widdrington, Northumberland.

Date of final inspection. June 15, 1952.

Equipment inspected. One—Used and fully re-conditioned caterpillar tractor, Model 2 U. No. 7965 complete with Le Tourneau winch No. P.34966 R.6.F.US.7 and hydraulically operated angledozer equipment.

Tests. The above tractor and equipment have been subjected to operational tests carried out under 'No Load' conditions and the engine, gears, transmissions, brakes, clutches and hydraulic gear found to operate satisfactorily for normal use.

Inspection. Supervision of the re-conditioning of the caterpillar tractor and equipment has been carried out to ensure the adequacy of the work and that the workmanship is to the required standard. After completion of the operational tests a thorough and careful visual examination was made of the

whole unit and power control together with the angledozer equipment to verify the general condition of the unit which was found to be satisfactory for service under normal conditions.

Conclusions. The inspections made during the course of the re-conditioning of the caterpillar tractor No. 7965 and the trials run after re-conditioning have proved that this unit has been overhauled in a workmanlike and satisfactory manner and the completed unit is accepted as re-conditioned to the required standards.

Remarks. In view of the fact that this is a second-hand vehicle the obligation assumed by us in furnishing inspection reports on this class of material extends only to the client for whom the report is made, which report represents our opinion on the day of inspection only, based entirely upon the reports of our inspectors, all of whom we endeavour to select with due care. We believe their reports are accurate, but the conclusions reached by them are matters of opinion, the accuracy of which we do not guarantee, and we shall not be responsible for damage or loss of any kind which may be connected in any way with our inspection or reports.

DB:OMC

Respectfully submitted,

ROBERT W. HUNT CO.

(Sgn) Lockwood."

The six reports for the scrapers were done in the same way as for the tractors, each scraper being described as used and fully re-conditioned. Each of the six contained only one operative paragraph headed "Inspection" which is in these terms:

"The Le Tourneau scraper, subject of this report, has been re-conditioned under our inspector's supervision to ensure that the work carried out was adequate and the workmanship is to the required standard. All working parts have been examined and accepted as being in good condition for further service. New pulley pins and link pins have been fitted where necessary. The hopper plates have been re-conditioned and are free from buckling and dents. New rubbing plates as required have been welded into position. The main frames are sound. Tyres have been removed and examined by the contractor for interior defects, and re-fitted. The whole unit has been painted in the standard yellow colour. The inspections made during the course of the re-conditioning of the Le Tourneau scraper No. s.28788-LP-F-SP have proved that this unit has been re-conditioned in a workmanlike and satisfactory manner, and the completed unit is accepted as re-conditioned to the required standards."

The two reports delivered by Hunts in respect of the two D.8 units were not in the same form. In one the words used were:

"The completed unit is accepted as re-conditioned to the required standards"

but it was nowhere described as fully re-conditioned. The other was described as "fully overhauled and re-conditioned", but there was no statement which could be construed as an expression of satisfaction by Hunts with the re-conditioning. When these documents were delivered to the plaintiffs, they were expressly described as not being trial certificates but only as latest reports.

On July 16 these reports were sent by the first defendant's liquidator to Mr. Ferguson. Meanwhile some of the D.8 units had gone out on hire. On July 16, a tyre and tube of one of the scrapers burst and Mr. Billingham (of the plaintiffs) was informed. At the same time a member of Beatons prepared reports on two other of the D.8 units setting out several serious defects. These reports were

sent to the third defendant asking for his instructions, but the plaintiffs were not informed. On Aug. 7 Mr. Sheppard (of Beaton's) told the third defendant that all the D.8 units were working satisfactorily and that there were only teething troubles, but on Aug. 11 he gave a much more alarming account of them to Mr. Billingham, saying that five sets of tracks, costing £800 each, would be required in six months; that two scraper tyres had already been replaced at a cost of £370; and that a further £130 had been spent on repairs. On Aug. 12 Mr. Ferguson, Mr. Hill and Mr. Billingham discussed the matter with the third defendant who suggested that an independent engineer be asked to examine the tractors. On the third defendant's recommendation, Mr. Garrett was appointed, and by Aug. 22 he had made preliminary reports based on visual inspection of three of the D.8 units. His opinion was that, taking into account the amount of work done in the two or three months since re-conditioning, the standard of re-conditioning had not been what was to be expected if the machines had been fully re-conditioned to eighty-five per cent. new. His adverse comments were due principally to the condition of the track links and assemblies.

On Aug. 26 the third defendant went abroad and did not return until the beginning of November. During this time he received further reports from Mr. Garrett and letters of complaint from the plaintiffs. On Oct. 30 the plaintiffs tried to discuss the matter with Mr. Lockwood, but, as he regarded the third defendant as his client, he did not feel that he could give them much information. He did, however, say that the plaintiffs might properly have objected to the fact that some of the re-conditioning was done by welding. On Nov. 3 the third defendant wrote to Mr. Garrett asking him to confirm that the cost of repairs recommended was £2,475. Mr. Garrett replied that that sum was based only on items that could be seen by external inspection. By this time the third defendant decided that something had gone wrong with the re-conditioning and with Hunts' system of inspection. He thought that he was legally protected by Hunts' certificates, but, wishing to put an end to the plaintiffs' complaints, at a meeting with them on Nov. 24 he offered to forgo the £6,000 due to him under the gentleman's agreement. This offer was rejected. At a final meeting between the parties in December the third defendant renewed his offer to forgo the £6,000, but it was again refused, and the negotiations ended. On Apr. 24, 1953, the plaintiffs issued the writ in the action.

The plaintiffs alleged, *inter alia*, that each of the sales was made subject to warranties given by the third defendant acting on behalf of one or other of the defendant companies or for himself personally; that the warranties were given orally by him on June 9 and 11, 1952, in relation to the first and second contracts; and that they were repeated in effect on June 27 in relation to the third contract.

DEVLIN, J., found as a fact that the third defendant gave no oral warranties as to quality, either personally or on behalf of the first or second defendants, during the conversations on June 9, 11, and 27; that his statements were merely embroidery of his admitted promises to supply Hunts' certificates; that both sides recognised that Hunts' standard provided the highest standard to which second-hand machines could reasonably be expected to attain; and that, if Hunts did their work properly, additional warranties would be superfluous. His LORDSHIP further found that there had been no breach of warranty in respect of the 43 R.B. excavator, as it was not sold subject to a Hunts' certificate, and that, therefore, the action against the second defendant failed. In regard to the matter of welding, His LORDSHIP came to the conclusion that, in the case of the D.8 units Hunts did accept welding "in order to conserve spare parts".

Sir Hartley Shawcross, Q.C., Eustace Roskill, Q.C., M. R. E. Kerr and R. A. MacCrindle for the plaintiffs.

K. Diplock, Q.C., C. G. A. Cowan and G. H. Hodgson for the defendants.

Cur. adv. vult.

May 19. DEVLIN, J., read a judgment in which he stated the facts and

held that the action failed against the second defendant on the grounds above stated and against the third defendant on the ground that he did not undertake personal liability in respect of any of the contracts of sale, and continued: The action against the first defendant, Traps Tractors, Ltd., depends on the allegations relating to the Hunt certificates. Before considering these certificates, I shall seek to determine what is meant by "fully re-conditioned". The term is said by the plaintiffs to have a meaning that is well understood in the trade, as distinct from "re-conditioned" simpliciter, which some witnesses thought was meaningless. I do not think there is strong enough evidence to establish for "fully re-conditioned" a trade meaning in the strict sense, but also I do not think that its meaning as understood in the trade is really any different from its natural and popular meaning. "Re-condition" is not a word to be found in the dictionary, but it obviously means "to put back into condition"; not, of course, into brand-new condition, but to renew the machine in the sense of giving it a new lease of life. It means more than overhauling or repairing. In any machine there are some parts which are intended to last as long as the machine itself lasts, and other parts which have a shorter life and need to be renewed from time to time. Re-conditioning requires, I think, that the machine should be thoroughly examined—usually that means "stripping down"—to see what renewable parts are worn, and all such parts which are substantially worn should be renewed. To insist that every slightly used part should be scrapped would be absurd. But any part that is left must, I think, have most of its life still in front of it, so that the machine, as a whole, is given, as I say, a new lease of life. When the parties talked of the plant, as they did in this case, as being made eighty-five per cent. new, their idea was, I think, that it would be as good as if only fifteen per cent. of its working life had gone. Inevitably, the decision whether a worn part should be retained or renewed must vary according to the standard exacted by the person responsible, some standards being stricter than others. Hunts had a reputation in the trade for exacting a high standard. I do not think that "fully" adds much to "re-conditioned", but it does add something. The reason why "re-conditioned" by itself is distrusted in the trade is, I think, because the word has been seized on by people who smarten up a machine with a new coat of paint and sell it as re-conditioned. "Fully" is thought necessary to exclude that practice. In truth, I think that, if a machine was sold as "re-conditioned" without qualification, it would not be enough to prove that part of it was re-conditioned. I can see, however, that qualifications might be implied. If, for example, a car was sold as "re-conditioned", it might be suggested that the term was intended to apply only to the engine, or something of that sort. The advantage of "fully" is that it expressly excludes qualifications of this sort. I am satisfied, therefore, that there is a difference which is thought in the trade to be important, and that a certificate of re-conditioning simpliciter is not acceptable in a contract which calls for full re-conditioning.

I can now consider the effect of the certificate clause and the points that are taken on it. It is undisputed that, if each of these machines is covered by a valid certificate testifying to Hunts' satisfaction that it is fully re-conditioned, the plaintiffs' case must fail, inquiry into the real condition of the machine being then irrelevant. The plaintiffs contend that the inspection reports tendered by the defendants are not certificates within the meaning of the contract, and that, if they are, they are invalid because Mr. Lockwood [Hunts' London manager] was improperly influenced by the third defendant. The defendants deny any improper influence, and say that in any event nothing short of fraud (which is not alleged) will invalidate the certificates.

It is convenient to consider first the issue raised by the last contention, for I think that that consideration opens the way to the true interpretation of the certificate clause. There is no general rule of law prohibiting the influencing of certifiers. Apart from fraud, a duty not to influence can only be imposed by an

implication arising from contract. Such an implication must, in accordance with settled principles, be both reasonable and necessary, and the contract must be examined to see what it yields in this respect. There is, after all, nothing to prevent a party from requiring that work shall be done to his own satisfaction. He might then choose to act on the recommendation of an agent. If an agent is named in the contract, it may be plain that he is to function only as the alter ego of his master, and then his master can tell him what to do: see *Ranger v. Great Western Ry. Co.* (1) per LORD CRANWORTH, L.C. (5 H.L. Cas. at p. 89) and per LORD BROUGHAM (*ibid.*, at p. 115). Whether it be the act of the master or the servant, there may be a question (again depending on the implication to be drawn from the contract) whether the dissatisfaction must be reasonable, or whether it can be capricious or unreasonable so long as it is conceived in good faith. A number of cases on this point are cited in BENJAMIN ON SALE, 8th ed., p. 582 et seq.

The tendency in modern cases seems to be to require the dissatisfaction to be reasonable.

What has to be ascertained in each case is whether the agent is or is not intended to function independently of the principal. The mere use of the word "certificate" is not decisive. Satisfaction does not necessarily alter its character because it is expressed in the form of a certificate. The main test appears to be whether the certificate is intended to embody a decision that is final and binding on the parties. If it is, then it is in effect an award, and it has the attributes of its arbitral character. It cannot be attacked on the ground that it is unreasonable, as the opinion of a party or the certificate of one who is merely an agent probably can. On the other hand, it must be made independently, for independence is the essence of the arbitral function. If two parties agree to appoint an arbitrator between them, it would be, I think, implied in the contract in order to give it business efficacy (it is not now in practice necessary to consider the point because of the control over the arbitrator which the Arbitration Acts give to the court) that neither side would seek to interfere with his independence. If a party to a contract is permitted to appoint his agent to act as arbitrator in respect of certain matters under the contract, a similar term must be implied; but it is modified by the fact that a man who has to act as arbitrator in respect of some matters, and as servant or agent in respect of others, cannot remain as detached as a pure arbitrator should be.

There is another distinction between certifiers. If work under a contract has to be completed to the satisfaction of a certifier, it may mean that his duty is merely to see that the requirements of the contract are met, or it may mean that he is entitled to impose a standard of his own. It may be that his standard is that to which the parties submit and that it constitutes the only provision in the contract about quality; or it may be that his standard is an added protection, so that performance under the contract must satisfy both the contract requirements and the certifier. Examples of the latter are to be found in *Newton Abbot Development Co., Ltd. v. Stockman Bros.* (2) and *Petrofina S.A. of Brussels v. Compagnia Italiana Trasporto Olii Minerali of Genoa* (3). So far as I am aware, there is no case in which a certifier who has to certify only according to his own standards has been held to be an arbitrator. It is not, however, possible under this head to draw a hard and fast line between the two categories. There must always be some room for the discretion of the certifier, however tightly the contract may be drawn. Even if he has to certify only whether an express term has been complied with, there must be room for the exercise of his judgment. *Cammell Laird & Co., Ltd. v. Manganese Bronze & Brass Co., Ltd.* (4), is a case in which it was held that the satisfaction of a third party operated only within the requirements of the contract; that is to say, it was not permissible for the third party to put on the seller obligations as to quality outside the contract. LORD WRIGHT said ([1934] A.C. at p. 433):

"It is true that the clause cannot be intended to deal with matters outside

the scope of the respondents' obligations under the contract, or to enlarge these obligations except in so far as these are enlarged because there is super-added the judgment of a third party".

Allied to this, there is a distinction between a certificate that is given only for the purposes of a particular contract and one that, although it may be called for by a particular contract, is not particularly related to that contract. The certifier may not then be an agent of either party. That is so in the case of a Lloyd's certificate or of a certificate by a public analyst, or others that may be obtainable on a fee. It has now become quite common to include among documents which have to be tendered against payment a certificate of inspection or of quality. Certificates of this sort are addressed to all the world or to all who may be concerned. If the phrase is not used as more than a label, they might be called certificates *in rem*, as compared with certificates *in personam*, which deal only with particular contracts and are addressed only to particular parties. The former carry the same meaning to all who read them. The latter may have to be interpreted in the light of particular contractual requirements or of information known only to the addressees. A certificate *in rem* certifies a standard of quality extraneous to the contract. It may be the certifier's own standard or it may be taken from some public or independent source. A certificate *in personam* may be based on the certifier's own standards or on standards prescribed by the contract. It may be a certificate of quality or a certificate that a contract has been carried out.

Finally, there is a distinction between a certifier whose function has been completed before the contract is entered into and one who has a function to perform under the contract. In the latter case there is room for an implied undertaking that he will not be improperly influenced. In the former case there can be no room for an undertaking that relates to the future. If anything is to be implied, it must be a warranty about the past. There may be grounds for implying a warranty that the certifier has not been improperly influenced, but, so far as I know, the point has never been decided. All the leading cases on the topic, such as *Hickman & Co. v. Roberts* (5) and *Panamena Europea Navegacion (Compania Limitada) v. Frederick Leyland & Co., Ltd. (J. Russell & Co.)* (6) deal with certifiers whose duties arose out of the contract. It seems clear that there cannot be the same necessity for implying a warranty in respect of the past as there is for implying an undertaking for the future. If a building owner makes the obligation of payment conditional on his architect's certificate of quality, he must not, for example, instruct his architect not to be content with less than three coats of paint, for he has impliedly undertaken that he will leave his architect free to judge independently, either by reference to the contract requirements or to his own standards of quality, whichever the case may be, how many coats of paint are required. But if he sells a completed house and agrees to supply with it his architect's certificate of quality, does he thereby warrant that he has not told his architect to be content with two coats of paint? It may be argued that there is no necessity for an implied warranty of that sort, and that the buyer is sufficiently protected by the fact that the seller would, in his own interests, have been concerned to get the best quality he could.

These are the sort of points that have to be answered, and the answers depend on the construction of the clause, which is common to all the contracts:

"All these machines are to be supplied with the Hunt Engineering Certificate that they have been fully re-conditioned to their satisfaction".

In form, the clause does no more than require a certain document to be supplied. Apart from what is inherent in it, there is not in the contract any express term about quality. It is, of course, to be assumed that the seller will not be able to obtain Hunts' certificate unless the goods are, in fact, of a certain quality, but the contract does not directly provide that they should be so. It is, however,

manifest that such a provision is implicit. The defendants do not argue that, if the certificate is invalidated, the contract is one for machinery "as and where lying", with no terms about quality in it. Both sides are agreed that the contract is for machinery of a quality that is described as fully re-conditioned. They differ in this detail, that the plaintiffs argue that, in the absence of a certificate, it is for the court to fix, in the light of the evidence, what is a reasonable standard of fully re-conditioned quality, while the defendants contend that it is fixed by the contract itself as the Hunt standard. For reasons which it is more convenient to give later, I prefer the defendants' contention. The plaintiffs do not argue that the clause is severable into two independent parts, the first being a term as to quality, and the second a term that Hunts are to be satisfied, so that the seller must comply with both. I think that is right; that is to say, the clause must be construed as a whole, and it was not intended that quality could be questioned if a valid certificate was supplied; the certificate is not merely an "added protection". The result is that, if the defendants supply a certificate in accordance with the contract, it is conclusive that the goods are of the contract quality. If they do not, that question is left open for determination in the ordinary way. On the other hand, the defendants do not (and I think could not) argue that they have an option either to supply a certificate or to tender goods that are, in fact, of the contract quality. They have undertaken to supply a certificate, and the consequences of their failure to do so will not be merely that the question of contract quality is left open, but also that they have broken a term of the contract which might, of itself, and irrespective of actual quality, sound in substantial damages, for uncertified goods are not as saleable as certified goods, even if both are of the same quality. I say "might" sound in substantial damages, but, in fact, it is not alleged in this case that the mere lack of a certificate has resulted in anything more than nominal damages. The claim for substantial damages is based on the defective quality of the machinery.

I conclude, therefore, that there are expressed or implied in the clause three provisions as follows: (i) as to quality, the machinery is to be fully re-conditioned up to the Hunt standard; (ii) a valid certificate by Hunts in the terms prescribed is conclusive that the machinery has, in fact, been fully re-conditioned up to this standard; (iii) an undertaking by the seller to supply such a certificate. It may be objected that there is nothing in the written part of the contract, at any rate, about the Hunt standard, and that the first of the three provisions that I have set out above introduces an unwarranted interpolation. I do not think so. I think it can be justified even on the written term, if it is construed in the light of the surrounding circumstances. Under that term, Hunts have to express their satisfaction. They cannot do so without applying either a standard of their own or some other standard. In other words, the distinction is between the certificate of standard quality and the certificate of contract requirements. I think it is quite plain from the evidence by the parties of what was understood in the trade and discussed between them that the former was intended. It was commonly understood in the trade that Hunts had a standard of full re-conditioning. If the parties, when they contracted, had been asked: "What is it that Hunts have got to be satisfied about? Have they got to be satisfied that the machinery has been fully re-conditioned according to their own standards, or that it has been fully re-conditioned according to the requirements of a contract made by the third defendant, or that it has been fully re-conditioned according to Hunts' own standards as modified in agreement with the third defendant?", the parties would all have agreed that Hunts were intended to certify in relation to their own standards. The other two alternatives would render the certificates valueless, unless one knew what the third defendant's requirements were, or what modifications to Hunts' standard had been agreed. No doubt, the plaintiffs were aware, if they thought about it, that the work of re-conditioning had

been done under a contract. But they were not concerned to know, and were not told, who had done the work of re-conditioning. Nor were they concerned with the relationship between Hunts and the third defendant. It was obvious that Hunts must have supervised the work of re-conditioning, but whether they had done so as agents of the third defendant or of the re-conditioners was irrelevant to the contract between the plaintiffs and the defendants. All that the third defendant had to do was to supply a Hunt certificate. If his contract with the re-conditioners had been that they were to supply him with a Hunt certificate, he could have fulfilled his contract of sale by passing the certificate on. This was not, therefore, a case in which Hunts were being put forward as the agents of the seller and being endowed by common consent with certain arbitral functions to perform under the contract of sale. They were certifiers, and nothing else. So far as the contract of sale is concerned, there is no need to suppose that they were the agents of the third defendant. All that he had undertaken to do under the contract was to procure and deliver their certificates. In short, the type of certificate the parties were contracting about is what I have called a certificate in rem. This was not disputed in argument, so I shall merely summarise the evidence that illustrates the point.

The plant was advertised by the third defendant as being sold with Hunt A certificate, it being thought by him and some others that Hunts had an "A" standard. Mr. Ferguson [the chairman of directors of the plaintiff company] thought it was something similar to A1 at Lloyd's. This standard, the parties agreed, was the equivalent of eighty-five per cent. new or virtually new. The evidence on this point was common ground, and, so far as the plaintiffs were concerned, most of it was obtained from them in cross-examination in order that the defendants might establish (as, in my judgment, they did) that the plaintiffs were really relying throughout on the Hunt certificate. Thus Mr. Ferguson said that it was a common thing to buy plant on Hunt certificates, and, for example, that people hiring plant often rang up and said: "Has it got an A certificate?" Mr. Hill [another director of the plaintiffs] said that he knew of the Hunt standard as being a hall-mark, that everyone in the trade knew of it, and anyone buying or selling equipment would attach great importance to whether or not it had a Hunt certificate showing that it was up to the Hunt standard. Mr. Garrett [the independent engineer who examined the machines] accepted the term "hall-mark", said that the certificates were well known in the trade, and that no one would hesitate to buy on a Hunt certificate. Mr. Billingham [Mr. Hill's personal assistant] said that it was a well-known standard, and that the greatest reliance had been placed on it in the trade of buying and selling. The third defendant also said that Hunts' standard was well known in the trade. When, in cross-examination, he was asked whether he knew the distinction between re-conditioned and fully re-conditioned, he answered: "I only know all my life, that is Hunts' certificate, that is Hunts' standard". Asked again about the Hunt certificate, he said:

"It is done to their own standards in their own way. They do not have a variety of standards".

Another witness, Mr. Davis, said that the Hunt standard or the Hunt certificate was well known in the trade and highly thought of.

All this evidence seems to me to make it abundantly plain that what these parties were contracting about, and what the contract called for, was a certificate of quality supplied by persons who were thought by the trade to fulfil the same sort of function as the classification societies fulfil in shipbuilding and surveying. The root of the trouble in the present case is that Hunts do not, in fact, fulfil any such function. Their main function, as I have said, is to issue certificates recording their examination of new plant. A specimen form of certificate in use for this purpose was put in as P.12. This does not certify any quality, but only that the material "has been accepted under the instructions provided".

It is clear that Hunts' reputation must be based on the fact that they receive or accept instructions to inspect only high quality material, coupled with the fact that, no doubt, they usually exercise a high degree of care in carrying out their inspections. Except on this assumption, the certificate is worthless to anyone who does not know what are "the instructions provided". It is, therefore, plain that, even in relation to new material, Hunts do not certify "in rem" for the benefit of all who may be concerned. They certify "in personam" in relation to a particular contract, and for the benefit of a particular customer who knows what his contract is. In respect of second-hand material, they not only refuse to act, except for a particular customer, but they do not certify at all. In these circumstances, I cannot refrain from observing that it is unfortunate that they have done nothing to stop the impression getting about in the trade in this country in second-hand plant that there *is* a Hunt certificate; and, indeed, that they have regularly accepted, as in this case, instructions to issue certificates. The expression "Hunt A certificate", Mr. Lockwood blandly observed at the beginning of his evidence

"is quite unknown to us, except by hearsay. We have heard it, but, of course, we disregard it."

He said that Hunts did not issue certificates, but reports. When he was taxed with the fact that, in respect of the T.D. 14 tractors, he had accepted instructions to issue a fully re-conditioned certificate, he said: "It is a word that has been very very loosely used."

If Mr. Lockwood's denials involved only a question of terminology, it would not matter, but it is plain that they go much deeper than that. It would be going too far to say that there is no such thing as a Hunt standard. In one sense, there is. Hunts do not usually undertake any work of inspection unless the machinery is stripped down. That must mean that they do not usually concern themselves with anything except full re-conditioning. In deciding what parts are sufficiently worn to require replacement, Hunts have a set of standard rules which they apply to different parts of the machine and which are common to all their inspectors. The notion of eighty-five per cent., which the parties to this contract thought was their standard is, in fact, incorrect, and, as Mr. Lockwood said, meaningless. You cannot have a universal standard for all parts. There have to be different standards for different parts. Thus, as I have already mentioned, Hunts take a standard of seventy per cent. for tyres. Another example given by Mr. Lockwood is that they allow a crankshaft up to two re-grinds. These are examples of individual parts where there are fixed requirements. In other cases, the inspector must often have to fix his own requirements according to his experience, which is, of course, in the Hunt organisation, a pooled experience. This body of requirements constitutes what may be called a Hunt standard. No doubt, it is a high one, and Hunts have acquired a reputation for care in seeing that it is complied with. But, if it were really a standard of quality, in the sense of being a hall-mark, it would be necessary for Hunts never to depart from it. In fact, it is no more than the standard which Hunts apply, subject to any instructions which they get from their client. If the client prescribes a modified standard, Hunts will apply it, for they do not regard themselves as certifying anything, but merely as reporting to their customer, who is nearly always the buyer, on the quality of the goods he is getting, or of the work that is being carried out under contract with him. Mr. Lockwood put it:

"We establish our own standard, but if our customer requires us to exceed it or diminish it we do so in accordance with his instructions and report accordingly."

In the particular case of the Costain contract, he regarded himself as modifying the Hunt usual standard in respect of tyres. In relation to welding, he thought

the decision to accept it or not was a matter of principle and was taken in agreement with the third defendant. In relation to painting, he spoke of being

"instructed to defer final release until such time as they had been painted".

The reports are intended only for his own customers. The final report is not intended as a complete embodiment of any conclusion. All the reports are to be read cumulatively. If there has been a modification from Hunts' usual standards, the report may contain a reference to it; or, on the other hand, if it is a matter that is well known to the customer, it may not be referred to. Thus one D.8 tractor was noted by Costains on delivery to them as having a cracked and welded frame for which they would not be responsible when re-conditioning. This was known to the third defendant and, therefore, not mentioned in the Hunt report, but it could not, of course, be known to a purchaser from the third defendant. It is thus quite plain from this account of Hunts' practice that Mr. Lockwood was not quibbling or playing with words when he was insistent that he provided reports and not certificates.

The evidence of what Hunts were actually thinking and doing does not, of course, throw any light on the true effect of the contract. I have set it out here, perhaps a little prematurely, so as to bring out into the open the nature of the misunderstanding that has, I think, prevented the contract between the plaintiffs and the defendants from working in the way in which it was intended to work. I must now return to the contract and consider whether the documents which have been tendered under it are certificates within the meaning of the clause. The clause, as I have said, calls for a certificate from Hunts that the machines have been fully re-conditioned up to their standard. Whether it has been broken depends on the character of the documents supplied by Hunts and not on what Hunts thought they were supplying or intended to supply.

Counsel for the defendants has pointed out that until a late stage of the case the plaintiffs never appeared to doubt that what they got were certificates which apparently conformed to the contract; their case has been that the certificates were improperly procured. The documents were sent on July 17, and were acknowledged by Mr. Billingham without comment on July 23. They appear to have been filed away without study or discussion with Mr. Ferguson or Mr. Hill. It seems to have been thought that any bit of paper with Hunts' name on was good enough for the contract. Mr. Billingham said that he had never seen a Hunt certificate or report before, that he had no idea what it was, and that they purported to be a Hunt certificate, he accepted them as such, and nobody studied them very carefully. The point which is now taken is that these documents are not certificates at all. In the course of the trial I ruled, though not without hesitation, that the point was open on the pleadings. I gave leave to amend para. 16 of the defence so that the defendants could set up an estoppel. They contend that the plaintiffs represented they were satisfied with the certificates and that the defendants were thereby induced to refrain from seeking to obtain further certificates. I think that this plea fails. There is no material from which I can imply any representation, and, if the defendants had sought to obtain from Mr. Lockwood further certificates, I do not think that they would have got them. I summarise later the evidence from Mr. Lockwood which shows that he would never have given an unqualified certificate. The plaintiffs' conduct, of course, precludes them from rejecting either the certificates or the machines, but I cannot see how it can affect their right to damages.

As I have said, the certificate under this contract has a double function. It is a hall-mark which (a) the seller has undertaken shall be put on the goods, and which (b) is conclusive that the goods are of the contract quality. The fact that the buyer has accepted the goods without the hall-mark does not preclude him from contending that the goods are not, in fact, of the contract quality and from claiming damages accordingly. Such a contention has to be determined by the court on its merits unless the seller produces a document which contains a binding

decision on it. If, in truth, the document relied on does not contain such a decision, I see no evidence that the plaintiffs represented to the defendants that it did. I must, therefore, examine these documents to see what they amount to, and I shall take first the reports relating to the D.8 units.

The first point which the plaintiffs take is that they are not in form certificates; they are not so described and do not, in terms, certify anything. This is not a point to be brushed aside. I doubt if, for example, a bank paying out money under a letter of credit requiring presentation of a certificate could be expected to accept a document in this form. A document which has to be handled in commerce must be in a form which leaves no reasonable doubt about its nature. But on the facts of this case the plaintiffs' conduct makes it, at least, difficult for them to rely on objections of form, at any rate if they stood by themselves. The plaintiffs may not have studied the documents, but they saw what they were and can now hardly contend that they expected something which was labelled as a certificate. I think also that the evidence that Hunts' "certificates" were well known in the trade, combined with Hunts' own evidence that they only issued reports, leads to the inference that the documents that were current in the trade were documents in the form of reports.

I proceed, therefore, to consider the substance and effect of the documents. Their language does not follow the wording of the contract; there is no statement, in terms, that the machinery has been fully re-conditioned to Hunts' satisfaction. I think that the only words that can be regarded as words of certification are in the conclusion that

"the completed unit is accepted as re-conditioned to the required standards".

What is meant by "the required standards"? Are the standards those required by the certifier or by the client to whom the report is addressed and for whom, presumably, the work of re-conditioning has been done? Of course, to the plaintiffs themselves and to the third defendant, who assumed, though wrongly, that Hunts certified only according to standards of their own, from which they never departed, the words might very well mean "the standards required by us". On the other hand, to one who knew the true facts and the conception which Hunts themselves entertained of their function, the words would mean "to our standards as modified where necessary to meet your instructions". Construed simply from what appears on the face of the document and without recourse either to the assumed or to true facts, I should interpret the words as meaning "the standards you required us to apply". "Require" is not the natural word to use if all that is meant is "our standards". On this construction, I hold that the certificates are not a compliance with the contracts.

On any view, I think that the language used is ambiguous. On the face of it, there are the two possible meanings which I have noted. A reasonable man in the position of the plaintiffs (and that is the test which I must apply) might well, if he were looking for greater certainty, turn back to the April reports which the defendants had sent on June 12, but expressly not as final certificates. He would find that they contained the phrase "re-conditioned to the required standards and to our satisfaction". He might ask himself whether the later omission of "to our satisfaction" was accidental or deliberate. He might note that the "required standards" seem to have been satisfied although it was expressly noted that the machines had not been painted and that there was a defective tyre to be replaced and the replacement had not been examined. I think that a certificate of this sort must, to satisfy the contract, be unambiguous and readily understandable. When a document is tendered under a contract, the recipient has often to make up his mind whether he is going to pay out money on it or to accept or reject goods; he has no right and may not have time to cross-examine the certifier or to ask him to clear up doubts. In *Equitable Trust Co. of New York v. Dawson Partners, Ltd.* (7) the contract called for

"a certificate of quality to be issued by experts who are sworn brokers".

The plaintiffs tendered a certificate issued by only one expert. **VISCOUNT SUMNER said** (27 Lloyd's Rep. at p. 52):

"There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines."

This was a case of documents tendered under a bankers' credit and there is no doubt on the authorities that such tenders have to be strictly scrutinised; but I do not think that the principle is peculiar to bankers' credits—I think it applies to any sort of commercial dealings where documents of this sort pass under a contract of sale. Similarly, if the document is looked on in its character of a final determination on the quality of the goods, it is equally important that it should be unambiguous. The seller has the advantage of being allowed to supply a document which, if effective, shuts out all further inquiry into the condition of the goods. It is not unreasonable to demand that such a document should be clear and substantially in the terms for which the contract calls. Even if it were established that all Plaintiffs' reports which hitherto have circulated in the trade were in as vague language as this one, it would still not, in my judgment, avail the defendants. What is commonly accepted in the trade can be a guide to the form of document which the parties must be supposed to contemplate, but whether in substance it complies with the contract must depend on the terms of each particular contract and the terms of each particular certificate. If the contract calls for a document which contains a specified statement, no amount of evidence that other parties to other contracts have been content with looser statements can modify the obligation.

As I have said, the intent of the certifier cannot affect the construction of the certificate except in so far as it is expressed therein. But it may have another bearing on the position. If the defendants could show that the ambiguity was unintentional and could easily be resolved by the grant of another certificate in a proper form, they might be able to contend that the damages were nominal; or the point might help them in their plea of estoppel. I think the evidence shows clearly, not only that Mr. Lockwood did not intend to issue a certificate in any form, but also that he did not intend to express in his reports his unqualified satisfaction with the re-conditioning. I have already summarised the evidence in which he agrees that he departed from Hunts' standards in respect of the tyres certainly and perhaps also the welding. He wrote the letter of June 26, 1952, in which he said that he did not take responsibility for any unexamined part. His evidence put the matter beyond doubt. He said:

"It has never been the policy of our company, nor is it accepted in any inspection organisation, to certify the quality of second-hand machinery. It is only being reported upon, factual reports. It was never our intention to accept or to issue a certificate".

Again he was asked:

"You do not accept the responsibility of certifying between two different parties, a vendor and purchaser, as to what the condition of second-hand material may be?"

and he answered "No". He said that, if he had been told that the reports were required for the purposes of a contract of sale with a third party, he would not have issued them, still less have altered them. Later he was asked about the reports generally and it was put to him:

"If you were asked now, on the basis of these documents, to make a report that it was fully re-conditioned to your standards, you would not be able to do so, would you?"

He answered "No".

I conclude, therefore, that these documents are not certificates in form, in

substance or in intent, and, accordingly, that there has been a breach of contract in respect of the D.8 units. I have reached my conclusion by holding that the sort of certificate which must be supplied is what I have called the certificate of quality given in rem and that nothing else will do. It may be said that one can reach the same conclusion without trying to classify or define too closely the nature of the certificate for which the contract calls, but by simply implying a warranty that, whatever sort of certificate is supplied, it must be the result of the uninfluenced and independent judgment of the certifier applying his own standards. It may be so, but there are difficulties about this which I have not been able to resolve to my own satisfaction. I prefer to obtain the result by the construction, in the light of all the circumstances, of the clause which the parties have used, rather than by the implication of a warranty. I have already indicated my doubts about the implication of a warranty relating to the past.

I think that there would be a difficulty also about defining the limits of such a warranty. Does the seller warrant absolutely that the certifier will apply his own standards? If so, is he liable for error or for negligence on the part of the certifier, although he (the seller) in no way contributes to it? Or is it merely a warranty that he has not himself effectively interfered in the process of certification? If the implied duty not to interfere only comes into existence on the creation of the contract, how should it be applied in a case such as this, where the contract contemplates that the question of certification is already settled and, in fact, it is not? Must it be proved that the seller intended to influence? Is it enough to show that he did an act which was reasonably calculated to influence the certifier, or must there be something in the nature of fraud or unfairness? I shall not attempt to answer any of these questions. On the view which I have taken, they do not arise; and I have, I hope, found such facts as will enable them to be answered if they should arise hereafter.

There is, however, one point on which I think that I ought to express my finding precisely, in case it should be material. I am satisfied that there was not, on the part of the third defendant, any conscious intention to influence Mr. Lockwood or to deflect him from his duty or to do anything underhand. [His LORDSHIP dealt with suggestions made by the plaintiffs in regard to this matter, and continued:] I do not think that the third defendant was trying to put pressure on Hunts, or that he thought they were the sort of people on whom pressure could successfully be put. Even if he thought that Hunts, in order to protect themselves, were willing to give a certificate in a form in which they ought not to give it, and he was willing to stand by and take advantage of that, I am not sure that it would be enough: see *Neale v. Richardson* (8). I do not think, however, that in fact there was anything of this sort. Indeed, the suggestion could not be made without impugning also the credit of Mr. Lockwood. It may be that, if the third defendant had studied as carefully as I have Hunts' reports and Mr. Lockwood's letter of June 26, particularly the penultimate paragraph, he would have realised that there must be a good deal which Hunts could not really be in a position to certify. But the full significance of this letter does not start out from the page on a cursory reading. I think the whole truth is that the third defendant and Mr. Lockwood were imbued with contrary ideas. The third defendant thought that Hunts had a standard which was incapable of modification and beyond the reach of influence, and that the only question was whether or not they were prepared to say, in the form for which his contract called, that their standard had been satisfied; while Mr. Lockwood regarded himself as obliged to follow his client's instructions, so long as he pointed out the matters for which he was not prepared to accept responsibility.

The plaintiffs advanced two alternative contentions on the certificates in respect of the D.8 units. As they do not require any further findings of fact, I need not do more than note them. The first is that, in relation to each of the units, there is a series of reports and that, if the series does embody a certificate, it is

contained in the series and not in the final or in any individual report. The series was intended to be read cumulatively, and unless the whole series was delivered, which it was not, there is no proper delivery of the certificate. The second point is that each series contains contradictions and inconsistencies, so that, as a certificate, they are bad on their face. The plaintiffs also argued that the revised reports were not valid certificates, because Hunts had already issued final reports to the third defendant and so were *functus officio*. In my judgment, that principle does not apply to this case.

I turn now to the certificates in respect of the two T.D.14 tractors. Hunts delivered only two documents in respect of them, and there is no question of their being invited to modify those documents or of their being given any instructions as to how they were to inspect. The plaintiffs' case, therefore, rests solely on the point that the documents delivered were not certificates. In my judgment, they were not, and the reasoning which I have already set out in relation to the D.8 units applies *a fortiori*. The two reports are not in the same form. In the case of one, the formula

"the completed unit is accepted as re-conditioned to the required standard"

is adopted, but there is not anywhere in the report a description of the unit as fully re-conditioned. The report on the other describes it as "fully overhauled and re-conditioned", but there is not any statement anywhere which can be construed as an expression of satisfaction by Hunts with the re-conditioning. Moreover, when these documents were delivered to the plaintiffs, they were expressly described as not being final certificates but only as latest reports. Counsel for the defendants contends that the description is immaterial, unless it is alleged to amount to an estoppel, and that the court must find on the facts whether the documents are certificates or not. I do not think it is necessary for the plaintiffs to invoke the doctrine of estoppel. Delivery under a contract does not involve merely a physical act. A seller does not deliver goods by depositing them in the buyer's backyard in the middle of the night. They must be tendered under the contract. These documents were not tendered as certificates. It is not good enough to send some documents described, in effect, as interim reports which the buyer might put in the wastepaper basket and then say a year or so later that they really were intended to constitute certificates after all.

In my judgment, there has been a breach of contract in relation to all the machinery except the 43 R.B. excavator, and I have now to deal with damages. The measure relied on by the plaintiffs is the difference in value between machinery fully re-conditioned in accordance with the contract and machinery in the state in which it was delivered. This is the *prima facie* measure laid down in the Sale of Goods Act, 1893, s. 53 (3), and it is not disputed that it is the right measure to apply in this case. In its application, four questions arise: (i) what is meant by fully re-conditioned in accordance with the contract; (ii) whether there is any evidence that the machines were not so re-conditioned; (iii) how the value of properly re-conditioned machines is to be assessed; (iv) how the actual value of the machines delivered is to be assessed.

I have already drawn attention to the controversy about the meaning of fully re-conditioned under the contract, and have stated my conclusion that it means fully re-conditioned up to the Hunt standard. I think this conclusion necessarily follows from my view that the parties were contracting in relation to a standard of quality set by Hunts, and that Hunts' duty was not that of certifying that a particular contract of re-conditioning had been satisfactorily carried out according to its terms. If I had adopted the latter view, then I think it would be for the court now to determine whether the contract of re-conditioning had been properly carried out or not and, for that purpose, to arrive at its own standard of what the contract required. Hunts being disqualified from acting, it would not

- be relevant to inquire what view they would have taken of the requirements of the contract. But the view which I have taken of the contract, for reasons already given, is that Hunts come into it in two ways. First, the quality of the full re-conditioning is to be Hunts' standard, which was thought to be a particularly high one, and, secondly, Hunts' statement that their standard has been complied with is to be conclusive. The second limb necessarily disappears with the disappearance of Hunts as certifiers, but that does not, in my judgment, affect the first. One may get at the matter in another way. In deciding on what would be the appropriate standard to take for full re-conditioning, the court must have regard to what the parties appeared to contemplate, even if they did not put it into the contract. In this case they clearly contemplated the Hunt standard. It might very well have been—and, indeed, I think the parties thought it was—that the Hunt standard assured a higher standard of re-conditioning than was usual. If that were, in fact, true, and if Hunts' certificate was not supplied, perhaps because the seller refused to take the necessary steps to obtain it, I should not be able to see why the buyer should have to put up with the usual and lower standard of re-conditioning. I do not mean, of course, that the views of any individual inspectors of Hunts would be material, or evidence as to their attitude admissible. I mean that, where there is a recognised Hunt standard, the sort of which Mr. Lockwood gave one or two examples, that is the standard to be applied; where there is not, the court will have to apply such standard as it thinks reasonable. In some cases, as in the case of wearing down of the grip bars, Hunts have an upper and a lower margin. In such a case, I think, it would be right to give effect to the view that the parties evidently entertained, that Hunts' standard was an exceptionally high one, by taking the higher margin. A particular question has been argued, namely, whether, on the Hunt standard, welding ought or ought not to be accepted. Hunts' practice in 1952 was to accept it *faute de mieux*. If new parts had been reasonably available, they would not have accepted it; but the general scarcity in 1952 of spare parts, whose purchase was dependent on dollars, was such, Mr. Lockwood says, that the practice of welding was universally adopted, and so they were not calling for new parts from re-conditioners like Costains. His evidence shows, I think, that if he had been satisfied in any case that spare parts could reasonably be obtained, Hunts would have required them. I think that the Hunt standard that should be applied is that welding ought to be accepted except in any case in which the plaintiffs can satisfy the referee (as they could have satisfied Hunts) that a spare part could be got.
- The next question is whether there is any evidence that the units were not fully re-conditioned. In the ordinary way, I should have to determine to what extent they were not fully re-conditioned before I could begin to assess the damage. It has, however, been agreed that that task should in the main be discharged by a referee. But counsel for the defendants submits that, as there is no evidence at all to justify the conclusion that the units were not fully re-conditioned at the time of sale, the damages can only be a nominal figure for the failure to supply certificates. I shall decide whether or not substantial damage has been proved; and it has been agreed that I shall deal with one substantial matter only in relation to each unit, leaving it to the referee (if I find substantial damage proved) to go into any other matters the plaintiffs rely on and to fix the proper figure for the whole. The point of the submission by counsel for the defendants lies in the fact that the units were not examined by anyone on behalf of the plaintiffs at the time of sale. When they were examined later, there is no dispute about what Mr. Garrett then found as set out in his reports. But by that time the tractors had all been worked, and the question is, therefore, whether it is proper to draw the inference, having regard to the amount of work done, that the units could not have been fully re-conditioned at the time of the sale. [HIS LORDSHIP reviewed the evidence, and said:] I find that, in respect

of each D.8 unit, there has been a failure in a substantial way to re-condition the tractor fully, and so I need not deal in detail with the scrapers. In the case of two of them, there was a defect common to both, which the defence could explain only on the hypothesis of a similar accident happening to both. I reject that hypothesis.

The third question is as to the ascertainment of the value the machinery would have had if fully re-conditioned at the time of sale. As to this, the only evidence of value is the contract price, and that can be accepted subject to one qualification. In the case of the second sale of the three D.8 units, the contract price was £8,000 each, but there was a collateral agreement, not set up as a legal bargain, by which a further £2,000 apiece was to be paid in a different form. [After reviewing the evidence in regard to the collateral bargain, HIS LORDSHIP continued:] I think it fair to take the value of each of these three units at the time of the sale as £9,500. I am not sure what repercussions, if any, this finding should have on the figure to be awarded as damages. It may be legally irrelevant. I do not think the point has yet been sufficiently explored in argument. But if the plaintiffs recover a sum as damages which puts them in the same position as if fully re-conditioned machines had been delivered, Mr. Ferguson is left with an obligation of honour to procure some further benefits for the third defendant, and this finding may assist him in determining what he ought to do to discharge it.

The fourth question is as to the assessment of the value of the units in the condition in which they were delivered. Here again, it is impossible to arrive at any figure of market value, and the only way of answering the question is to determine what it would have cost to make good the machines as fully re-conditioned, and the time which it would take to do it. It is necessary to estimate the time because the value to the plaintiffs is diminished not only by the cost of the work to be done on the machines but also because they lose hire while the work is being done. As to the cost, the total of what has actually been spent does not afford a conclusive guide, since some of the items are clearly for running repairs. Further, the cost as estimated at the time of Mr. Garrett's examination would not be a satisfactory guide without making some allowance for the fact that the plaintiffs had by that time had a good deal of work out of each machine. If the machines had been fully re-conditioned on sale, they would have been worn to some extent at the date of examination; and to restore them to a fully re-conditioned state as at that date, without making any allowance for the benefit of the service they had given, would be to give the plaintiffs too much. It seems to me that it must, in the end, come down to a broad figure. I am satisfied that the work of re-conditioning was not properly done or properly supervised. A purchaser who knew that and wanted them fully re-conditioned would have had to have undertaken the task himself and to have allowed for it in the price he offered. He would have had to have them stripped down, where necessary, and examined, and such work done as was shown to be required. He would, therefore, deduct from the price which he would otherwise have paid such sum as he estimated would be sufficient to cover the cost of these items and of the consequent loss of hire. The figure to be obtained is that which the prudent purchaser would, in the light of the facts we now know and of any others which emerge on further inquiry, have deducted from his offer.

The case in respect of the T.D.14 units is rather different. The complaints about them are not so serious and the evidence in relation to them not so strong. [HIS LORDSHIP reviewed the evidence, and continued:] It is not necessary for the plaintiffs to do more than make out a *prima facie* case from which, in the absence of explanation, I ought to draw the inference that these units were not fully re-conditioned. I do, in the circumstances, draw that inference.

I think I have now covered all questions of principle and those major questions relating to the assessment of damage which were discussed before me. The hope

was expressed on both sides that, once these questions were settled, it might be possible for the parties to agree on a round figure as the appropriate compensation, if any is due. I am sure that it will be in the interests of both sides if that hope can be fulfilled. As I have said, I am satisfied that, in the end, no examination of detail, however meticulous, will of itself produce the right answer, which will have to be arrived at on a broad estimate. There is, however, further detail which, if necessary, will have to be examined to provide a satisfactory basis for such an estimate, and that will have to be done before a referee who will report to me. If, therefore, the parties cannot agree on a figure, I shall ask counsel to consider what form the order for a report should take and mention the matter again to me. Meanwhile, and subject to hearing counsel further on the form of the judgment and on costs, I think the most convenient course would be that I should now direct judgment to be entered for the second and third defendants against the plaintiffs, and for the plaintiffs against the first defendant for a declaration that the first defendant has broken the first and third contracts referred to in the statement of claim by delivering thereunder machinery which was not fully re-conditioned in accordance with those contracts, and that the plaintiffs are entitled to be paid as damages such sum as shall, on further inquiry, be determined to represent the difference between the actual value of the machinery and the value which it would have had if fully re-conditioned.

[After discussion judgment for the plaintiffs against the first defendant was directed to be entered in the form of a declaration and to include an order for reference to an Official Referee for inquiry and report under s. 88 of the Supreme Court of Judicature (Consolidation) Act, 1925, on the amount of the damages. Judgment was given for the second and third defendants against the plaintiffs.]

Judgment accordingly.

Solicitors: *Freshfields* (for the plaintiffs); *Booth & Blackwell* (for the defendants).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

NOTE.

ANDERSON v. LAMBIE AND ANOTHER.

[HOUSE OF LORDS (Lord Morton of Henryton, Lord MacDermott, Lord Reid and Lord Keith of Avonholm), November 17, 18, 19, 23, 24, 1953, January 25, 1954.]

Legal Aid—House of Lords—Costs—Respondent assisted person in court below—Unsuccessful in House of Lords—Appearance in House of Lords not in forma pauperis.

APPEAL by the appellant from an interlocutor of the First Division of the Court of Session, recalling an interlocutor of the Lord Ordinary (LORD MACKINTOSH).

In December, 1948, the appellant, who owned certain lands in Lanarkshire, by missives of sale dated Dec. 15 and 16, 1948, agreed to sell part of these lands to the respondents. Following on these missives, a disposition of lands was executed on Jan. 22 and 26, 1949, and recorded in the Register of Sasines on Feb. 2, 1949. The appellant sought to reduce the disposition on the ground that more land was conveyed by it than by the missives of Dec. 15 and 16, 1948. The Lord Ordinary pronounced an interlocutor reducing the disposition but, on a reclaiming motion, the First Division of the Court of Session, by interlocutor dated Dec. 16, 1952, recalled the Lord Ordinary's interlocutor and dismissed the action. The appellant appealed to the House of Lords against that interlocutor.

In the Inner House (though not in the Outer House) the respondents were

assisted persons under the Legal Aid Scheme. They did not appear in forma pauperis* in the House of Lords. This note deals only with the question of costs.

Hector M'Kechnie, Q.C., and *R. Smith Johnstone* (both of the Scottish Bar) for the appellant.

W. I. R. Fraser, Q.C., and *R. P. Taylor* (both of the Scottish Bar) for the respondents.

The House took time for consideration.

Jan. 25. The House allowed the appeal. On the question of costs their Lordships said:

LORD MORTON OF HENRYTON: My Lords, having regard to all the circumstances of the case, I am of the opinion that the respondents should pay to the appellant three-quarters of the costs of his appeal to the House and of the proceedings in the Outer House and the sum of five guineas in respect of proceedings in the Inner House.

My noble and learned friend, **LORD MACDERMOTT**, is unable to be present today, but he has read my opinion and also those about to be delivered by my noble and learned friends, **LORD REID** and **LORD KEITH OF AVONHOLM**. He asks me to state that he agrees the appeal should be allowed and for the reasons stated in these three opinions.

LORD REID: My Lords, on the question of costs your Lordships are confronted with a difficult situation. In the Inner House (though not in the Outer House) the respondents were assisted persons. One must presume, therefore, that they are persons of such modest means that they could not properly be expected to bear the full expenses of litigating in the Court of Session. Under the Legal Aid Scheme in its present form there is no provision for legal aid in this House, even for a respondent who has been successful as an assisted person in the Court of Session or the Court of Appeal. In the present case we are deciding against such respondents, and, if the usual order as to costs were made, they would be ordered to pay the whole costs of the appellant in this House. Costs in this House may far exceed expenses in the Court of Session yet the scheme operates to relieve such a litigant from part at least of the lesser liability in the Court of Session and does nothing to protect him against a greater liability in this House which he can in no way avoid. Even if he failed to appear and the appeal were heard *ex parte* he would normally be ordered to pay the costs of the successful appellant; and in this important and difficult case it would have deprived us of much assistance if the respondents had failed to appear by counsel. I can quite understand that it may be good policy to refuse assistance to one who seeks to appeal to this House, but it may be that the position of a respondent who had been an assisted person was not specially considered when the present scheme was made. Of course, a respondent who is sufficiently poor can be allowed to appear in this House in forma pauperis, but it would seem probable that this was not open to the present respondents. So, in a case like the present, both that privilege and the protection of legal aid must be refused to a respondent in this House who has had protection in the court below and has been brought here against his will. I realise that if we do not make the usual order in favour of the appellant in this case we would be discriminating against him for no fault of his, but it seems to me that the facts which I have stated ought not to be entirely neglected, and I think that the situation might properly be met by ordering the respondents to pay only a part of the appellant's costs in this House.

I agree with my noble and learned friend, **LORD MORTON OF HENRYTON**, as

* Although the Legal Aid and Advice Act, 1949, 18 HALSBURY'S STATUTES, 2nd edn., 532, is so framed as to extend to the House of Lords, it is not yet in force in relation to that House; see, generally, HALSBURY, Simonds edn., vol. 9, p. 370, para. 863.

to expenses in the Court of Session, and I also agree that the respondents should be required to pay three-quarters of the appellant's costs in this House.

LORD KEITH OF AVONHOLM: My Lords, in the matter of costs in this House I agree with my noble and learned friends, LORD MORTON OF HENRYTON and LORD REID. The position is anomalous. There is no suggestion that the respondents financially are any better off than they were when they received legal aid in the Inner House. It may be that so long as legal aid is not available generally in connection with proceedings in appeal from the Court of Session to this House the position of a respondent who has received legal aid in the Court of Session and is brought here on appeal could be met by a regulation under s. 12 (3) (c) of the Legal Aid and Advice Act, 1949, or some other provision of that Act. But that is for the appropriate authority to consider.

Solicitors: *William Charles Crocker*, agents for *Hunter, Harvey, Webster & Will*, Edinburgh (for the appellant); *Shaen, Roscoe & Co.*, agents for *Robert White & Co.*, Edinburgh (for the respondents).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

EASTLAND v. EASTLAND.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karininski, J.), November 12, 1953, February 24, 1954.]

Divorce—Cruelty—Meanness of the husband in money matters—Shiftlessness of the husband—Conduct not directed against, or aimed at, the wife—Matrimonial Causes Act, 1950 (c. 25), s. 1 (1) (c).

The wife petitioned for divorce on the ground of the husband's cruelty alleging that he treated her with meanness over money matters and had consistently refused to make her any or any sufficient allowance for household necessities or for other purposes; that he had mismanaged his financial affairs and run into debt, leaving her to deal with his creditors; that he had refused to make her any allowance for food or other purposes and had told her to order goods on credit but had refused to pay for the goods until the creditors pressed for payment, well knowing that she suffered humiliation and distress by reason thereof.

HELD: the husband was not shown to have treated the wife with cruelty within s. 1 (1) (c) of the Matrimonial Causes Act, 1950, as his conduct, though deplorable, was not directed against or aimed at the wife; and, accordingly, her petition was dismissed.

Observations of BUCKNILL, L.J., and DENNING, L.J., in *Kaslefsky v. Kaslefsky* ([1950] 2 All E.R. at pp. 401, 402), applied.

AS TO CRUELTY AS A GROUND FOR DIVORCE, see HALSBURY, Hailsham Edn., 1954 Supp., Vol. 10, p. 649, para. 954.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 1 (1) (c), see HALSBURY'S STATUTES, Second Edn., Vol 29, p. 389.

Cases referred to:

- (1) *Simpson v. Simpson*, [1951] 1 All E.R. 955; [1951] P. 320; 115 J.P. 286; 27 Digest, Replacement, 299, 2447.
- (2) *Jamieson v. Jamieson*, [1952] 1 All E.R. 875; [1952] A.C. 525; 116 J.P. 226; 3rd Digest Supp.
- (3) *Kelly v. Kelly*, (1870), L.R. 2 P. & D. 59; 39 L.J.P. & M. 28; 22 L.T. 308; 27 Digest, Replacement, 298, 2434.
- (4) *Lauder v. Lauder*, [1949] 1 All E.R. 76; [1949] P. 277; 27 Digest, Replacement, 306, 2537.
- (5) *Kaslefsky v. Kaslefsky*, [1950] 2 All E.R. 398; [1951] P. 38; 114 J.P. 404; 27 Digest, Replacement, 296, 2413.

- (6) *Westall v. Westall*, (1949), 65 T.L.R. 337; 27 Digest, Replacement, 296, 2416.
- (7) *Squire v. Squire*, [1948] 2 All E.R. 51; [1949] P. 51; [1948] L.J.R. 1345; 112 J.P. 319; 27 Digest, Replacement, 296, 2415.
- (8) *Usnar v. Usnar*, [1949] P. 1; [1948] L.J.R. 1418; 27 Digest, Replacement, 299, 2445.
- (9) *Evans v. Evans*, (1790), 1 Hag. Con. 35; 161 E.R. 466; 27 Digest, Replacement, 294, 2398.

PETITION for divorce by the wife.

By her petition dated May 13, 1953, the wife alleged:

" 8. That the [husband] has since the celebration of the marriage treated the [wife] with cruelty. 9. That the [husband] has throughout the married life treated the [wife] with meanness over money matters and has consistently refused to make her any or any sufficient allowance for household necessities or for other purposes; that he has consistently, despite the [wife's] protests, mismanaged his financial affairs and run into debt, leaving the [wife] to deal with his creditors, well knowing that his conduct caused distress and injury to the [wife's] health and that he has ignored and neglected the [wife]. 10. That from the date of the said marriage until the date hereof the [husband] has refused despite the [wife's] repeated requests to make her any allowance of money for food or other purposes; when the [wife] protested the [husband] quarrelled with her, told her to order goods on credit, and refused to pay for the same until the creditors pressed for payment, well knowing that the [wife] suffered humiliation and distress by reason thereof."

The wife pleaded instances of such conduct and prayed that the court would exercise its discretion in her favour, that the marriage might be dissolved.

On Nov. 12, 1953, the petition came undefended before KARMINSKI, J., who at the conclusion of the evidence, given by the wife and her mother, adjourned the case to enable counsel to be instructed on behalf of the Queen's Proctor to argue the case.

M. B. Smith for the wife.

J. P. Comyn for the Queen's Proctor.

KARMINSKI, J.: The wife and the husband were married in October, 1940. The husband, who was then a farm assistant, which means, I think, he worked for a wage or a salary at a farm, was twenty-seven years of age and a bachelor, and the wife was nineteen and unmarried. The parties had had sexual relations before marriage and, indeed, the wife was pregnant with a child, who was the eldest child of the marriage. I mention that fact, not for the purpose of moral censure, but because I think it is of some importance in the present case to see how the marriage started. There were two other children of the marriage, making three in all. After the marriage the parties lived together, first with the wife's parents. The husband apparently gave her no allowance, though she asked for one, and in December, 1941, they moved to a farm, not, I think, very far away from where they had been living, which had been bought by the husband with money from a legacy of some relation. It is said he paid £3,500 for that farm and the wife complains that when he was there he did not work very hard and gave her no allowance. There were clearly a great many difficulties about the wife's position. She could never get a regular allowance from her husband, she had an increasing family to keep and the husband's way of conducting his affairs was to run up bills at the local shops and when really hard-pressed reluctantly to pay them; a state of affairs which the wife described, with great moderation, as very worrying. The husband failed as a farmer but I am not prepared to say whether it was his fault or merely his misfortune. I have the impression that he was a fairly shiftless and impracticable individual. At any

A rate he failed, and the wife and husband and children had to move. Inevitably the wife went back to her parents, and thereafter another child was born. The husband, after the failure of his farm, sought employment and worked at Staplehurst. He told his wife virtually nothing about what he was getting and gave her very little, if any, financial support. He appears to have been impracticable, because after selling the farm there was one cheque for £800 which he left lying about the house for some time before paying into his bank. What happened to the money resulting from the sale of the farm we do not know but I have a suspicion, though no more, that it was very quickly absorbed by his many creditors. Eventually the wife and the husband moved to a cottage not far from her parents and the third child was born. Again the husband did not give the wife an allowance and he ran up bills and paid creditors when they pressed him; but the pressure by the creditors was, of course, not infrequently directed at the wife because they came round to the cottage to collect their money and found her there. She has described that, again I think very moderately, as being most humiliating and very worrying. So their life went on. The husband in 1950 seems to have taken a partnership again in some agricultural concern but the financial position did not change and the wife became more and more worried and distressed. Finally the husband sold the lease of the home to the landlord for £300. What happened to that money I do not know, but again I suspect it went to satisfy creditors. In 1952, this home having been sold, and the husband making no effort to provide any other home, the wife went back to her mother and never returned to him.

D I will deal briefly with the question of the wife's adultery. She went away with her mother for what might be described as a recuperative holiday abroad in January, 1953, and while there she formed an affection for a man with whom she committed adultery. That association terminated with the holiday and it took place at a time when the wife was clearly very unhappy and worried.

E I come now to the question of the wife's health, a matter which is often useful to discuss first in questions of cruelty. No medical evidence was called but the wife and her mother both gave evidence, which I accept, showing that the wife's health suffered, and that her nervous system was affected during the course of this unhappy marriage. Evidence was also forthcoming to show that since the separation in 1952 her health has partially at any rate recovered. I do not have a moment's doubt that the circumstances to which I have adverted injured the wife's health, and that she was an unhappy and a nervous woman by the time they separated in 1952. I have to be satisfied, however, in order to make a finding of cruelty, that the wife's ill health was caused by the husband's cruelty. It is elementary in these cases of mental unhappiness that the health of one or sometimes both the parties suffers as the result of living in an atmosphere of unhappiness, but great care must be taken to assess the cause of the injury to health. With the one exception, the wife's complaints are limited to the husband's shiftlessness and his irresponsibility, and, in short, his failure on the whole to maintain her. The exception was an occasion when the wife, who was the treasurer of a local political association, invited a man who was the secretary of that association to come to the house to sign some cheques which apparently had to be signed by them jointly; the husband behaved oddly and the wife, who thought he was spying on her, taxed him with it, and he suggested that he rather hoped to catch her in some compromising position with this other man. That caused her some distress. Though the husband never gave the wife any regular house-keeping allowance throughout the marriage, he does appear reluctantly to have paid for the household goods which were consumed in the home. It is not, indeed, difficult to picture the wife's distress and humiliation and anxiety at being constantly pressed by local tradesmen and others for bills she had incurred in running the home, but great care has to be taken in cases of this kind not to extend lightheartedly the area of legal cruelty.

The industry of counsel for the Queen's Proctor has failed to disclose any case where, as in the present, the main complaint was financial meanness or failure to support the home. He did, however, call my attention to *Simpson v. Simpson* (1) and *Jamieson v. Jamieson* (2). In neither case was money the sole source of trouble. In *Simpson v. Simpson* (1) the husband, who was found by the justices to have been guilty of persistent cruelty, had committed matrimonial offences other than purely financial ones. He had made the wife's life, as it was said, a hell; he kept food which was reserved for himself and he asked his wife to cook it for him; he refused to take her for a holiday; he had failed to make the house comfortable and habitable, he was for long periods taciturn and unfriendly to her and on several occasions, most important of all to my mind, he had told her to go from the home, so that the husband's meanness in that case was by no means the only source of complaint. In *Jamieson v. Jamieson* (2), which was tried on the issue whether the wife's averments could amount *prima facie* to a case of cruelty, it was alleged that not only was the husband mean in providing housekeeping money and, in fact, had invariably failed to provide sufficient, but also that he had told the wife he hated the sight of her when she complained, had shut the door in her face, had often been rude and threatening to his wife in the presence of the children and had greatly humiliated her, and on one occasion, which one suspects may have been the cause of the final break-up of the home, had threatened to throw the wife down the stairs of the matrimonial home. There again the area of complaint was far less limited than in the present case.

The difficulty in this sort of case is to find on which side of the border of cruelty the facts lie. It is, of course, implicit in our law that in order to find cruelty proved it is not necessary to find physical violence. Cruelty by words, by talk, or by conduct other than violence, may be cruelty none the less and possibly may be more dastardly cruelty than the cruelty of blows. Since *Kelly v. Kelly* (3), there can be no doubt that this court can find cruelty notwithstanding the complete absence of any blow or act of violence. Nagging will suffice, if persistent. Abuse, harsh language, conduct of that kind, may well be cruelty provided always it causes either injury to health or a reasonable apprehension thereof. It may be convenient to refer briefly to two recent cases, one on each side of the line. In *Lauder v. Lauder* (4) the husband had been found guilty by ORMEROD, J., upheld by the Court of Appeal, of cruelty which was marked by a form of silence which went far beyond sulking and was found to be the "sending to Coventry" of the wife by the husband because she had failed in one way or another to comply with his wishes. ORMEROD, J., and the majority of the Court of Appeal, found that the silences, the sulking and the "sending to Coventry" were not expressions of the character of a natural taciturn and silent man but was the weapon deliberately and intentionally used by him in an attempt to reduce the wife into subjection. Indeed, LORD MERRIMAN, P., in his judgment pointed out how effective a weapon that sort of conduct might be to a normal, healthy and affectionate wife, and it was marked in the case of the husband in *Lauder v. Lauder* (4) by a refusal sometimes for periods of over a week to speak to his wife at all, while in her presence he was carrying on normal and cheerful conversations with casual visitors or guests. *Kaslefsky v. Kaslefsky* (5), on the other hand, was a case of cruelty brought by a husband against the wife and his charges were mainly based on the wife's negative conduct to him. I use the word "negative" advisedly because it was marked by a refusal on her part of sexual intercourse when the husband returned from overseas service during the war, by a refusal to do any of the usual wifely duties in looking after the house, by keeping the child up very late, by doing no work, and by neglecting the child. She had also written while he was on service abroad saying that she wanted her freedom and suggesting that the child, whom she did not want, should be adopted. His Honour, JUDGE PUGH, sitting as a special commissioner in divorce, following the

guidance of the Court of Appeal in *Westall v. Westall* (6), refused to find the wife guilty of cruelty, stating that in his view the wife was lazy, or, as he put it, sluttish, and was a wife who neglected her duties, but he found that in her conduct there was no evidence that those acts were intentional or aimed specifically at the husband. The husband appealed, and the Court of Appeal in a considered judgment dismissed the appeal. The wife did not appear. BUCKNILL, L.J., said ([1950] 2 All E.R. at p. 401):

"I venture to think that that is one of the tests which one has to apply: Is the conduct of the wife, unless done for the express purpose of injuring the health of the husband, innocent in the sense that it is justified or justifiable in the circumstances? In cases such as refusal of sexual intercourse, or sheer laziness, or neglect of a child, I think that is conduct which is innocent so far as any charge of cruelty is concerned, unless it is done for the express purpose of causing injury to the health of the complaining spouse."

DENNING, L.J., said ([1950] 2 All E.R. at p. 402; [1951] P. at p. 46):

"First, when the conduct consists of direct action by one against the other, it can then properly be said to be aimed at the other, even though there is no desire to injure the other or to inflict misery on him. Thus, it may consist of a display of temperament, emotion, or perversion whereby the one gives vent to his or her own feelings, not intending to injure the other, but making the other the object—the butt—at whose expense the emotion is relieved. The sick wife in *Squire v. Squire* (7) had no desire to injure her husband, but she was guilty of cruelty because she made her husband the butt of her inordinate demands. The moody husband in *Lauder v. Lauder* (4) directed his sulkiness at his wife, although he had no wish to hurt her. So, also, the nagging wife in *Usmar v. Usmar* (8). These cases show that, when the conduct consists of direct action against the other, then it is not essential that there should be a specific intent to injure or even to cause distress. Cases of this kind must, however, be carefully watched. When there is no intent to injure, they are not to be regarded as cruelty unless they are plainly and distinctly proved to cause injury to health. Secondly, when the conduct does not consist of direct action against the other, but only of misconduct indirectly affecting him or her, such as drunkenness, gambling, or crime, then it can only properly be said to be aimed at the other when it is done, not only for the gratification of the selfish desires of the one who does it, but also in some part with an intention to injure the other or to inflict misery on him or her. Such an intention may readily be inferred from the fact that it is the natural consequence of his conduct, especially when the one spouse knows, or it has already been brought to his notice, what the consequences will be, and nevertheless he does it, careless and indifferent whether it distresses the other spouse or not. The court is, however, not bound to draw the inference. The presumption that a person intends the natural consequences of his acts is one that may—not must—be drawn. If in all the circumstances it is not the correct inference, then it should not be drawn. In cases of this kind, if there is no desire to injure or inflict misery on the other, the conduct only becomes cruelty when the justifiable remonstrances of the innocent party provoke resentment on the part of the other, which evinces itself in actions or words actually or physically directed at the innocent party."

I apply those tests to the present case. I have stated that the fault of the husband in the present case is his shiftlessness, and his failure to provide properly for the wife, at any rate until after pressure had been brought on him. Those, no doubt, are grave defects, which I doubt not were brought to his notice from time to time by a rightly aggrieved wife. I do not think the present is a case where the husband desired to injure the wife in any way, and I also think that his conduct

was not directed at her. The Matrimonial Causes Act, 1950, s. 1 (1) (c), requires that to establish cruelty the husband must have "treated" the wife with cruelty, or vice versa, and the court has to try to ascertain in these cases whether or not there was anything on the husband's part which could in any way be described as treatment. Although there may be unhappiness in a marriage the court cannot for that cause alone find cruelty.

It was observed by SIR WILLIAM SCOTT in *Evans v. Evans* (9) (1 Hag. Con. at p. 38):

"And if it be complained that by this inactivity of the courts much injustice may be suffered, and much misery produced, the answer is that courts of justice do not pretend to furnish cures for all the miseries of human life. They redress or punish gross violations of duty, but they go no farther; they cannot make men virtuous: and, as the happiness of the world depends upon its virtue, there may be much unhappiness in it which human laws cannot undertake to remove."

One is conscious that in cases of this kind one or other of the spouses has suffered some hardship and has been made unhappy by the defects of character as well as conduct of the other spouse, and that, to my mind, is what has happened here. Conduct, as counsel for the Queen's Proctor has pointed out, constituting cruelty must be taken as being capable of being aimed at or directed to or impinging on the petitioning spouse and that, in the present case, is the difficulty. In my view the husband was not, by his conduct, aiming anything at the wife, nor was his conduct directed against her. His conduct was negative, as was the conduct of the wife in *Kaslefsky v. Kaslefsky* (5). Much as I sympathise with the unhappiness of the wife, I am bound to hold as a matter of law, or as a mixed question of fact and law, that the husband's conduct, deplorable though no doubt it was, falls short of cruelty. I must, therefore, dismiss this petition.

Petition dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Monckton, Son & Collis*, Maidstone (for the wife); *Treasury Solicitor*.

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

CHAO AND OTHERS (TRADING AS ZUNG FU CO.)
v. BRITISH TRADERS AND SHIPPERS, LTD. (N.V. HANDELS-
MAATSCHAPPIJ J. SMITS IMPORT-EXPORT Third Party).

[QUEEN'S BENCH DIVISION (Devlin, J.), July 26, 27, 1954.]

Damages—Breach of contract—Date for and method of assessment—Sale of goods c.i.f.—Shipment after contract date—Forged date on bills of lading—Goods accepted by buyers with knowledge of late shipment—Fall in market price of goods—Discovery of forgery—Goods virtually unsaleable.

By a contract made in August, 1951, the sellers, who were traders in London, agreed to sell to the buyers, who were merchants in Hong Kong, twenty tons of Rongalite C. of Swedish origin, at £590 a ton c.i.f. Hong Kong. The sellers then entered into a contract to purchase the goods from suppliers in Holland, and the buyers re-sold the goods to sub-purchasers, who were a firm of merchants in Hong Kong. After negotiations between the parties it was agreed that the shipment was to be made from a continental European port not later than Oct. 31, 1951, as the market for the goods in Hong Kong was falling. The goods were shipped from Antwerp on Nov. 3, 1951, but the bills of lading were forged by or on behalf of the suppliers without the knowledge of the sellers and purported to show that the goods had been shipped on Oct. 31. On Nov. 10, 1951, the sellers' bank presented the bills of lading to the buyers' bank and on Nov. 12 received £11,800 due from the buyers under the contract. Towards the end of November the sub-purchasers, having discovered that the goods had not been shipped in October, informed the buyers of the fact and cancelled the contract of re-sale. On Dec. 12 the buyers obtained confirmation of the fact that the shipment had not been made by Oct. 31. On Dec. 17 the goods arrived in Hong Kong and the buyers took delivery of them. On and since that date the goods were virtually unsaleable in Hong Kong. The only sale of similar goods during that time was at £70 per ton, a price which the buyers were prepared to regard as the salvage value of the goods. The buyers brought an action against the sellers (*Chao (Trading as Zung Fu Co.) v. British Traders and Shippers, Ltd. (N.V. Handelsmaatschappij J. Smits Import-Export Third Party)* ([1954] 1 All E.R. 779)) in which it was held that the buyers were entitled to damages for breach of contract. The case was adjourned for further argument on the assessment of damages. On the hearing for assessment of damages,

HELD: (i) in assessing the damages the relevant point of time was when, after the buyers knew of their rights, they could with reasonable diligence have re-sold the goods, and in the circumstances that date could be taken to be not later than Dec. 17, 1951, when the goods arrived in Hong Kong.

(ii) the buyers were entitled to damages assessed at the difference between the contract price, £590 per ton, and the salvage value of the goods, £70 per ton, on the contract quantity of the goods, twenty tons, because, although the measure of damages was the difference between the contract price and the market price, there was no real market price on Dec. 17, 1951, the goods being virtually unsaleable in Hong Kong at that time.

(iii) as the buyers had not rejected the goods, the price at which the goods could be bought in Hong Kong was irrelevant.

AS TO DAMAGES WHERE THERE IS NO AVAILABLE MARKET, see HALSBURY, *Hailsham Edn.*, Vol. 29, p. 197, para. 262; and FOR CASES, see DIGEST, Vol. 39, p. 669, Nos. 2566, 2567, and p. 670, No. 2575.

Cases referred to:

- (1) *Finlay (James) & Co. v. N.V. Kwik Hoo Tong H.M.*, [1928] 2 K.B. 604; 97 L.J.K.B. 817; 139 L.T. 582; *affd.* C.A., [1929] 1 K.B. 400; 98 L.J.K.B. 251; 140 L.T. 389; 31 Lloyd's Rep. 220; Digest Supp.

- (2) *Chae Trading as Zung Fu Co.* v. *British Traders and Shippers, Ltd.* (N.V. *Handelsmaatschappij J. Smits Import-Export Third Party*), [1954] 1 All E.R. 779.

ACTION for, inter alia, damages for breach of contract.

The case originally came on for hearing before DEVLIN, J., in January, 1954. On Jan. 29, 1954, His LORDSHIP delivered judgment in favour of the plaintiffs and reserved the question of the assessment of damages for further argument. The original judgment, in which His LORDSHIP indicated the general principles on which the damages should be assessed, is reported at [1954] 1 All E.R. 779, where the facts of the case are stated. The facts essential for the purposes of the present report, which deals only with the assessment of the damages, are summarised in the headnote.

Ashe Lincoln, Q.C., and *G. J. Webber* for the plaintiffs (the buyers).

Easton Roskill, Q.C., and *G. G. Honeyman* for the defendants (the sellers).

M. R. E. Kerr for the third party (the suppliers).

DEVLIN, J.: I have now to assess the damages which flow from the breach of contract which I have found in this case to have been committed, that is, the delivery by the sellers to the buyers of forged bills of lading, with the result that the buyers, who accepted them, lost the right to reject which they could have exercised had they known, as they ought to have known from the bills of lading, the true date of shipment. The principle on which the damages fall to be assessed I have also already considered, and I have held that the damages are to be determined in accordance with the decision of the Court of Appeal in *James Finlay & Co. v. N.V. Kwik Hoo Tong H.M.* (1).

In *Finlay's* case (1) the facts were very similar, but the dates are important. In that case the ship arrived with the goods on board before the documents were tendered; the date of its arrival was Nov. 9, 1920, the documents were tendered on Nov. 12, and the ship completed her discharge on Nov. 15. The goods were rejected by the sub-buyers, and, accordingly, they were sold by auction in December, 1920, and it was not until some considerable time later, I think in 1922, that the buyer discovered that the bill of lading was false, and brought the action for damages. The measure of damages was held to be the difference between the contract price of the goods and the market price, as evidenced by the price that was obtained at the auction. The dates which I have taken are to be found in the report of the case, and the report makes it clear that the market price did not in that case fluctuate between the date of tender, Nov. 12, and the date when the goods were sold, Dec. 10. It had, however, fallen considerably below the contract price, and the buyer was thus enabled to get by way of damages compensation for the fall in the market. That followed because, had he exercised his right to reject, he would have been able to do so, and by doing so he would, in effect, have relieved himself of the result of the fall in the market.

The basis on which that conclusion was reached is stated by WRIGHT, J., in the court of first instance. Having explained the measure of damages, he said ([1928] 2 K.B. at p. 613):

"The measure of damages in such a case, in my judgment, is that which I have explained, and it seems to me exactly to fall within the language of s. 53 (2) of the Sale of Goods Act, 1893—namely, 'the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.'"

Applying that measure, I should not have thought that there would be any difficulty in principle on the facts in this case. The dates and figures in the present case are that the contract price was £590 per ton, the documents were tendered while the voyage was still continuing, on Nov. 10, 1951, and by that date the price had fallen. It is common ground that the reason why the price fell was because of an embargo that had been placed by the Chinese authorities on the

importation of goods of this type from Hong Kong. That embargo, in the words of one of the witnesses, "knocked the market to pieces". One of the matters which I shall have to consider is whether there was really a market at all, but there were, at any rate, quotations, although they are said to be, and many of them are in fact given as, "nominal" quotations. The nominal quotation on Nov. 10 was 365 cents per pound, which worked out at the equivalent of £504 sterling per ton, so that by that date the market price had, on any view, fallen to some extent. A By Dec. 17, the date when the goods arrived, the quotations had fallen still further, and the comparable figure in sterling per ton was £330.

I have already in my judgment [see *Chao (Trading as Zung Fu Co.) v. British Traders and Shippers, Ltd. (N.V. Handelsmaatschappij J. Smits Import-Export Third Party)* (2)] dealt with the date on which the plaintiffs knew or ought to have known that they had a right to reject, and it is unnecessary for me now to say more than that, for the purpose of this judgment, I can take it as being not later than Dec. 17. Accordingly, this is not a case like *Finlay's* case (1), in which that knowledge was not discovered until some time afterwards. The date when delivery was taken from the ship was a date on which the plaintiffs knew a great deal, and it is sufficient for the purpose of the judgment in this case to say that they knew enough to enable them to reject. I say that it is sufficient, because the case for the plaintiffs is that on or before Dec. 17, and until today the goods were substantially worthless, so that the exact date does not matter. B C

In those circumstances a difficulty may arise in attempting to find the value of the goods at the relevant time, but it does not appear to me that there is any real difficulty in principle in a case of this sort. The only difficulty that I feel is a difficulty that arises on these figures. So far as the principle is concerned, the D buyer is, on the measure to which I have just referred as set out by WRIGHT, J., in *Finlay's* case (1), entitled to be put in the same position as he would have been in if he had exercised his right to reject. He has got the goods, he has parted with his money, and, therefore, he wants to relieve himself of the goods and get back his money; and if that is done he will be in the same position as he would have been in if he had never parted with his money and had never received the E goods. Accordingly, the reasonable course for him is that, as soon as he ascertains that he has a right to compensation in that the bill of lading was a false one, he should then, or within a reasonable time thereafter, sell the goods for what they will fetch, and that he should obtain from the seller the difference between the price which he gets for the goods and the contract price which he pays. In that way he will be put in almost precisely the same position as if he had rejected the F goods. In other words, the measure is the difference between the contract price and the price at which the buyer has sold the goods.

Whether that is put as the price which the buyer actually gets for the goods, or whether it is put as the market price obtainable for the goods on the day when the buyer should sell them, I do not think matters very much. It is put in both G ways in the course of the judgment in the Court of Appeal in *James Finlay & Co. v. N.V. Kwik Hoo Tong H.M.* (1), but, if one bears in mind the principle that the buyer is bound to mitigate his damage, then as soon as he knows of his rights—he cannot, of course, do so before he does know his rights, and, of course, "as soon as" means within a reasonable time thereafter—he must sell the goods, and if he chooses not to sell the goods he is not to be put in any better or worse H position by delaying for his own purposes, so that, in substance, it is the price which he actually gets on selling them, or the price which he actually could get if he did sell them. On that principle, the only difficulty which arises is due to the fact that, on the plaintiffs' case, the buyer could not have sold the goods at any time on or after Dec. 17, in the Hong Kong market, that is to say, at any time after he knew of his rights to compensation.

Before I deal with that, which is a difficulty arising purely on the facts of this case, I must deal with the objection which counsel for the defendants has

advanced to the principle as I have just stated it. He submits that the true measure is the difference between the contract price and the price at which the buyer could have bought corresponding goods in the market on Nov. 10, 1951, that being the date when the documents were tendered, and when, therefore, his right to reject the goods arose. Counsel for the defendants conceded that that was not the date which was taken in *James Finlay & Co. v. N.V. Kwik Hoo Tong H.M.* (1), the principle of which case I am applying, but he pointed out that in that case the market price at the date of tender was the same as the market price at the time of the auction, and, therefore, there was, as he puts it, tersely, no money in the point. It is quite clear that it never occurred to anybody to take the date of tender as being the relevant date. It is clear also from the terms of the judgment of WRIGHT, J., that he was not taking the date of tender. There is nothing to show that he considered the date of tender as being in any way relevant, but, as counsel for the defendants in the present case says, there being nothing in the point, it was not argued, and it is open to him now.

In my judgment that contention is fallacious, in two respects. In the first place, it is fallacious because I do not think that Nov. 10 was the relevant date, and, secondly, it is fallacious in that it takes the buying price instead of the selling price. With regard to the first fallacy, the breach for which damage is being awarded is, in effect, the breach of the duty imposed by the contract to give, by means of the bill of lading, correct information about the date of shipment. The bill of lading was a false bill of lading, although the defendants themselves were not privy to the fraud. It was intended by those who perpetrated the fraud to be acted on and to deceive, among others, the plaintiffs, and the plaintiffs were so deceived. It seems to be quite illegal to say that they must be expected as reasonable men to act in the same way as if they had not been deceived.

An aggrieved party cannot be expected to act in such a manner as to compensate himself for the consequences of a wrong, whether it be in tort or in breach of contract, which deceives him, until he has ascertained the fact. It seems to be quite fictitious to talk of the buyers having to be treated as if they had gone out into the market and bought goods on Nov. 10, when, in fact, they had supposed that they had already taken up goods which were in accordance with the contract, and they had no notion, and could have had no notion, that they had any rights as respects the contract. Counsel for the defendants has fortified his argument by reference to a passage in the judgment which I have already delivered in this case, which, he says, leads to the conclusion that he has advanced. I do not know that it would matter very much if it did lead to the conclusion which he advanced, because a dictum of a judge of first instance is not binding even on himself; but, in fact, I do not think that it does lead to that conclusion, and I do not think that it is necessary for me to alter in any way the view which I then expressed. I said ([1954] 1 All E.R. at p. 792):

“If I might call the breach of the term to deliver correct documents breach (a) and the failure to ship goods in conformity with the contract, i.e., on the contract date, breach (b), it seems to me that the right to damages for breach (a) vests when the breach is committed, that the measure is then determined as being the proper measure to put the buyer in as good a position as he would have been in if the breach had not been committed . . .”

That I still believe to be the correct statement of the law, but it does not state, and it does not require, that the amount is to be determined by reference to the conditions which existed on the day when the breach was committed. The right to damages then vests, and the measure is then decided on, as it were, in law, but it may well be that the amount cannot be ascertained until subsequent events have determined it. That must be so, of course, in every case of fraud, where the damages cannot be quantified until it is seen what means of mitigation are open to the aggrieved party when he knows the facts.

Counsel for the defendants objects to the . . . of fraud, because he says that the position is different in tort from what it would be in damages for breach of contract. I do not know that it is, but the matter is not peculiar to fraud. If one takes, for example, a case of wrongful dismissal, the right to damages vests on the date of the breach, and that is the date of the wrongful dismissal. The measure of damages is then determined once and for all, and it is the difference between the salary or wages which the plaintiff would have earned under the contract for the remaining period of the contract and such salary or wages as he has been able to obtain by obtaining comparable work during the period of the contract which he did not serve with his former employer. The amount is still unsettled; it cannot be ascertained until it is seen what alternative remuneration the plaintiff is able to secure, and it would be nothing to the point to say that on the date of the breach there happened to be a job vacant which was precisely the same as the one from which the plaintiff had been dismissed, at precisely the same salary, if the plaintiff did not know about that and could not by the exercise of reasonable diligence have obtained it. I think, therefore, that the date is not the date of the breach, but the date when the plaintiff could, acting with reasonable diligence, and after he knew of his right, have re-sold the goods on the market and got the best price he could for them.

The second fallacy in the argument of counsel for the defendants is that he takes the buying price and not the selling price. That is not generally a matter of importance. The margin between the two is, ordinarily, not great, but in this case it happens to be of very considerable importance. It is common ground that the quotations represented, at any rate, the price at which anybody could have bought Rongalite in Hong Kong, and it may be that they could have bought it for less, but it is disputed whether they represented the price which a seller could necessarily have got when the market was so constricted that there was no longer the ordinary small margin between the buying and selling price. In my judgment, the buying price has nothing to do with the calculation which I have to make. It is, no doubt, quite true that, if the goods had been rejected, the buyer, if he had wanted to provide himself with similar goods for the purpose of fulfilling his contract of re-sale, could have gone out in the market as on the day of the rejection and bought them, and the difference between the contract price and the lower buying price would have been the profit which he made by virtue of the rejection, and which in one sense he has lost because he did not reject. It is also, of course, true that, if a buyer rejected and wanted to claim damages against the seller, the measure of damages, which could only arise at all if the market had risen and not fallen, would be the price at which he bought goods in order to put himself in the same position. Those calculations, and the relevance of the buying price, depend, however, on the fact that the buyer has not got the goods: he has returned the goods, and he is putting himself in the same position, so far as he can, as if the contract goods had been delivered. Therefore, he has to buy. In this case the buyer has got the goods, and a calculation which supposes, incorrectly and notionally, that he should go out and buy another quantity of the same goods, has nothing to do with the reality of the matter. What he wishes to do in those circumstances, in order to put himself in the same position, is to sell the goods, and not to buy them, and one would think, therefore, that the measure which I have stated, and which seems to me to follow the principle to which I have referred, would be the right one.

Therefore, as I say, the only difficulty that arises is because of the fact that there cannot be fixed with any degree of certainty the price at which the buyer could have sold on the market on Dec. 17 or thereafter. There is a substantial body of evidence to show that the quotations to which I have referred were merely nominal quotations, and many of them are, indeed, described as "nominal". There were some sales; there is no specific evidence of the quantity which was sold, but the general evidence is that they were all very small sales, and that no

substantiated to the principle as I heard during the relevant period. That evidence comes from a number of sources, but I heard yesterday the evidence of Mr. Sulke, a partner in the plaintiff firm, who was dealing with the matter, and I have no hesitation in acting on it. He seemed to me to be a good and reliable witness, and his evidence is corroborated and fortified by much other evidence given in the course of the case. The conclusion which I draw from that evidence is that there was no market in which these goods could be sold, in the ordinary sense; that the market had gone to pieces, and that, the only demand for this material being from the mainland, an enormous surplus was built up in the go-downs in Hong Kong, which nobody was willing to take, and the only outlet was these small sales. The test of the matter, after all, is that Mr. Sulke has got a quantity of this material on his hands, and I am satisfied that his evidence is true when he says that he has endeavoured to sell it and that he has failed so to do, and he still cannot sell it. When I say that he had endeavoured to sell "it", that requires modification. He has not, or at any rate he did not for a considerable period after the event, endeavour to sell the twenty tons the subject-matter of the contract, because he supposed that they were not his property; but he had another ten tons of a similar material, and he endeavoured to sell the ten tons and was unable to do so. I am satisfied, therefore, that the case of the plaintiffs is made out when they say that this commodity was virtually unsaleable in the Hong Kong market.

"Virtually unsaleable", however, does not mean that the goods have no value for the purpose of the calculation of damages. They have not been sold yet, and it is possible that they may never be sold, but it is also possible that trade may revive and that some sort of a market may be found for them if they are held on to for long enough. They, therefore, have some value, although it may be a speculative one, but that possibility in itself is something that must be valued.

The only sale of any quantity which the evidence reveals is a sale at 50 cents per pound, which works out, I am told, at £70 per ton. The plaintiffs are content to take that as being evidence, so to speak, of the salvage value of the goods, and that is, therefore, the figure which, for the purpose of this calculation of value, I place on them. The only other observation that I would make is that counsel for the defendants contended that, there being no seller's market in Hong Kong, it was the duty of the plaintiffs in such circumstances to seek a market elsewhere. I need not say any more about that than that I am not satisfied on the evidence that there was any market elsewhere in which the plaintiffs, acting reasonably, could have re-sold this quantity of these goods. Accordingly, the damages will be calculated on the basis of the difference between the contract price of £590 per ton and the figure of £70 per ton, on the contract quantity of twenty tons.

Judgment accordingly.

Solicitors: *A. Kramer & Co.* (for the plaintiffs); *Constant & Constant* (for the defendants); *Middleton, Lewis & Co.* (for the third party).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

BITHELL v. BITHELL.

[MANCHESTER SUMMER ASSIZES (Lord Merriman, P.), July 19, 1954.]

Divorce—Insanity—Incurable unsoundness of mind—Care and treatment for five years—Statement signed by visitors to the effect that it was proper that patient should continue to be detained—Detention under an order—Matrimonial Causes Act, 1950 (c. 25), s. 1 (1) (d), s. 1 (2) (a), (d)—Mental Treatment Act, 1930 (c. 23), s. 5 (10);

On Mar. 7, 1947, the wife was received into a mental hospital as a temporary patient on the application of the husband in accordance with the provisions of the Mental Treatment Act, 1930, s. 5 (1) (2) and (3). On Mar. 8, 1947, two members of the visiting committee visited the wife in accordance with the provisions of s. 5 (9) of the Act and signed a statement, in accordance with s. 5 (10), that it was proper that she should continue to be detained. On Sept. 6, 1947, on the expiry of the period of six months limited for the detention of temporary patients by s. 5 (11), the wife, having regained the capacity of forming and expressing her own volition, was re-admitted to the hospital as a voluntary patient under s. 1 (1) of the Act of 1930. She remained such a patient continuously thereafter. She was incurably of unsound mind. By a petition dated Aug. 19, 1953, as amended, the husband prayed for dissolution of the marriage on the ground, provided by the Matrimonial Causes Act, 1950, s. 1 (1) (d), that the wife was incurably of unsound mind and had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition.

HELD: the wife had been continuously under care and treatment for the period required by s. 1 (1) (d) of the Matrimonial Causes Act, 1950, because from Mar. 8, 1947, when the two members of the visiting committee of the mental hospital signed the statement that they were satisfied that she should continue to be detained (i.e. detained as a temporary patient), she was detained under an "order . . . under the Lunacy and Mental Treatment Acts, 1890 to 1930", within the meaning of the Matrimonial Causes Act, 1950, s. 1 (2) (a), and because her re-admission to the mental hospital as a voluntary patient, where she thereafter remained continuously throughout the five-year period, followed without any interval her detention as a temporary patient, thereby satisfying the requirements of s. 1 (2) (d) of the Matrimonial Causes Act, 1950; accordingly, a decree nisi was granted.

EDITORIAL NOTE. In *Chapman v. Chapman*, p. 116 ante, a period of voluntary treatment was added to a period of detention to make up the five year' period for the purpose of founding a divorce petition, the period of initial detention in that case being a very temporary period under an urgency order. The instrument authorising the initial detention was, however, one described by the Lunacy Act, 1890, as an "order". In *Benson v. Benson*, [1941] 2 All E.R. 335, a direction by the Board of Control for an extension of the six months' period permitted for the detention of a temporary patient was held to be an "order" for the purposes of a subsequent divorce. Now detention as a temporary patient with the concurrence of a visiting committee under s. 5 (10) of the Mental Treatment Act, 1930—a concurrence which is given by what the Act describes as a "statement"—is held to be detention under an "order" for the purposes of a subsequent divorce.

FOR THE MENTAL TREATMENT ACT, 1930, s. 5, see HALSBURY'S STATUTES, Second Edn., Vol. 17, pp. 1234-1236.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 1 (1) (d), s. 1 (2) (a) (d), see *ibid.*, Vol. 29, p. 390.

Cases referred to:

- (1) *Benson v. Benson*, [1941] 2 All E.R. 335; [1941] P. 90; 110 L.J.P. 43; 165 L.T. 172; 27 Digest, Replacement, 371, 3065.
- (2) *Whitley v. Whitley*, [1946] 2 All E.R. 726; *affd.* C.A., [1947] 1 All E.R. 667; 177 L.T. 360; 27 Digest, Replacement, 371, 3067.

PETITION by the husband for divorce on the ground that the wife was incurably of unsound mind and had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. The facts appear in the headnote. A

A. M. Knight for the husband.

W. J. Moore for the Official Solicitor, guardian ad litem for the wife.

LORD MERRIMAN, P.: So far as the facts are concerned, there neither is B
nor at any time has been any dispute. It is clear that on Mar. 7, 1947, the wife was received into the mental hospital at Rainhill, strictly in accordance with the procedure provided by s. 5 (1) and (2) of the Mental Treatment Act, 1930, which applies to temporary treatment, without certification, of certain persons. The husband made the application which was accompanied by the recommendation of two medical practitioners, as s. 5 (3) of the Act requires. The matter was reported in due course to the Board of Control. The Mental Treatment Act, 1930, s. 5, provides several safeguards for the patient. Section 5 (11) says that C

" . . . a person received as a temporary patient may be detained for a period not exceeding six months but shall not be detained as such for any longer period."

Section 5 (12) provides that D

" If . . . a temporary patient becomes capable of expressing himself as willing or unwilling to continue to receive treatment, he shall not thereafter be detained for more than twenty-eight days unless in the meantime he has again become incapable of so expressing himself."

Not less important are the provisions of s. 5 (13) which reads: E

" Where it is anticipated that a person who is undergoing treatment as a temporary patient under this section [s. 5] will not recover within the period of six months, but his early recovery appears reasonably probable, that period may from time to time be extended for further periods of such length not exceeding three months as may be specified in directions given by the Board of Control . . . " F

The rest of the sub-section lays down who is to make the application and who is to make the necessary recommendations, and so on.

The situation resulting from the giving of directions under s. 5 (13) of the Act of 1930 has been dealt with in *Benson v. Benson* (1), in which the Board of Control towards the end, but before the actual completion, of the period of six months, had given one of the extensions provided by s. 5 (13). The point of the decision was that a direction for such an extension was an " order " within the meaning of the Matrimonial Causes Act, 1937, s. 3 (a);* and, accordingly, when the status of being a voluntary patient followed immediately thereafter without any break of continuity, the period of being under care and treatment was continuous (by virtue of s. 3 (b)* of the Matrimonial Causes Act, 1937) for the purposes of s. 176 (d) of the Supreme Court of Judicature (Consolidation) Act, 1925.† The case of *Benson v. Benson* (1) expressly left undecided the G
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* Section 3 of the Matrimonial Causes Act, 1937, is repealed and is now replaced by s. 1 (2) (a) (d) of the Matrimonial Causes Act, 1950, 29 HALSBURY'S STATUTES, 2nd edn., 390.

† The section, which was substituted in the Act of 1925 by s. 2 of the Matrimonial Causes Act, 1937, is now replaced by s. 1 (1) of the Matrimonial Causes Act, 1950, 29 HALSBURY'S STATUTES, 2nd edn., 389.

question whether, short of such a direction by the Board of Control, there could at any earlier period of the detention as a temporary patient, be any question of the patient have been detained under an order. I do not think it necessary to refer to the cursory glance at that aspect of the matter which is contained in my judgment in *Benson v. Benson* (1) because it is plain that whatever I may have thought, I was not prepared to express any opinion about that one way or the other and said so ([1941] 2 All E.R. at p. 340). Nobody, I am assured, up to the present time has doubted the validity of that decision. I do not propose to doubt it myself, but I would like to call attention, for the purpose of record, to two careless slips which appear from the report. At p. 339 I am talking of the two hospitals concerned, the one into which she was originally admitted and the other in which after the first period of being a temporary patient she was admitted as a voluntary patient. The allusion [letter C] should have been to the Chester Mental Hospital, where she had been a temporary patient and not to the Lancaster Mental Hospital in which she became a voluntary patient. Similarly, at p. 340, letter D, the word "voluntary" should have been "temporary". Having taken this opportunity of correcting those errors I propose to say no more about *Benson v. Benson* (1).

I have described how the temporary patient gains admission to the mental hospital, but the next step is one of great importance in the present case. Section 5 (9) provides a safeguard of the greatest importance, and reads:

"Within one month of the reception of any person received as a temporary patient under this section [s. 5] he shall be visited by at least two members of the visiting committee of the institution, if he is in an institution which has a visiting committee* [as in the present case], or if he is not in such an institution by two at least of the visitors of licensed houses appointed for the district in which he is, of which visitors one must be a registered medical practitioner: Provided that in the area within the immediate jurisdiction of the Board of Control*, the duty imposed by this section on the visitors of licensed houses shall be performed by the Board of Control."

Section 5 (10) provides:

"If the persons making the said visits are of opinion that it is proper that the patient should continue to be detained they shall sign a statement to that effect and shall leave it with the person in charge but if they are of opinion that it is not proper that he should continue to be detained, they shall, before the expiration of the second day after the day of the said visit, send to the Board of Control a report stating their said opinion, and the grounds on which it is based, together with such other observations as they think fit."

I think I ought at this point to call attention to s. 5 (14) which provides,

"The Board of Control may at any time order—(i) that any person received as a temporary patient shall be discharged; or (ii) that steps shall be taken to deal with him under the principal Act [the Lunacy Act, 1890] as a person of unsound mind."

That sub-section is of importance in connection, amongst other things, with sub-s. (9), the proviso to which substitutes the Board of Control itself in certain areas for the visitors of licensed houses. The proviso to s. 5 (9) does not apply

* (i) For the words "visiting committee" there were substituted, by the National Health Service Act, 1946, s. 50 and sched. IX, the words "hospital management committee".

(ii) For the words "Board of Control" there were substituted by the same Act, the words "Minister of Health".

Both amendments were effective as from July 1, 1947, by virtue of the National Health Service Act (Appointed Day) Order 1947 (S.R. & O., 1947, No. 983).

to the present case as there is a visiting committee of the particular institution. In the case, however, of a licensed house within the immediate control of the Board of Control the combined effect of these two sub-sections would be this: the Board of Control itself as visitor—that is its representative sent down to deal with the case as visitor of the particular institution—would be obliged to express the opinion that it was or was not proper that the particular patient should continue to be detained. If yea, all good and well; if nay, it would manifestly be their duty at once to discharge the patient, which they have the power to do at any time. It is apparent, therefore, on the face of the section itself, that this particular safeguard, whoever the visitors may be in the circumstances of any given case, is extremely important from the point of view of a patient who is in the hospital because it is assumed, as s. 5 (1) predicates, that though the person is suffering from mental illness and is likely to benefit by temporary treatment he is for the time being incapable of expressing himself as willing to receive such treatment. In other words, by whatever name one calls it, the affirmative opinion of the visitors, be they the visiting committee of the institution or visitors of licensed houses, or the Board of Control themselves in the special case dealt with in the proviso to s. 5 (9) of the Act of 1930, is in effect the authority for the continued detention up to the end of the first six months of the temporary patient. On the other hand, if the opinion is that the person ought no longer to be detained, the expression of that opinion is the first step in what presumably will in due course be a discharge order by the Board of Control, if not by someone else in the meantime. If it is the Board of Control itself or its representatives that express that opinion, naturally the discharge will be immediate. In other words, it seems to me to be plain that from the moment when the affirmative opinion is expressed by whichever of these bodies happens to be the right one in the particular case, there is at once the sanction of law for the continuation of the detention up to the six-monthly limit*. I think it is not without significance that s. 5 (10) of the Act of 1930 enacts that the visitors are to sign a statement to that effect and leave it with the person in charge which looks very much like handing him, in some form or another, a written authority to continue to detain the patient. It is clear from the perusal of *Benson v. Benson* (1) that that particular question never came into issue in that case at all. That case does not affect the question one way or the other, but it is also clear that it was overlooked by BARNARD, J., who came to the conclusion in *Whitley v. Whitley* (2) that it was impossible to hold that the original application or request for the reception of a temporary patient by the husband, and the recommendation of the medical practitioners in support of it, amounted to an order. He said ([1946] 2 All E.R. at p. 730):

“As I have already said, I consider it my duty to construe this Act [Matrimonial Causes Act, 1937] strictly, and under no stretch of the imagination can I construe the word ‘application’ as ‘order’, or the word ‘request’ as ‘authority’. Undoubtedly, the wife was detained as a temporary patient pursuant to s. 5 of the Mental Treatment Act, 1930, and obviously she was properly detained, but, in my view, she was not detained in pursuance of any order under the Lunacy and Mental Treatment Acts, 1890 to 1930.”

Note the use of the word “authority”. As it happens BARNARD, J., was mistaken in stating that obviously she was properly detained. She was not, because this safeguard of the visit by the visitors had not been carried out. The Court of Appeal through the Official Solicitor ascertained that the provisions had not been complied with at all ([1947] 1 All E.R. at p. 668):

* I.e., the six months' limit set by s. 5 (11) of the Mental Treatment Act, 1930.

“ . . . in that the visiting committee signed no statement to the effect that it was proper that the wife should continue to be detained.”

A In the present case, I have had the advantage of very clear evidence of the medical superintendent, who has satisfied me, on a point about which there has been no controversy, that the wife is incurably of unsound mind, and has also satisfied me that on the Friday after this patient was admitted she, in common with two other women patients, was visited by two persons who he has satisfied me were two visitors within the meaning of s. 5 (9) of the Act of 1930. In a statement in the minute book in the superintendent's possession they stated: “ We, the undersigned, being two members of the committee, have today seen the undermentioned temporary patients, [one of whom was the wife in the present case] and are satisfied that they should be detained.” It is true that B until the end of six months she continued to be detained as a temporary patient. It is equally true that though she is, I am satisfied, incurably of unsound mind, it was not thought right or proper to apply to the Board of Control for a direction for an extension which, if it had been granted, would, for what it is worth, have been covered directly by the decision in *Benson v. Benson* (1). That application C was not made because when a special inspection was made well within the last twenty-eight days of the six months, the medical superintendent came to the conclusion that the wife had been “ relieved ” to the extent that, though by no means cured, or curable, she had at least regained the capacity of forming and expressing her own volition and, therefore, it would have been inappropriate, D if not impossible, to make an application to the Board of Control for an extension on the basis that the facts were otherwise. Indeed, in exercise of her own volition, coincidentally with the expiration of the six months' detention as a temporary patient, she became a voluntary patient, thereby satisfying the requirements of the Matrimonial Causes Act, 1950, s. 1 (2) (a) and (d), provided always that the detention which immediately preceded her becoming a voluntary E patient was detention under an order.

I have expressed my own view that there was plainly an element of authority about the statement signed and recorded in the proper minute book by the visiting committee. In my opinion, although, of course, the question could not arise for decision in the Court of Appeal in *Whitley v. Whitley* (2) (because, as I have said, these duties under s. 5 (10) were not carried out at all) I think there is a F clear indication of the view that I ought to take about the effect of the proper action taken by the visitors in this case. BUCKNILL, L.J., delivering the judgment of the Court of Appeal, said ([1947] 1 All E.R. at p. 668):

“ This sub-section (s. 5 (11)) clearly indicates that the statement or report of the visiting committee is one of the essential requisites for the lawful G detention of the temporary patient for the period of not more than six months.”

Finally, after the inquiries which disclosed the failure to comply with the terms of the sub-section, he said (*ibid.*):

H “ It is clear to us that the provisions of the sub-sections of s. 5 to which we have referred have not been complied with in this case, in that the visiting committee signed no statement to the effect that it was proper that the wife should continue to be detained. We think, that the failure to comply with these important provisions, which are intended to safeguard a patient against any possible abuse of the powers given under this Act [Mental Treatment Act, 1930], itself defeats the argument that the wife was lawfully detained under an order made under the Mental Treatment Act, 1930.”

Consequently, the appeal was dismissed, though, of course, necessarily for different reasons from those given by BARNARD, J. It is true that the Court of Appeal did not decide that, if the provisions of s. 5 (10) had been properly carried out by the visiting committee, their action would have amounted to an "order" for the continued detention of the patient. Indeed, if they had done so, they would have been deciding something which could not possibly have arisen as an issue in that case.

I must say that I have some difficulty in distinguishing between an act which is an authority for the continued detention of a temporary patient and an act which is an "essential requisite" to the continuation of the lawful detention of the temporary patient or something which can fairly be called an "order" for her detention. I am not deciding anything which does not arise in the present case, and I am certainly not to be taken to be dissenting from the decision of BARNARD, J., to the contrary effect as regards an application. In my opinion, however, from the moment when in the present case the visitors said and certified that they were satisfied that the wife should continue to be detained, she was detained under an order and as that statement was efficacious from Mar. 8, 1947, on which day it was signed and recorded in the book, until Sept. 6, 1947, when the six months' period elapsed and the wife of her own volition became a voluntary patient, she was detained under an order within the meaning of the Matrimonial Causes Act, 1950, s. 1 (2) (a). That being so, with very considerable indebtedness to counsel, Mr. Knight and Mr. Moore, who have put this case so clearly before me, I am prepared to say that the conditions are complied with and that the husband is entitled to a decree nisi.

- Decree nisi granted.

Solicitors: *Skelton & Co.*, agents for *Wall, Johnson & Hopwood Sayer*, Wigan (for the husband); *Treasury Solicitor*.

[Reported by J. HUGILL, Esq., Barrister-at-Law.]

ATTORNEY-GENERAL FOR ONTARIO AND OTHERS v.
WINNER AND OTHERS. WINNER AND OTHERS v. S.M.T.
(EASTERN), LTD. AND OTHERS.

[PRIVY COUNCIL (Lord Porter, Lord Oaksey, Lord Tucker, Lord Asquith of Bishopstone and Lord Cohen), November 4, 5, 9, 10, 11, 12, 16, 17, 18, 1953, February 22, 1954.]

Privy Council—Canada—Dominion and provincial legislation—Province of New Brunswick not empowered to limit inter-provincial, etc., connecting undertakings—Omnibus undertaking—British North America Act, 1867 (c. 3), s. 92 (10) (a).

By the British North America Act, 1867, s. 92: "In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say,— . . . (10) Local works and undertakings, other than such as are of the following classes:—(a) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province . . ."

In June, 1949, W., an American citizen living at Lewiston, Maine, operating motor buses for the carriage of passengers and goods for hire or compensation, was granted a licence under the Motor Carrier Act, 1937, as amended, of New Brunswick, by the motor carrier board of that province, to operate public motor buses from Boston, Massachusetts, through the Province of New Brunswick, to Halifax and Glace Bay in the Province of Nova Scotia, and return, over certain specified routes, but not, after Aug. 1, 1949, to embus or debus passengers in the Province of New Brunswick. After Aug. 1, 1949, W. continued to embus and debus passengers within the province, and he also proposed, incidentally to his other operations, to pick up, within the province, passengers and their baggage having their destination also within the province. S.M.T. (Eastern), Ltd., a company incorporated in New Brunswick, held licences granted by the motor carrier board to operate public motor buses within the province, and the present proceedings were commenced by that company claiming, inter alia, an injunction against W. restraining him from embussing and debussing passengers within the province and a declaration that he had no right to do so. The trial judge, by consent of the parties, posed two questions of law for the opinion of the Supreme Court of New Brunswick, Appellate Division, pursuant to the Rules of the Supreme Court of New Brunswick, Ord. 34: (i) Were the operations or proposed operations of W. within the Province of New Brunswick, or any part or parts thereof, prohibited or in any way affected by the provisions of the Motor Carrier Act, 1937, and amendments thereto, or orders made by the motor carrier board? (ii) Was 13 Geo. 6, c. 47 (1949) [amending the Motor Carrier Act, 1937], intra vires of the legislature of the Province of New Brunswick? By agreement between the parties, a third question was added: Were the proposed operations prohibited or in any way affected by reg. 13 of the Motor Vehicle Act, 1934, and amendments, or under s. 6 or s. 53 or any other sections of that Act? The Supreme Court of New Brunswick, Appellate Division, answered all these questions in the affirmative. During the course of the proceedings, the matter being of constitutional importance, the Attorney-General for Canada and Attorneys-General for seven other provinces, together with certain other transport undertakings, intervened. On appeal to the Supreme Court of Canada, the court held that it was not within the legislative power of the Province of New Brunswick to enact legislation by, or under which, W. might be prohibited from bringing passengers into the province from beyond its borders and permitting them to alight therein, or from carrying

passengers from within the province to any point outside beyond its borders, or from carrying passengers along the route traversed by his buses from place to place in the province, to which passengers stop-over privileges had been extended; but that, except as to passengers to whom such privileges had been extended, it was within the legislative power of the province to enact legislation under which he might be prohibited from carrying passengers from place to place within the province incidentally to his other operations. On appeal by the Attorneys-General for Ontario, Alberta and Prince Edward Island to the Privy Council against that part of the judgment permitting any kind of picking up or setting down within the province, whether on journeys beginning outside but ending within the province, or on journeys beginning within but ending outside the province, and cross-appeal by W. and others against so much of the judgment as prohibited purely inter-provincial traffic,

Held: (i) a line of buses, connecting provinces or operating beyond the limits of a province, may be an undertaking within s. 92 (10) (a) of the British North America Act, 1867, although there is no "work", in the sense of a physical thing such as a railway line, which forms part of the connecting undertaking: *Re Radio Communication in Canada, A.-G. of Quebec v. A.-G. of Canada, etc.* ([1932] A.C. at p. 315), applied; and

(ii) the action of the province in the present case was an incursion into the field of the Dominion legislature to which jurisdiction over inter-provincial connecting undertakings was reserved; and the limitation imposed by the licence granted to W., if not also the legislation under which the limited licence was granted, was *ultra vires* and of no effect.

Per curiam: an undertaking to carry on an inter-provincial connecting bus service can exist for the purposes of s. 92 (10) (a) of the British North America Act, 1867, before a licence for the buses is granted and before the transporting begins.

Appeal dismissed; cross-appeal allowed.

Cases referred to:

- (1) *Montreal City v. Montreal Street Ry.*, [1912] A.C. 333; 81 L.J.P.C. 145; 105 L.T. 970; 17 Digest 433, 125.
- (2) *Re Radio Communication in Canada, A.-G. of Quebec v. A.-G. of Canada, etc.*, [1932] A.C. 304; 101 L.J.P.C. 94; 146 L.T. 409; Digest Supp.
- (3) *A.-G. for Canada v. A.-G. for Ontario*, [1937] A.C. 326; 106 L.J.P.C. 72; 156 L.T. 302; Digest Supp.
- (4) *Toronto Corp. v. Bell Telephone Co. of Canada*, [1905] A.C. 52; 74 L.J.P.C. 22; 91 L.T. 700; 17 Digest 431, 116.
- (5) *Colonial Building & Investment Assn. v. A.-G. of Quebec*, (1883), 9 App. Cas. 157; 53 L.J.P.C. 27; 49 L.T. 789; 17 Digest 431, 115.
- (6) *Great West Saddlery Co. v. Regem*, [1921] 2 A.C. 91; 90 L.J.P.C. 102; 125 L.T. 136; 17 Digest 440, 168.
- (7) *Lymburn v. Mayland*, [1932] A.C. 318; 101 L.J.P.C. 89; 146 L.T. 458; Digest Supp.
- (8) *Canadian Pacific Ry. Co. v. Notre Dame de Bonsecours Corp.*, [1899] A.C. 367; 68 L.J.P.C. 54; 80 L.T. 434; 17 Digest 432, 121.
- (9) *Madden v. Nelson & Fort Sheppard Ry. Co.*, [1899] A.C. 626; 68 L.J.P.C. 148; 81 L.T. 276; 17 Digest 438, 154.

APPEAL by special leave by the Attorney-General for Ontario, the Attorney-General for Alberta and the Attorney-General for Prince Edward Island, and CROSS-APPEAL by special leave by Israel Winner, the Canadian National Railway Company and the Canadian Pacific Railway Company, from a judgment of the Supreme Court of Canada, dated Oct. 22, 1951, reversing a judgment of the Supreme Court of New Brunswick, Appellate Division, dated May 1, 1950, on questions of law raised by the Supreme Court of New Brunswick, Chancery

Division, dated Jan. 17, 1950. The appeals were consolidated. The facts appear in the judgment.

Dana Porter, Q.C., and *C. R. Magone, Q.C.* (both of the Canadian Bar), for the Attorney-General for Ontario.

H. J. Wilson, Q.C. (of the Canadian Bar), for the Attorney-General for Alberta.

W. E. Darby, Q.C., and *J. O. C. Campbell, Q.C.* (both of the Canadian Bar), for the Attorney-General for Prince Edward Island.

J. F. H. Teed, Q.C. (of the Canadian Bar), for the Attorney-General for New Brunswick, on behalf of the province and ex. rel. S.M.T. (Eastern), Ltd.

L. Tremblay, Q.C. (of the Canadian Bar), for the Attorney-General for Quebec.

C. F. H. Carson, Q.C. (of the Canadian Bar), for Israel Winner, the Canadian National Railway Company and the Canadian Pacific Railway Company.

F. P. Varcoe, Q.C. (of the Canadian Bar), and *F. Gahan, Q.C.*, for the Attorney-General for Canada.

J. A. Y. MacDonald, Q.C. (of the Canadian Bar), and *R. Millner* for the Attorney-General for Nova Scotia.

C. R. Magone, Q.C. (of the Canadian Bar), for the Attorney-General for British Columbia.

S.M.T. (Eastern), Ltd., Maccam Transport, Ltd., and Carwil Transport, Ltd., were not represented.

Feb. 22. **LORD PORTER:** The problem with which their Lordships are confronted in the present appeal is concerned with the conflicting jurisdiction of the Parliament of Canada on the one part, and, on the other part, of the legislation and regulations of the Province of New Brunswick made under its local Acts.

The parties immediately concerned were originally (i) as defendant, one Winner who resides in the United States of America and was in the business (inter alia) of operating motor buses for the carriage of passengers and goods for hire or payment from Boston through the State of Maine and the Province of New Brunswick to Glace Bay in the Province of Nova Scotia and intermediately, and (ii) as plaintiff, the respondent S.M.T. (Eastern), Ltd., which holds licences granted by the motor carrier board of the Province of New Brunswick to operate motor buses for hire or payment over certain highways which need not be further specified between St. Stephen and the city of St. John both in New Brunswick. In substance, the plaintiff's claim was for an injunction against the defendant restraining him from embussing and debussing (i.e., taking up or setting down) passengers within the Province of New Brunswick and a declaration that he had no right to do so. In his defence the defendant stated that he had, in fact, embussed and debussed passengers in the province and that he intended to continue doing so unless and until some court of competent jurisdiction should declare that he was legally debarred therefrom. On these contentions HUGHES, J., of the Chancery Division of the Supreme Court of New Brunswick gave no decision, but propounded certain questions of law to be raised for the opinion of the Supreme Court of New Brunswick, Appellate Division. He further ordered that, for the purpose of this opinion, the facts relevant to the issues to be determined should be deemed to be those set out in his order.

Those essential to the matter now in question are as follows:—1. The plaintiff is a company incorporated under and by virtue of the New Brunswick Companies' Act and is in the business (inter alia) of operating motor buses for the carriage of passengers and goods for hire or compensation over the highways of the Province of New Brunswick. 2. The plaintiff holds licences granted by the motor carrier board of the Province of New Brunswick to operate public motor buses between St. Stephen, New Brunswick, and the city of St. John, New Brunswick, over highway route No. 1 and between the said city of St. John and the Nova Scotia border over highway route No. 2, for the purpose of carrying passengers and goods for hire or compensation. 3. The plaintiff by its public motor buses

maintains a daily passenger service over the routes set out in para. 2 hereof. 5. — (a) On June 17, 1949, on the application of the defendant, the motor carrier board granted a licence to the defendant, permitting him to operate public motor buses from Boston in the State of Massachusetts through the Province of New Brunswick on highways Nos. 1 and 2 to Halifax and Glace Bay in the Province of Nova Scotia and return, but not to embus or debus passengers in the said Province of New Brunswick after Aug. 1, 1949. (b) At the time of making the said application, the defendant challenged the validity of 13 Geo. 6, c. 47 (1949), and the Motor Carrier Act, 1937, as affected thereby, as being ultra vires of the legislature of the Province of New Brunswick. (c) The motor carrier board made no specific ruling on the defendant's challenge as set out in sub-para. (b), but acted under 13 Geo. 6, c. 47 (1949). 6. The defendant by his motor buses maintains a regular passenger service over the routes set out in para. 5 (a) hereof. 7. Since Aug. 1, 1949, the defendant has continually embussed and debussed passengers within the Province of New Brunswick and it is his intention to continue to do so unless and until it shall have been declared by some court of competent jurisdiction that such operations are prohibited by the Motor Carrier Act, 1937, and amendments thereto, or by any other applicable statute or law. 8. The defendant intends to carry passengers not only from points without the Province of New Brunswick to points within the said province and vice versa, but also, in connection with and incidental to his operations as more particularly described in para. 9 hereof, to carry passengers from points within the said province to destinations also within the said province, unless and until it shall have been declared by some court of competent jurisdiction that such operations are prohibited by the Motor Carrier Act, 1937, and amendments thereto, or by any other applicable statute or law. 9. — (a) The business and undertaking of the defendant consists of the operation of motor buses for the carriage of passengers and goods for hire or compensation between the city of Boston in the Commonwealth of Massachusetts and the town of Glace Bay in the Province of Nova Scotia and between intermediate points. (b) The said business and undertaking is conducted by the defendant over that portion of its route which lies between the said city of Boston and the town of Calais, Maine, under a certificate granted by inter-State commerce commission (a Federal commission of the United States of America having jurisdiction, inter alia, over inter-State transportation). (d) The motor carrier board of the Province of New Brunswick, on June 17, 1949, on the application of the defendant as set forth in para. 5 hereof, purported to licence the operation of the defendant, in the Province of New Brunswick, as follows:

"Israel Winner doing business under the name and style of 'MacKenzie Coach Lines,' at Lewiston in the State of Maine is granted a licence to operate public motor buses from Boston in the State of Massachusetts, through the Province of New Brunswick on highways Nos. 1 and 2, to Halifax and Glace Bay in the Province of Nova Scotia and return, but not to embus or debus passengers in the said Province of New Brunswick after Aug. 1, 1949."

(e) The board of commissioners of public utilities for the Province of Nova Scotia has purported to approve the defendant's operations in the Province of Nova Scotia over the following routes:

"(a) New Brunswick border to Glace Bay, via route No. 4—Wentworth valley and Truro, 302 miles; (b) New Brunswick border to Glace Bay, via route No. 2—Parrsboro and Truro, 319 miles; (c) New Brunswick border to Glace Bay, via route No. 6—Pugwash, Wallace, Pictou and New Glasgow, 292 miles; (d) Truro to Halifax, 64 miles (3 miles of which is within the corporate limits of the town of Truro and city of Halifax)."

(f) Subsequently the said board of commissioners of public utilities for the

Province of Nova Scotia amended the certificate granted to the defendant as set out in sub-para. (e) hereof as follows:

"Operation of this route is permitted To BE SUSPENDED from Jan. 12, 1949 until May 1, 1949."

(g) The defendant, in fact, operates as a public motor carrier between the city of Boston aforesaid, the town of Glace Bay aforesaid and intermediate points, in accordance with the timetable, between May 1 and Dec. 15 in each year, the period of time covered by the certificates granted by the inter-State commerce commission. (j) Incidentally to its operations as aforesaid, the defendant proposes to pick up, within the Province of New Brunswick, passengers and their baggage having a destination also within the Province of New Brunswick.

The questions for the opinion of the Supreme Court of New Brunswick were:— (i) Are the operations or proposed operations of the defendant within the Province of New Brunswick or any part or parts thereof, as above set forth, prohibited or in any way affected by the provisions of the Motor Carrier Act, 1937, and amendments thereto, or orders made by the said carrier board? (ii) Is 13 Geo. 6, c. 47 (1949), *intra vires* of the legislature of the Province of New Brunswick? To these questions there was, by agreement between the parties, added what may be described as an enlargement of the first question, but may, perhaps, be more conveniently dealt with (as it was dealt with in the Supreme Court of New Brunswick) as forming a third question viz.:—(iii) Are the proposed operations prohibited or in any way affected by reg. 13 of the Motor Vehicle Act, c. 20 of the Acts of 1934, and amendments, or under s. 6 or s. 53 or any other sections of the Motor Vehicle Act?

In order to appreciate the basis on which it was thought necessary to make these inquiries, it is essential to set out a number of the provisions of the relevant Acts, but their Lordships have not thought themselves required to deal with the third question or to transcribe any portion of the Motor Vehicle Act of 1934 since, admittedly, no action has been taken under that Act and, moreover, as the Supreme Court of New Brunswick have pointed out, the principles on which any questions arising under that Act are to be determined involve considerations similar to those applicable to the case of the Motor Carrier Act. Nor have their Lordships considered it desirable to set out the whole of the latter Act. Essential sections have alone been transcribed. The bearing of other sections can best be dealt with where they affect the argument, and the amendments of the Motor Carrier Act which have been made from time to time can best be treated in the same way. The provisions which their Lordships feel constrained to set out are as follows:—

"2.—(1) In this Act unless the context otherwise requires:—(a) 'Board' means the motor carrier board as hereinafter constituted. (b) 'Licence' means a licence granted to a motor carrier under this Act. (c) 'Licensed motor carrier' means a motor carrier to whom a licence has been granted by the board under this Act. (d) 'Motor carrier' means a person, firm or company that operates or causes to be operated in the province a public motor bus or a public motor truck. (e) 'Public motor bus' means a motor vehicle plying or standing for hire by, or used to carry, passengers at separate fares. [Am. 1939, c. 37, 1949, c. 47.] (f) 'Regulations' mean and include the rules and regulations and general orders made by the board under this Act. 3.—(1) The members of the board of commissioners of public utilities are hereby constituted a board for the purposes of this Act and shall be known as the motor carrier board. The chairman and secretary of the said board of commissioners of public utilities shall be, respectively, the chairman and secretary of the motor carrier board. (2) In the absence of any member of the board from a regularly constituted meeting thereof the secretary shall sit and perform the duties of a member of the board. (3) Without limiting any

powers, duties, authority or jurisdiction conferred or imposed by this Act, all powers, duties, authority and jurisdiction as are vested in the board of commissioners of public utilities for common carriers are hereby vested in the board over motor carriers except as otherwise specifically provided in this Act.

4.—The board may grant to any person firm or company a licence to operate or cause to be operated public motor buses or public motor trucks over specified routes or between specified points. [Am. 1949, c. 47.] 5.—(3) In determining whether or not a licence shall be granted, the board shall give consideration to the transportation service being furnished by any railroad, street railway or licensed motor carrier, the likelihood of proposed service being permanent and continuous throughout the period of the year that the highways are open to travel and the effect that such proposed service may have upon other transportation services. (4) If the board finds from the evidence submitted that public convenience will be promoted by the establishment of the proposed service, or any part thereof, and is satisfied that the applicant will provide a proper service, an order may be made by the board that a licence be granted to the applicant in accordance with its finding upon proper security being furnished.

9.—If at any time conditions are such that in the opinion of the chief highway engineer, a highway is being or would be damaged by the operation of any public motor bus or public motor truck, the chief highway engineer may order an immediate discontinuance of operation on such highway until further order. 11.—Except as provided by this Act, no person, firm or company shall operate a public motor bus or public motor truck on the highways within the province without holding a licence from the board authorising such operations and then only as specified in such licence and subject to this Act and the regulations. 17.—(1) The board may from time to time make regulations fixing the schedules and service, rates, fares and charges of licensed motor carriers, prescribing forms, requiring the filing of returns reports and other data and generally make regulations concerning motor carriers and public motor buses and public motor trucks as the board may deem necessary or expedient for carrying out the purposes of this Act and for the safety and convenience of the public and may from time to time repeal, alter and amend any such orders, rules and regulations. All general regulations shall be subject to the approval of the Governor in Council and on being approved shall be published in the Royal Gazette. [Am. 1940,

c. 11.] ”

The Act was originally passed in 1937, but certain amendments have been made in it since that date. Two alterations in s. 4 may be referred to inasmuch as some reliance was placed on them as assisting in the construction of the provisions of the Act. Originally the section ended

“ over specified routes *and* between specified points within the province ”.

The alteration from “ and ” to “ or ”, in their Lordships’ opinion, is immaterial to any question which they have to decide. As to the omission of the words “ within the province ”, they agree with the Supreme Court of Canada that, whatever may have been in the mind of the provincial authorities in deleting them, those words must be implied inasmuch as the province can exercise no authority over another province or over a foreign country.

The vital question for their Lordships’ determination is what restrictions are or can be placed by the Province of New Brunswick on inter-State or international undertakings by reason of the provisions of the Motor Carrier Act, and whether the terms of the licence actually granted to Mr. Winner are authorised under that Act. The powers entrusted to the Dominion and province respectively are those set out in s. 91 and s. 92 of the British North America Act, 1867. Well known as those provisions are their Lordships think that the matter is clarified by setting out the relevant provisions of s. 92, omitting, however, sub-s. (16),

inasmuch as that sub-section in the present case adds nothing to the arguments which depend on the wording of sub-s. (10).

" 92. In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say,—10. Local works and undertakings, other than such as are of the following classes:—(a) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province; (b) Lines of steam ships between the province and any British or foreign country; (c) Such works as although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the provinces. 13. Property and civil rights in the province."

It is now authoritatively recognised that the result of these provisions is to leave local works and undertakings within the jurisdiction of the province but to give to the Dominion the same jurisdiction over the excepted matters specified in (a), (b) and (c) as they would have enjoyed if the exceptions were in terms inserted as one of the classes of subjects assigned to it under s. 91: see *Montreal City v. Montreal Street Ry.* (1) ([1912] A.C. 342).

The Supreme Court of the province answered all three questions and, at the expense of repetition but for the sake of clarity, their Lordships again set out the questions inserting the answers given by that court:

" 1. Are the operations or proposed operations of the defendant within the Province of New Brunswick or any part or parts thereof as above set forth, prohibited or in any way affected by the provisions of the Motor Carrier Act (1937) and amendments thereto, or orders made by the said motor carrier board? Answer: 'Yes, prohibited, until the defendant complies with the provisions of the Act.'

" 2. Is 13 Geo. 6, c. 47 (1949), intra vires of the legislature of the Province of New Brunswick? Answer: 'Yes, in respect of this defendant.' (RICHARDS, C.J., and HUGHES, J., answering simply 'Yes.')

" 3. Are the proposed operations prohibited or in any way affected by reg. 13 of the Motor Vehicle Act, c. 20 of the Acts of 1934 and amendments, or under s. 6 or s. 53 or any other sections of the Motor Vehicle Act? Answer: 'Yes, until the defendant complies with the provisions of the Act, and the regulations made thereunder?'"

From that decision an appeal was taken by Mr. Winner to the Supreme Court of Canada by leave of the Supreme Court of New Brunswick. Meanwhile the Attorney-General of New Brunswick gave notice of his intention to intervene and, at a later time, pursuant to orders made by the Supreme Court of Canada, the Attorneys-General of Canada and of the Provinces of Ontario, Quebec, Nova Scotia, British Columbia, Alberta and Prince Edward Island, together with Canadian National Railway Company, Canadian Pacific Railway Company, Maccam Transport Company and Carwil Transport, Ltd. intervened.

When the matter came to be considered by the Supreme Court of Canada, that court pointed out that it was concerned not with a reference but with an action, that the claim was, in its origin, made by one motor carrier against another motor carrier asking that he be prohibited by injunction from taking up and setting down passengers in the Province of New Brunswick and that the questions asked involved the consideration of matters outside those involved in the decision of the dispute raised by the pleadings. The Chief Justice, indeed, took the view that the only power of the province was to deal with the appellant under the Motor Vehicle Act since (i) by s. 22 the provisions of the Motor Carrier Act were to be deemed to be in addition to the provisions of the Motor Vehicle Act;

(ii) the Motor Vehicle Act provided for the treatment of non-residents whereas the Motor Carrier Act did not; (iii) in the case of non-residents, therefore, the motor carrier board has no authority to give or withhold or limit the terms of a licence; (iv) there was no evidence or contention that Mr. Winner had not complied with the provisions of the Motor Vehicle Act, and (v) there was, therefore, no ground on which the court could grant an injunction. The other members of the court agreed with the Chief Justice that there was no reference and that the sole question for their determination was whether, as between the two parties, the one could obtain as against the other an injunction prohibiting him from picking up or setting down passengers within the province. In their view, however, the provisions of the Motor Carrier Act affected the position of a foreigner and the dispute between the parties was whether, under those provisions or by the terms of their licence, the board had power to prohibit Mr. Winner from embussing or debussing passengers within the Province of New Brunswick. They did not determine that the board had no power to issue a licence to a non-resident, and, accordingly, based their decision on a consideration whether the Motor Carrier Act or the terms of the licence were authorised by the powers given to a province under the British North America Act.

Their Lordships are not prepared to hold that the board lack authority to deal with residents in provinces or countries other than New Brunswick or to decide that the provisions of the Motor Carrier Act have no application to the case. Nor, indeed, was any such contention put before them. They, therefore, proceed to discuss the problem whether the Motor Carrier Act or the licence is ultra vires the jurisdiction of the province. It was on this basis that the matter was dealt with by the Supreme Court of Canada, and, accordingly, that court did not answer the individual questions put to them but summed up their conclusions in the following order:

"And this court, proceeding to render the judgment which should have been rendered by the said Supreme Court of New Brunswick, Appellate Division, did order and adjudge that the answer to such parts of the questions submitted as it is considered necessary to answer for the disposition of the issues properly raised in the pleadings is as follows:—1. It is not within the legislative powers of the Province of New Brunswick by the statutes or regulations in question, or within the powers of the motor carrier board by the terms of the licence granted by it, to prohibit the appellant by his undertaking from bringing passengers into the Province of New Brunswick from outside said province and permitting them to alight, or from carrying passengers from any point in the province to a point outside the limits thereof, or from carrying passengers along the route traversed by its buses from place to place in New Brunswick, to which passengers stop-over privileges have been extended as an incident of the contract of carriage; but except as to passengers to whom stop-over privileges have been extended as aforesaid it is within the legislative powers of the Province of New Brunswick by the statutes and regulations in question, and within the powers of the motor carrier board by the terms of the licence granted by it, to prohibit the appellant by his undertaking from carrying passengers from place to place within the said province incidentally to his other operations."

It will be observed that the order in question adopts a compromise which does not appear to have been contended for by either side, viz., whilst permitting the taking up or setting down of passengers engaged in an inter-provincial or international journey, it prohibited the carrying of persons between two points where the journey was wholly within the province.

From that decision there was an appeal by special leave to their Lordships' Board by the Attorney-General of Ontario and others against that part of the judgment which permitted any kind of picking up or setting down within the

Province of New Brunswick, whether in the course of a journey beginning outside the province and ending within it or in the course of a journey beginning within it and ending without the province. There was also a cross-appeal by Mr. Winner and others against the prohibition of purely inter-State traffic, i.e., carriage from one point within the province to another point also within it.

A Before their Lordships when dealing with the matter of the appeal it was urged (i) that Mr. Winner's business did not come within the exception contained in s. 92 (10) (a) and (ii) in any case the province as owner of, or as being in control of, its highways had jurisdiction over them not only to license operations on them but to regulate them in all respects. By virtue, it was said, of the powers of the province to control provincial highways and traffic, the motor carrier board had power to grant or refuse a licence to Mr. Winner at their discretion. B It was acknowledged that it had, in fact, granted him a licence but asserted that the condition attached to the licence was merely a condition on which he became entitled to operate on the highways of the province, not a regulation of his business or undertaking.

C The first proposition involves a close and careful consideration of the terms and effect of s. 92 (10) (a). The argument was put in a number of ways. In the first place it was said that works and undertakings must be read conjunctively, that the sub-section has no operation unless the undertaking is both a work and an undertaking—the former a physical thing and the latter its use. There was, it was maintained, in the present instance, no work and the existence of a work was an essential element in order to make the sub-section applicable. D The necessity for the existence of both elements might, it was said, be illustrated by considering the case of a railway where there was both a track and the carriage of goods and passengers over it, and in construing the words "works and undertaking" regard must be paid to the words associated with them in the sub-section. Their Lordships do not accept the argument that the combination of a work and an undertaking is essential if the sub-section is to apply. Perhaps the simplest method of controverting it is to point out that the section begins E by giving jurisdiction to the provinces over local works and undertakings. If, then, the argument were to prevail, the province would have no jurisdiction except in a case where the subject-matter was both a work and an undertaking. If it were not both but only one or the other the province would have no authority to deal with it and, at any rate under this section, local works which were not also undertakings and local undertakings which were not works would not be F subject to the jurisdiction of the province—a result which, so far as their Lordships are aware, has never yet been contemplated. Moreover, in sub-s. (10) (c) the word "works" is found uncombined with the word "undertakings", a circumstance which leads to the inference that the words are to be read disjunctively so that, if either works or undertakings connect the province with others or extend beyond its limits, the Dominion, and the Dominion alone, is empowered to deal G with them. The case of steamships is an even more potent example of the difficulty of reconciling the suggested construction with the wording of the section. Lines of steamships between the province and any British or foreign country can carry on their operations without the existence of any works. The only connecting link which they provide is by passing to and fro from the one to the other. Their Lordships must, accordingly, reject the suggestion that the H existence of some material work is of the essence of the exception. As in ships, so in buses it is enough that there is a connecting undertaking.

It is true and was contended that it is possible to postulate that s. 92 (10) has a limited scope and deals only with matters which are both works and undertakings. Works alone and undertakings alone are in this aspect entrusted to the province under sub-s. (13) as being property and civil rights or under sub-s. (16) as being matters of a merely local or private nature in the province. It was argued, accordingly, that jurisdiction over interconnecting works and under-

takings is given to the Dominion under the general words inserted at the beginning and end of s. 91 but not under s. 92 (10). In terms, however, the language of s. 92 (10) (c) embraces a wider subject-matter and, in their Lordships' view, is not confined to so limited a construction. All local works and all local undertakings are included under the phraseology used and it is, in their Lordships' opinion, immaterial that *ex abundante cautela* they are again covered by sub-s. (13). If the province is given authority over both local works and local undertakings it follows that the exceptional works and undertakings in sub-s. (10) (a) likewise comprise both matters.

Some illumination is, as their Lordships think, given by a consideration of the decision in the *Radio* case (*Re Radio Communication in Canada, A.-G. of Quebec v. A.-G. of Canada, etc.* (2)) as expressed in the judgment of the Board ([1932] A.C. 314, 315). The question in issue was whether the control of radio transmission was in whole or in part within the jurisdiction of the Dominion or of a province and it was held that the sole authority resided with the Dominion. Undoubtedly the main contention in that case was that a convention had been entered into between Great Britain, Canada and other Dominions and Colonies, on the one part, and foreign countries, on the other, and that, accordingly, under the general powers conferred on it by s. 91 of the British North America Act to make laws for the peace, order and good government of Canada, the Parliament of Canada had, under the convention, a power similar to that which it would have had under s. 132 if the convention had been a treaty between the British Empire, as an entity, and foreign countries. This aspect of the decision is stressed by their Lordships' Board in *A.-G. for Canada v. A.-G. for Ontario* (the *Labour Convention* case) (3) ([1937] A.C. 351). But that case was concerned with the effect of s. 132 and, except incidentally, does not mention s. 92. The *Radio* case (2), on the other hand, expressly applies the provisions of s. 92 (10) ([1932] A.C. 314):

"Their Lordships draw special attention to the provisions of head 10 of s. 92. Those provisions, as has been explained in several judgments of the Board, have the effect of reading the excepted matters into the preferential place enjoyed by the enumerated subjects of s. 91 . . ."

After quoting the words of this sub-section, the judgment continues:

"Now, does broadcasting fall within the excepted matters? Their Lordships are of opinion that it does, falling in [sub-s. (10)] (a) within both the word 'telegraphs' and the general words 'undertakings connecting the province with any other or others of the provinces or extending beyond the limits of the province'."

Later, the judgment proceeds to say (*ibid.*, 315):

"'Undertaking' is not a physical thing, but is an arrangement under which of course physical things are used".

In their Lordships' view these expressions are directly applicable to the present case. In the *Radio* case (2) there was no connecting work only a connecting undertaking unless the somewhat fanciful suggestion were to be adopted that the flow of an electric discharge across the frontier of a province is to be regarded as a physical connection. It is argued that the provinces are entrusted with local works and undertakings subject, however, to the exception that they must be "other than such as are in the following classes", and that, on its true construction, the section must mean "other than such *local* works and undertakings as are within those exceptions". The submission goes on to maintain that, *ex concessis*, Mr. Winner's work or undertaking is not local having no anchorage as it were within the province and for that reason is not within the exception. Their Lordships' Board does not so read the sub-section. In their opinion, "other than such" merely means such works and such undertakings as are within the categories thereafter set out. The argument can be tested by considering its effect on one of the specific subjects mentioned, e.g., railways. A

A railway is an exception to local works and undertakings because it is included in the words "other than such", etc. But if the appellants' argument is sound the section must mean local works and undertakings other than such local works and undertakings as are in the category of railways: and, as the exception only includes *local* works, it would take local railways out of the jurisdiction of the province, which it does not, and would not comprehend interconnecting railways, which have always been held to be included and the inclusion of which is obviously one of the objects of the sub-section.

B One further point was put forward on this aspect of the case. It was suggested that, whatever view be taken of the matters which their Lordships have dealt with, yet Mr. Winner's activity never became an undertaking until he received a licence; until then it was but a project. He could not get to work before he had a licence. It is true, the argument went on, that he had obtained a licence, but his licence only permitted him to run through New Brunswick without embarking or disembarking passengers. That was his undertaking and, so far as New Brunswick was concerned, it could not be enlarged by a claim that it was an inter-provincial or international undertaking. Their Lordships are not prepared to accept the contention that an undertaking has no existence until it is carried into effect or is capable of being lawfully carried out. It may be an undertaking at any rate if the promoter has done everything which was necessary on his part to put it in motion, and has made all the essential arrangements. Indeed, the argument that the undertaking did not come into existence until a licence was granted and the transporting actually began is, in their Lordships' view, inconsistent with the opinion expressed by the Board in *Toronto Corp'n. v. Bell Telephone Co. of Canada* (4) where it is said ([1905] A.C. 58):

D "The view of STREET, J., apparently was that, inasmuch as the Act of Incorporation did not expressly require a connection between the different provinces, the exclusive jurisdiction of the Parliament of Canada over the undertaking did not arise on the passing of the Act, and would not arise unless and until such a connection was actually made. In the meantime, in his opinion, the connection was a mere paper one, and nothing could be done under the Dominion Act without the authority of the legislature of the province. This view, however, did not find favour with any of the learned judges of appeal. In the words of MOSS, C.J.O., 'the question of the legislative jurisdiction must be judged of by the terms of the enactment, and not by what may or may not be thereafter done under it. The failure or neglect to put into effect all the powers given by the legislative authority affords no ground for questioning the original jurisdiction.' If authority be wanted in support of this proposition, it will be found in the case of *Colonial Building & Investment Assocn. v. A.-G. of Quebec* (5) (9 App. Cas. 165), to which the learned judges of appeal refer."

F In any case, Mr. Winner had obtained a licence and has been exercising a business of transportation under it and has not limited his undertaking to the terms of his licence.

G To succeed on this point the appellants would have to say that this is a local work and undertaking because it makes use of the provincial roads, and that the only existing undertaking is one in which the respondent cannot take up or set down passengers in the provinces. In fact, however, another undertaking does exist, viz.: that of through carriage and also of picking up and setting down passengers within the province, and that undertaking existed from the initiation of Mr. Winner's activities and still exists since, whether rightfully or wrongfully, he has from the start embussed and debussed passengers within the province. That he does so is stated in the facts and whether the picking up and setting down of passengers is lawful or unlawful is the matter which their Lordships have to determine. On this part of the case, therefore, the Board agrees with the majority of the judges of the Supreme Court; and, though it is true that the

learned Chief Justice does not find it necessary to consider the point, he at least has expressed no opinion against it.

The second contention put forward on behalf of the appellants was that, whatever their exact legal position with regard to the roads, they admittedly make, maintain and control them: the roads are local works and undertakings constructed and maintained by the province; in that capacity it is entitled to regulate their use in any way it pleases and, indeed, to prohibit their use if it so wishes. The contention is an important one because, if it is true, inter-provincial undertakings connecting one province with another are within the jurisdiction of the Dominion, but can be totally sterilized by Acts and regulations of the province curtailing or preventing the use of its roads. It was alleged that the roads are property in the province—as, indeed, they are—that roads of one province are divided by an imaginary line from those of another province or another nation at the point of meeting: there is, therefore, no connecting work and, their roads being local, the province has absolute power over their uses, i.e., both the method of use and whether they may or may not be used at all. Their Lordships are not concerned to dispute either the provincial control of the roads or that it has the right of regulation, but there nevertheless remains the question of the limit of control in any individual instance and the extent of the powers of regulation.

It would not be desirable nor do their Lordships think it would be possible to lay down the precise limits within which the use of provincial highways may be regulated. Such matters as speed, the side of the road on which to drive, the weight and lights of vehicles are obvious examples, but in the present case their Lordships are not faced with considerations of this kind nor are they concerned with the further question which was mooted before them, viz., whether a province had it in its power to plough up its roads and so make inter-provincial connections impossible. So isolationist a policy is, indeed, unthinkable. The roads exist and, in fact, form a connection with other provinces and also, in this case, with another country. Since, in their Lordships' opinion, Mr. Winner is carrying on an undertaking connecting New Brunswick both with Nova Scotia and the State of Maine there exists an undertaking connecting province with province and extending beyond the limits of the province. Prima facie at any rate such an undertaking is entrusted to the control of the Dominion and taken out of that of the province. No doubt, if it were not for s. 92 (10) (a) of the British North America Act the province, having jurisdiction over local works and undertakings and over property and civil rights within the province, could have prohibited the use of or exercised complete autocratic control over its highways, but the sub-section in question withdraws this absolute right where the undertaking is a connecting one. To this limitation some meaning must be given and their Lordships cannot accept the view that the jurisdiction of the Dominion is impaired by the province's general right of control over its own roads. So to construe this sub-section would, in their Lordships' opinion, destroy the efficacy of the exception.

The limitation of the jurisdiction of Dominion and province have been many times canvassed and litigated both in the Canadian Courts and in the Privy Council. Undoubtedly, the province has wide powers of regulation. Many instances were adduced in the course of argument and their Lordships may refer to certain of those most relied on. In *Colonial Building & Investment Assn., v. A.-G. of Quebec* (5) the provincial mortmain laws were said to be contrary to the jurisdiction given to the Dominion in respect of Dominion companies. The principles relied on are set out in the following words (9 App. Cas. 166):

"But the powers found in the Act of Incorporation are not necessarily inconsistent with the provincial law of mortmain, which does not absolutely prohibit corporations from acquiring or holding lands, but only requires, as a condition of their so doing, that they should have the consent of the

Crown. If that consent be obtained, a corporation does not infringe the provincial law of mortmain by acquiring and holding lands. What the Act of Incorporation has done is to create a legal and artificial person with capacity to carry on certain kinds of business, which are defined, within a defined area, viz., throughout the Dominion. Among other things, it has given to the association power to deal in land and buildings, but the capacity so given only enables it to acquire and hold land in any province consistently with the laws of that province relating to the acquisition and tenure of land."

Similar propositions were laid down in *Great West Saddlery Co. v. Regem* (6), where the gist of the decision may be taken from the headnote where it says ([1921] 2 A.C. 91):

"A company incorporated by the Dominion under the Companies Act of Canada (R.S. Can., 1906, c. 79), with power to trade in any province may, consistently with ss. 91 and 92 of the British North America Act, 1867, be subject to provincial laws of general application, such as laws imposing taxes, or relating to mortmain or requiring licences for certain purposes, or as to the form of contracts . . ."

For the same reasons it was held in *Lyburn v. Mayland* (7) ([1932] A.C. 324) that a provision prohibiting the selling of the shares of Dominion companies was not ultra vires provincial legislation inasmuch as it did not preclude them from selling their shares unless they were registered, but merely subjected them to competent provisions applying to all persons trading in securities. Both the latter cases, however, are careful to point out that legislation will be invalid if a Dominion company is sterilised in all its functions and activities or its status and essential capacities are impaired in a substantial degree.

What provisions have the effect of sterilising all the functions and activities of a company or impair its status and capacities in an essential degree will, of course, depend on the circumstances of each case, but in the present instance their Lordships cannot have any doubt but that the Act or the licence or both combined do have such an effect on Mr. Winner's undertaking in its task of connecting New Brunswick with both the United States of America and with the Province of Nova Scotia.

Nor, indeed, whatever may be said of the Act, is the licence a provision applying to all persons. It is a particular provision aimed at preventing Mr. Winner from competing with local transport companies in New Brunswick.

But, it is contended, there are two rights—that of the Dominion and that of the province—one giving power to the one body and the other to the other; and enabling Dominion or province to pass legislation dealing with its own topic, the province with its roads and the Dominion with connecting undertakings. So long as the Dominion has not, as it has not, passed legislation dealing with the matter, the powers overlap and the province is entitled to enact its own provisions which, unless and until the Dominion deals with the matter, are valid and enforceable. This argument does not appear to have been presented to the courts in Canada and their Lordships do not agree with it. The province has, indeed, authority over its own roads, but that authority is a limited one and does not entitle it to interfere with connecting undertakings. It must be remembered that it is the undertaking, not the roads, which come within the jurisdiction of the Dominion, but legislation which denies the use of provincial roads to such an undertaking or sterilises the undertaking itself is an interference with the prerogative of the Dominion. Whatever provisions or regulations a province may prescribe with regard to its roads it must not prevent or restrict inter-provincial traffic. As their Lordships have indicated this does not in any way prevent what is in essence traffic regulation, but the provisions contained in local statutes and regulations must be confined to such matters.

In the present case they are not so confined. They do not contain provisions as to the use of the highways—they are not even general regulations affecting

all users of them. They deal with a particular undertaking in a particular way and prohibit Mr. Winner from using the highways except as a means of passage from another country to another State. It does not, indeed, follow that a regulation of universal application is necessarily unobjectionable—each case must depend on its own facts, but such a regulation is less likely to offend against the limitation imposed on the jurisdiction of the province inasmuch as it will deal with all traffic and not with that connecting province and province. The question as their Lordships see it, and, indeed, as it was argued, raises the hackneyed consideration what is the pith and substance of the provision under consideration. Is it in substance traffic regulation or is it an interference with an undertaking connecting province and province? Their Lordships cannot doubt but that it was the latter. It obviously sought to limit activities of an undertaking connecting the State of Maine with New Brunswick and New Brunswick with Nova Scotia. It was not mere regulation of road traffic. It is true that the distinction between the jurisdiction of the Dominion and that of a province may be a fine one as appears from a comparison of two cases both to be found in [1899] A.C., viz.: *Canadian Pacific Ry. Co. v. Notre Dame de Bonsecours Corpn.* (8) and *Madden v. Nelson & Fort Sheppard Ry. Co.* (9). But except to call attention to the fact that each case must depend on an exact examination of its own facts those decisions are not directly relevant to any point which their Lordships have to decide.

In their Lordships' opinion the action of the province was an incursion into the field reserved by the British North America Act to the Dominion. In coming to this conclusion their Lordships refrain from deciding whether the Act or the regulations, or both, are beyond the powers of the province. It may be that the Act can be so read as to apply to provincial matters only. If this be so the licence given to Mr. Winner is an unauthorised limitation of his rights because it is for the Dominion alone to exercise, either by Act or by regulation, control over connecting undertakings. On the other hand, it may be that the Act itself must be construed as interfering with undertakings connecting province with province or with another country. In either case the province, either through the Act itself or through the licence issued in pursuance of regulations made under the Act, has exceeded its jurisdiction. The licence, indeed, may be good as a licence, but the limitation imposed in it is *ultra vires and of no effect*.

There remains, however, the further question whether, although the licence cannot be limited in the manner imposed by the board, Mr. Winner can, nevertheless, as the Supreme Court adjudged, be prohibited from taking up and setting down purely provincial passengers, i.e., those whose journey both begins and ends within the province. So far as their Lordships are able to judge none of the parties and none of the interveners suggested such a compromise in any of the courts in Canada. Their Lordships might, however, accede to the argument if there were evidence that Mr. Winner was engaged in two enterprises, one within the province and the other of a connecting nature. Their Lordships, however, cannot see any evidence of such a dual enterprise. The same buses carried both types of passenger along the same routes; the journeys may have been different, in that one was partly outside the province and the other wholly within, but it was the same undertaking which was engaged in both activities.

The Supreme Court, however, approached the question from a different angle. To them, a distinction should be drawn between what was an essential and what an incidental portion of the enterprise. In their view, the portion which could be shed without putting an end to it did not constitute an essential part of the undertaking and, therefore, could be dealt with by the province, leaving only the essential part for the Dominion's jurisdiction. Their Lordships are of opinion that this method of approach results from a misapprehension of the true construction of s. 92 (10) (a) of the British North America Act. The question is not what portions of the undertaking can be stripped from it without interfering

with the activity altogether: it is rather what is the undertaking which is in fact being carried on. Is there one undertaking, and as part of that one undertaking does the respondent carry passengers between two points both within the province, or are there two?

The view of the Supreme Court is succinctly put by RAND, J., when he says ([1951] S.C.R. at p. 924):

"Assuming then that the international and inter-provincial components of Winner's service are such an undertaking as head 10 envisages, the question is whether, by his own act, for the purposes of the statute, he can annex to it the local services. Under the theory advanced by Mr. Tennant, given an automobile, an individual can, by piecemeal accumulation, bring within para. 10 (a) a day-to-day fluctuating totality of operations of the class of those here in question. The result of being able to do so could undoubtedly introduce a destructive interference with the balanced and co-ordinated administration by the province of what is primarily a local matter; and the public interest would suffer accordingly. There is no necessary entirety to such an aggregate and I cannot think it a sound construction of the section to permit the attraction, by such mode, to Dominion jurisdiction of severable matter that otherwise would belong to the province."

No doubt, the taking up and setting down of passengers journeying wholly within the province could be severed from the rest of Mr. Winner's undertaking, but so to treat the question is not to ask is there an undertaking and does it form a connection with other countries or other provinces, but can you emasculate the actual undertaking and yet leave it the same undertaking or so divide it that that part of it can be regarded as inter-provincial and the other part as provincial.

The undertaking in question is, in fact, one and indivisible. It is true that it might have been carried on differently and might have been limited to activities within or without the province, but it is not, and their Lordships do not agree that the fact that it might be carried on otherwise than it is makes it or any part of it any the less an interconnecting undertaking. The contention is clearly dealt with by the observations of the Board in the *Bell Telephone* case (4), observations which, in their Lordships' opinion, have a direct application to the present case and are to be found in the following words ([1905] A.C. 59):

"It was argued that the company was formed to carry on, and was carrying on, two separate and distinct businesses—a local business and a long-distance business. And it was contended that the local business and the undertaking of the company so far as it dealt with local business fell within the jurisdiction of the provincial legislature. But there, again, the facts do not support the contention of the appellants. The undertaking authorised by the Act of 1880 [43 Vict. c. 67] was one single undertaking, though for certain purposes its business may be regarded as falling under different branches or heads. The undertaking of the Bell Telephone Company was no more a collection of separate and distinct businesses than the undertaking of a telegraph company which has a long-distance line combined with local business, or the undertaking of a railway company which may have a large suburban traffic and miles of railway communicating with distant places. The special case contains a description of the company's business which seems to be a complete answer to the ingenious suggestion put forward on behalf of the appellants."

In coming to this conclusion their Lordships must not be supposed to lend any countenance to the suggestion that a carrier who is substantially an internal carrier can put himself outside provincial jurisdiction by starting his activities a few miles over the border. Such a subterfuge would not avail him. The question is whether in truth and in fact there is an internal activity prolonged over the border in order to enable the owner to evade provincial jurisdiction, or

whether in pith and substance it is inter-provincial. Just as the question whether there is an interconnecting undertaking is one depending on all the circumstances of the case, so the question whether it is a camouflaged local undertaking masquerading as an interconnecting one must also depend on the facts of each case and on a determination of what is the pith and substance of an Act or regulation. Of course, as has so often been pointed out, whether on the evidence adduced an activity can be adjudged to be local is a matter of law, but once it is decided that it can be local the question whether it is so is one of fact for the relevant tribunal to determine. In the case under consideration no such question arises, the undertaking is one connecting the province with another and extending beyond the limits of the province and, therefore, comes within the provisions of s. 92 (10) (a) and is solely within the jurisdiction of the Dominion.

One note of warning should, however, be sounded. Their Lordships express no opinion whether Mr. Winner could initiate a purely provincial bus service even though it was under the aegis of and managed by his present organisation. No such question, however, arises or has been raised. As it is, their Lordships will humbly advise Her Majesty (i) that the appeal of the Attorneys-General for Ontario, Alberta and Prince Edward Island ought to be dismissed, (ii) that the appeal of Israel Winner, Canadian National Railway Co. and Canadian Pacific Railway Co. ought to be allowed, (iii) that the order of the Supreme Court ought to be varied by substituting the following answer to such parts of the questions submitted as it considered it was necessary to answer for the disposal of the issues properly raised in the pleadings. "1. It is not within the legislative powers of the Province of New Brunswick by the statutes or regulations in question, or within the powers of the motor carrier board by the terms of the licence granted by it, to prohibit the appellant by his undertaking, as described in para. 9 (a), (g), (h) and (j) of the facts set out in the order of HUGHES, J., dated Jan. 17, 1950, from bringing passengers into the Province of New Brunswick from outside the said province and permitting them to alight, or from carrying passengers from any point in the province to a point outside the limits thereof, or from carrying passengers along the route traversed by its buses from place to place in New Brunswick", (iv) that the order of the Supreme Court as to costs ought to stand, save that it should be varied by giving Israel Winner the whole instead of two-thirds of his costs of the appeal to the Supreme Court. The costs incurred by Israel Winner in the consolidated appeals to this Board are to be paid by the Attorneys-General for Ontario, Alberta and Prince Edward Island.

Appeal dismissed; Cross-appeal allowed.

Solicitors: *Lawrence Jones & Co.* (for the Attorneys-General for Ontario, Alberta, Prince Edward Island and Quebec); *Norton, Rose, Greenwell & Co.* (for the Attorney-General for New Brunswick, on behalf of the province and ex. rel. S.M.T. (Eastern), Ltd.); *Blake & Redden* (for Israel Winner, the Canadian National Railway Company and the Canadian Pacific Railway Company); *Charles Russell & Co.* (for the Attorney-General for Canada); *Burchells* (for the Attorney-General for Nova Scotia); *Gard, Lyell & Co.* (for the Attorney-General for British Columbia).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

Re BURTON'S SETTLEMENTS. SCOTT AND OTHERS v.
NATIONAL PROVINCIAL BANK, LTD. AND OTHERS.

[CHANCERY DIVISION (Upjohn, J.), June 17, 18, 23, July 28, 1954.]

Power of Appointment—Exercise—Fraudulent exercise—Genuine intention to benefit objects—Conditional gift of appointor's residue—Condition for appointees settling shares of appointed fund—Whether excessive exercise.
Will—Condition—Certainty—“Such period as my trustees shall think reasonable”.

By his first marriage in 1901, the testator had two daughters, I. and A., who attained the age of twenty-one, and by his second marriage in 1924 he had two daughters, F. and H., who also attained the age of twenty-one. A. predeceased the testator. On his first marriage the testator made a marriage settlement in favour of his wife and issue of that marriage. By a voluntary settlement dated Apr. 28, 1915, he settled investments (“the 1915 fund”) on certain trusts during his life and the widowhood of his wife, and he directed that after his death and the death or re-marriage of his wife the trustees should stand possessed of the funds on trust for all his issue to attain twenty-one by any marriage born during his lifetime “in such shares if more than one and in such manner as [the testator] shall by deed . . . or by will or codicil appoint” and in default of appointment on trust for all his children in equal shares. On the occasion of his second marriage, by a settlement dated Aug. 19, 1924, he settled further investments on trusts for himself and his second wife and, after the death of the survivor, on trust for the children of the marriage as the testator should appoint during the joint lives of the spouses and in default of appointment as the survivor of them should appoint by will or codicil. By a supplemental settlement dated Nov. 4, 1924, the testator settled further funds on the same trusts. By cl. 3 of his will dated Aug. 20, 1924, the testator appointed the income of the 1915 fund to his second wife during her widowhood. By cl. 6 he gave his residuary estate in trust for all his children who attained the age of twenty-one in equal shares and by cl. 7 he settled the share of each daughter in the residue on trust for her during her life with a power of appointment amongst her issue on her death. By cl. 1 of a codicil dated Nov. 13, 1930, the testator appointed the funds comprised in his first marriage settlement to I. absolutely; by cl. 3 he appointed the funds comprised in the 1915 settlement among all his children who should attain the age of twenty-one in equal shares. By cl. 11 he provided that no daughter should be entitled to her share of residue unless she should within six months of the testator's death or reaching full age or within such further period as the trustees should think reasonable settle her share in residue and the share appointed to her by the testator under the marriage settlements, the 1915 settlement and the supplemental settlement, on the trusts set out in cl. 7 of the will and “if any daughter of mine shall refuse or fail to comply with such condition my will shall be construed and take effect as if she had not been a daughter of mine”. The testator died on July 12, 1932, and his second wife was still living at the date of these proceedings. On the question whether the appointment contained in cl. 3 of the codicil was a valid exercise of the power of appointment contained in the settlement of Apr. 28, 1915,

HELD: (i) as the appointment of the settled property made by cl. 3 of the codicil of Nov. 13, 1930, was genuinely intended to benefit the appointees, who were objects of the power of appointment, the appointment was valid; and the fact that the testator had bequeathed his own property to appointees of the settled property on condition that the appointed property, given absolutely by the appointment, should be settled by the appointees did not make the appointment a fraud on the power, but the appointees

were put to their election whether to accept the testator's bequest and to comply with his condition or to forfeit his bequest.

Vatcher v. Paull ([1915] A.C. 372), applied.

Re Simpson ([1952] 1 All E.R. 963), distinguished.

Per curiam: merely to attach to an absolute appointment of trust property a condition intended to compel the appointee to settle the appointed fund on trusts under which persons who are not objects of the power may benefit, is not of itself enough to make the appointment a fraud on the power, but the condition, if attached to the appointed fund itself, must be rejected as an excessive exercise of the power (see p. 204, post).

(ii) clause 11 of the codicil did not operate to revoke the appointment contained in cl. 3 of the codicil in the event of a daughter refusing to comply with the condition contained in cl. 11, but was directed merely to excluding such a daughter from participation in the trust fund comprising the testator's residuary estate.

(iii) a period of time (e.g., six months) with such further period as trustees should think reasonable within which to do an act was sufficiently certain for the purposes of the condition constituted by cl. 11 of the codicil, and, therefore, that clause was not void for uncertainty.

Dictum of JENKINS, J., in *Re Coven* ([1948] 2 All E.R. at p. 501), applied.

Equitable Assignment—Absence of consideration—Compliance with condition imposed on testamentary gift.

By a settlement dated Dec. 30, 1947, F., who attained the age of twenty-one on July 10, 1947, in compliance with cl. 11 of the testator's codicil dated Nov. 13, 1930, directed the trustee, the N. bank, to hold her interests under the settlement of Apr. 28, 1915, the second marriage settlement and the supplemental settlement on the trusts thereafter specified. No appointment of the funds subject to the second marriage settlement and the supplemental settlement had been made. The N. bank was the trustee of the testator's will and codicils and also of the 1915 settlement, the second marriage settlement, the supplemental settlement and the settlement of 1947.

HELD: F. had effectively settled her interests under the second marriage settlement and the supplemental settlement, because she had executed the settlement of Dec. 30, 1947, in order to comply with cl. 11 of the codicil and to enable her to enjoy her share of residue, and equity would not permit her thereafter, if and when an appointment were made in her favour, to repudiate her settlement: dictum of BUCKLEY, J., in *Re Ellenborough* ([1903] 1 Ch. at p. 700), applied: moreover, the N. bank, as trustee, already held the relevant funds before the settlement of Dec. 30, 1947, was executed, and, therefore, the direction to the bank and declaration of trusts in the settlement of Dec. 30, 1947, were effective without the assistance of a court of equity.

AS TO FRAUD ON A POWER OF APPOINTMENT, see HALSBURY, Hailsham Edn., Vol. 25, pp. 581-584, paras. 1033, 1034.

Cases referred to:

- (1) *Re Ellenborough*, [1903] 1 Ch. 697; 72 L.J.Ch. 218; 87 L.T. 714; 40 Digest 537, 800.
- (2) *Re Brooks*, [1939] 3 All E.R. 920; [1939] Ch. 993; 109 L.J.Ch. 28; 161 L.T. 158; Digest Supp.
- (3) *Tailby v. Official Receiver*, (1888), 13 App. Cas. 523; 58 L.J.Q.B. 75; 60 L.T. 162; 20 Digest 334, 770.
- (4) *Sifton v. Sifton*, [1938] 3 All E.R. 435; [1938] A.C. 656; 107 L.J.P.C. 97; 159 L.T. 289; Digest Supp.
- (5) *Re Gape*, [1952] 2 All E.R. 579; [1952] Ch. 743; 3rd Digest Supp.

- (6) *Re Wilson's Will Trusts*, [1950] 2 All E.R. 955; *affd.* H.L. sub nom. *Bromley v. Tryon*, [1951] 2 All E.R. 1058; [1952] A.C. 265; 2nd Digest Supp.
- (7) *Re Wood's Will Trusts*, [1952] 1 All E.R. 740; [1952] Ch. 406; 3rd Digest Supp.
- (8) *Re Bouverie*, [1952] 1 All E.R. 408; [1952] Ch. 400; 3rd Digest Supp.
- (9) *Re Jones*, [1953] 1 All E.R. 357; [1953] Ch. 125; 3rd Digest Supp.
- (10) *Re Cowen*, [1948] 2 All E.R. 492; [1948] 1 Ch. 747; [1948] L.J.R. 1590; 2nd Digest Supp.
- (11) *Re Wilkinson*, [1926] Ch. 842; 95 L.J.Ch. 528; 135 L.T. 736; 44 Digest 442, 2678.
- (12) *Re Talbot-Ponsonby's Estate*, [1937] 4 All E.R. 309; Digest Supp.
- (13) *Vatcher v. Paull*, [1915] A.C. 372; 84 L.J.P.C. 86; 112 L.T. 737; 37 Digest 492, 865.
- (14) *Re Dick*, [1953] 1 All E.R. 559; [1953] Ch. 343; 3rd Digest Supp.
- (15) *King v. King*, (1864), 15 L.Ch.R. 479; 20 Digest 429, 1590i.
- (16) *Re Simpson*, [1952] 1 All E.R. 963; [1952] Ch. 412; 3rd Digest Supp.
- (17) *Re Newe*, [1938] 3 All E.R. 220; [1938] 1 Ch. 793; 107 L.J.Ch. 395; 159 L.T. 210; Digest Supp.
- (18) *Re Crawshaw*, [1948] 1 All E.R. 107; [1948] Ch. 123; [1948] L.J.R. 586; Digest Supp.
- (19) *Alexander v. Alexander*, (1755), 2 Ves. Sen. 640; 28 E.R. 408; 37 Digest 407, 177.
- (20) *Sadler v. Pratt*, (1833), 5 Sim. 632; 58 E.R. 476; 37 Digest 490, 849.
- (21) *Churchill v. Churchill*, (1867), L.R. 5 Eq. 44; 37 L.J.Ch. 92; 37 Digest 498, 907.
- (22) *Roach v. Trood*, (1876), 3 Ch.D. 429; 34 L.T. 105; 37 Digest 491, 855.
- (23) *Beere v. Hoffmister*, (1856), 23 Beav. 101; 26 L.J.Ch. 177; 28 L.T.O.S. 155; 53 E.R. 40; 37 Digest 507, 996.
- (24) *Wellesley v. Mornington (Earl)*, (1855), 2 K. & J. 143; 69 E.R. 728; 37 Digest 505, 983.
- (25) *Re Holland*, [1914] 2 Ch. 595; 84 L.J.Ch. 389; 112 L.T. 27; 37 Digest 491, 857.
- (26) *Portland (Duke) v. Topham (Lady)*, (1864), 11 H.L.Cas. 32; 34 L.J.Ch. 113; 10 L.T. 355; 11 E.R. 1242; 37 Digest 503, 963.

ADJOURNED SUMMONS to determine, among other questions, (1) whether the appointment contained in cl. 3 of the codicil dated Nov. 13, 1930, to the will dated Aug. 20, 1924, of the testator, Arthur Burton, in respect of the fund subject to a voluntary settlement dated Apr. 28, 1915, was (i) valid, or (ii) void, as being a fraud on the power of appointment contained in the 1915 settlement; (2) whether a settlement dated Dec. 30, 1947, executed by the second plaintiff, the testator's daughter by his second marriage, Mrs. Fay Lamdin, effectively settled any share which might after the date thereof be appointed to Mrs. Lamdin under the settlements dated Aug. 19, 1924, and Nov. 4, 1924.

The testator was married twice, viz., in 1901 and 1924. There were three daughters of his first marriage of whom one, Ida, survived him. The other two died before the testator. On the occasion of his first marriage the testator executed a marriage settlement, dated Nov. 8, 1901, which is immaterial to this report. On Apr. 28, 1915, the testator executed a voluntary settlement, which is referred to more fully later. In 1919 the testator settled further investments in trust for his daughter, Ida, and her issue.

The testator's second marriage took place on Aug. 20, 1924. On that occasion the testator executed a marriage settlement dated Aug. 19, 1924, and hereinafter referred to and called "the second marriage settlement". Subsequently he executed two supplemental settlements dated Nov. 4, 1924, and Mar. 12, 1931, which are mentioned later. On Aug. 20, 1924, he made his will.

Subsequently he made two codicils to his will, dated Nov. 13, 1930, which is referred to hereinafter, and dated Feb. 26, 1932, which is immaterial to this report. By his second marriage the testator had two daughters, viz., the plaintiffs Heather Scott and Fay Lamdin. Both these daughters attained twenty-one. On July 12, 1932, the testator died. On Dec. 31, 1936, the first defendant, the National Provincial Bank, Ltd., was appointed to be the sole trustee of the testator's will and codicils and of the settlements. The testator's second wife, who was still living at the date of the summons, re-married in 1940. On July 10, 1947, the testator's daughter, Fay Lamdin, attained the age of twenty-one years, and by a settlement dated Dec. 30, 1947, she settled her interest under the settlement of Apr. 28, 1915, the second marriage settlement and the settlement dated Nov. 4, 1924, in purported compliance with cl. 11 of the codicil of Nov. 13, 1930, which is hereinafter set out.

The plaintiff Heather Scott was married once only, on Sept. 1, 1951, to the plaintiff, David Scott, and there was one child of that marriage, Susan Scott. The plaintiff Fay Lamdin was married twice, first on Mar. 27, 1948, to John Douglas Worsfold, of which marriage there was one child, the second defendant, Tony Worsfold, who was born in September, 1949, and secondly, on Sept. 22, 1951, to the fourth plaintiff, Arthur David Lamdin, of which marriage there was one child, Miles Lamdin.

No appointment was made by the testator under the second marriage settlement or under the settlement dated Nov. 4, 1924, and none had been made by his second wife at the date of these proceedings.

The testator's daughter Ida died while these proceedings were pending. She never married.

By the testator's voluntary settlement, dated Apr. 28, 1915, he settled the investments therein referred to hereinafter called "the 1915 fund") on certain trusts during his life and during the widowhood of his first wife. By cl. 4 he provided:

"After the death of [the testator] and the death or second marriage . . . of [his first wife] the trustees shall stand possessed of the [1915 fund] in trust for all or any one or more of the issue of [the testator] as well as by [his first wife] as by any future wife (such issue being born in the lifetime of [the testator]) at such ages or times . . . (not being earlier as to any object of this power than his or her age of twenty-one years or date of marriage) in such shares if more than one and in such manner as [the testator] shall by deed . . . or by will or codicil appoint and in default of and subject to any such appointment in trust for all the children of [the testator] as well as by [his first wife] as by any future wife who being sons attain the age of twenty-one years or being daughters attain that age or marry in equal shares and if there shall be but one such child the whole to be in trust for that one child."

Clause 9 empowered the testator to appoint by will or deed a life or less interest in the whole or any part of the income of the 1915 fund to a widow of his.

By the second marriage settlement the testator settled funds on trust for his second wife during her life and after her death for the testator (if surviving) during his life, and after the death of the survivor, in trust for the children or remoter issue of the marriage in such manner as the testator during the joint lives of the husband and wife should by deed appoint and in default of and subject to any such appointment as the survivor of them should appoint by will or codicil and in default of any such appointment in trust for all or any child or children of the marriage who being male should attain the age of twenty-one years or being female should attain that age or marry in equal shares. By a further settlement dated Nov. 4, 1924, declared to be supplemental to the second marriage settlement, the testator settled further funds on the same trusts as set out in the second marriage settlement. By a further settlement dated Mar. 12, 1931, also declared to be supplemental to the second marriage

settlement, the testator settled a fund on the trusts therein set out during the joint lives of himself and his second wife, and subject thereto on trust for the testator absolutely.

By cl. 3 of his said will, dated Aug. 20, 1924, the testator appointed the whole of the income of the 1915 fund to his second wife so long as she should remain his widow. By cl. 6 (c) (d) and (e) of the will the testator gave his residuary estate to trustees on trust to pay the second wife an annuity during her life and subject thereto on trust

“for all or any of my children or child who being male attain the age of twenty-one years or being female attain that age or marry in equal shares.”

By cl. 7 of his will the testator settled the share of each daughter in the residuary estate on trust for her for life with a power of appointment amongst her issue after her death and in default of such appointment in trust for all her children who being male should attain the age of twenty-one years or being female should attain that age or marry in equal shares. By cl. 1 of the codicil dated Nov. 13, 1930, the testator exercised the power of appointment contained in the marriage settlement of 1901 by directing the trustees thereof to stand possessed of the trust property on trust for his daughter Ida absolutely. By cl. 2 the testator recited that by virtue of a settlement of 1919 (not otherwise material to this report) certain trust funds were settled in trust for Ida and her issue and that by virtue of the first marriage settlement and the appointment in cl. 1 of the codicil and of the settlement of 1919 his daughter Ida was adequately provided for. In cl. 3 the testator referred to the settlement of Apr. 28, 1915, and in particular to his testamentary power of appointment thereunder in favour of his issue by any wife, and after reciting that he had issue of his second marriage two children, Fay and Heather, and might possibly have further issue, and after referring to the fact that he had exercised his power of appointment over income to his widow for life by his will, the testator directed that the trustees of the settlement of Apr. 28, 1915, should, after the death or re-marriage of his wife, stand possessed of the trust funds and property subject thereto and the future income thereof in trust in equal shares for all or any the children or child of the second marriage who should be living at his death and being male should attain the age of twenty-one years or being female attain that age or marry, with a gift over in favour of Ida (which, in the events which happened, could not take effect). By cl. 8 of the codicil the testator made dispositions of his residuary estate. He revoked cl. 6 (d) of his will, and in substitution he directed the trustees to pay the income of the trust fund to his wife during her life so long as she should remain his widow and after her re-marriage to pay one moiety of the income to her during the remainder of her life without power of anticipation; and subject thereto he directed that his trustees should stand possessed of the capital and future income thereof in favour of his children or child of his second marriage who being male should attain the age of twenty-one years or being female should attain that age or marry under it in equal shares; but he directed that the share of a daughter should be retained by his trustees and held by them on the trusts declared in cl. 7 of the will. By cl. 11 he provided:

“No daughter of mine shall be entitled to any share of the trust fund except subject as aforesaid and subject to this express condition namely as regards a daughter of mine by my second marriage that she shall within six calendar months next after my decease if she shall be of full age at my decease or otherwise within six calendar months next after the date when she shall have attained her majority or within such further period as my trustees shall think reasonable or as regards my daughter Ida Marian Burton within six calendar months next after the failure of the issue of my second marriage or within such further period as my trustees shall think reasonable execute a settlement of the share hereinbefore appointed to her of

the trust funds and property comprised in the [settlement of Apr. 28, 1915] and in the case of my daughter Ida Marian Burton also of the trust funds and property comprised in [the testator's first marriage settlement of 1901] and in the case of a daughter of my second marriage also of her share in the trust funds and property comprised in [the second marriage settlement and the supplementary settlements] containing the same trusts for the benefit of herself and her children and issue and subject to the same powers and provisions mutatis mutandis as are declared and contained in my said will and this codicil thereto or either of them of and concerning her share in the trust fund the persons to be appointed trustees of any such settlement to be approved of by my trustees and the cost of preparing executing and stamping the same to be paid out of my estate as part of my testamentary expenses: provided always that if any such daughter shall execute a settlement of her share in the funds [of the settlement of Apr. 28, 1915] and of her share (if any) in the said first marriage settlement funds and in [the second marriage settlement and the supplementary settlements] funds with my approval during my lifetime such settlement shall be deemed to be a compliance with the said condition. If any daughter of mine shall refuse or fail to comply with such condition my will shall be construed and take effect as if she had not been a daughter of mine."

Recital 14 of the settlement dated Dec. 30, 1947, made by the second plaintiff, Fay Lamdin, read as follows:

"The settlor has in order to comply with the hereinbefore recited condition in that behalf contained in the first codicil to the testator's said will resolved to settle in manner hereinafter expressed her share and interests in the funds held upon the trusts of the post-nuptial settlement the second marriage settlement and the first supplemental settlement."

The settlement of Dec. 30, 1947, then proceeded:

"Now this deed witnesseth that in pursuance of her said resolve and for divers other good causes and considerations the settlor hereby declares as follows:—1. The bank shall henceforth retain or stand possessed of the [share appointed to the settlor under the settlement dated Apr. 28, 1915] and also (subject to the prior life interest of [her mother], the testator's widow) of such part or share of the trust funds comprised in or representing or remaining subject to the provisions of the second marriage settlement and the first supplemental settlement of Nov. 4, 1924 as the settlor is or may become entitled to after the death of [the widow] either in pursuance of any appointment made by [the widow] in exercise of the power vested in her as aforesaid or in default of any such appointment . . ."

G. A. Rink for the plaintiffs.

N. S. S. Warren for the first defendant, the bank.

M. Browne for the second defendant, an infant.

A. J. Belsham for the third, fourth and fifth defendants.

UPJOHN, J. (dealing first with question (2) at p. 195, letter F, ante): I have to determine whether the settlement of Dec. 30, 1947, catches any appointment which may hereafter be made in favour of the second plaintiff, Fay Lamdin, under the 1924 settlements. The settlement of Dec. 30, 1947, was executed in purported compliance with the condition contained in cl. 11 of the testator's codicil of Nov. 13, 1930. [His LORDSHIP then read recital 14 of the settlement dated Dec. 30, 1947, and continued:] It is said that, so far as the settlement of Dec. 30, 1947, purported to settle Mrs. Lamdin's interest under a future appointment, it was invalid on the well-known principle that a settlement of a mere spes successionis can only operate as a contract to settle and is only enforceable if accompanied by valuable consideration. That has been established

in a line of cases of which the best-known is perhaps *Re Ellenborough* (1). In *Re Brooks* (2) FARWELL, J., referred to that decision and said ([1939] 3 All E.R. at p. 923; [1939] Ch. at p. 998) (quoting from the judgment of BUCKLEY, J. ([1903] 1 Ch. at p. 700)):

A ... An assignment for value binds the conscience of the assignor. A court of equity as against him will compel him to do that which ex hypothesi he has not yet effectually done. Future property, possibilities, and expectancies, are all assignable in equity for value: *Tailby v. Official Receiver* (3). But when the assurance is not for value, a court of equity will not assist a volunteer, the reason for that being, that, since it is merely a voluntary act and not an act for consideration at all, the conscience of the assignor is not affected so as in equity to prevent him from saying: 'I am not going to hand over this property to which now for the first time I have become entitled'."

B

It is said that in the present case there was merely a voluntary settlement, but in fact the settlement was made in order to comply with the condition in cl. 11 of the codicil to enable the settlor to enjoy benefits from the testator's residue. In these circumstances the conscience of the settlor is clearly affected. She cannot, therefore, say to the trustees, if and when an appointment is made to her, and the funds thereby appointed fall into possession: "I am going to retain the testator's residuary estate but repudiate the settlement which I have made, and I require you to hand over the property appointed to me". Her conscience is bound in equity, and she must give effect to the settlement which she has made for the purpose of enjoying residue. She made her election once and for all when she executed the settlement of Dec. 30, 1947. Clause 11 of the codicil did not require Mrs. Lamdin to settle any interest which might be appointed to her under the 1924 settlements; but it has been conceded that she executed the settlement of Dec. 30, 1947, in the belief that she was bound to settle any such interest in order to be able to retain her interest in the testator's residuary estate, and the present question has been argued as though cl. 11 had expressly required her to settle (as she in fact purported to do) any interest which might be appointed to her under the settlements of 1924.

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There is a further ground on which Mrs. Lamdin must, in my opinion, fail in her claim that any interest appointed to her under the settlements of 1924 would not be caught by the settlement of Dec. 30, 1947. As appears from the recitals in the settlement of Dec. 30, 1947, the National Provincial Bank, Ltd., was the trustee of all relevant documents, including the settlements of 1924 and the settlement of Dec. 30, 1947. Clause 1 of the settlement of Dec. 30, 1947, did not purport to be an assignment of Mrs. Lamdin's interests but merely a direction to the bank to hold them on new trusts. In the circumstances, the assistance of a court of equity is not required, since the bank, as trustee of the settlements of 1924, already holds all the relevant funds. Accordingly, the principle of *Re Ellenborough* (1) could not apply here.

F

G

I shall, therefore, declare that the settlement of Dec. 30, 1947, effectively settled any share which might after the date thereof be appointed to Mrs. Lamdin under the settlements of 1924.

[HIS LORDSHIP took time for consideration of the remaining questions.]

H July 28. UPJOHN, J., read the following judgment. This summons raises an interesting question whether a testator, in exercising a special power of appointment conferred on him, committed a fraud on that power and, if not, whether certain conditions which he imposed on the appointees are valid and effectual or void for uncertainty or otherwise. [HIS LORDSHIP stated the facts and continued:] The principal question which I have to consider is whether, looking at the will and codicil [i.e., the codicil of Nov. 13, 1930] as a whole and having regard especially to cl. 11 of the codicil, the appointment contained in the

testator's codicil constituted a fraud on the power contained in the 1915 settlement; and it will be convenient first to notice two subsidiary points which have been argued before me.

The first of these subsidiary points is whether the concluding direction in cl. 11 that, in the case of a daughter refusing to comply with the condition, his will should be construed and take effect as if she had not been a daughter, operates to revoke the appointment contained in cl. 3 of the codicil. In my judgment cl. 11 cannot be so construed. As appears from the opening words of that clause and from its place in the codicil, cl. 11 is only dealing with the trust fund, i.e., the testator's residue, and what the clause is saying, in effect, is that, the appointment in cl. 3 having taken effect, then, if the daughter does not settle the share so appointed within the time limited thereafter, she is cut out of her interest in the trust fund. I see nothing to render the appointment in cl. 3 itself nugatory *ex post facto* if she fails to settle the property thereby appointed.

The next subsidiary point is whether cl. 11 is void for uncertainty. The only ground on which it is suggested that the clause is so void is that the time limit, viz. (in the events which have happened), six months after each daughter of the second marriage became twenty-one years of age or within such further period as the trustees should think reasonable, renders the clause void for uncertainty. Clause 11 constitutes a condition subsequent. In such a case it can be of no validity unless the court and the parties concerned can see from the beginning precisely and distinctly on the happening of what event it is that the preceding vested estate was to determine: see *Sifton v. Sifton* (4) ([1938] 3 All E.R. at p. 445) and *Re Gape* (5) ([1952] 2 All E.R. at p. 580). So far as this court is concerned, however, the test to be applied is an objective one to be determined by the court: *Re Wilson's Will Trusts* (6) ([1950] 2 All E.R. at p. 964); *Re Wood's Will Trusts* (7) ([1952] 1 All E.R. 740). Counsel for the plaintiffs has submitted that to ascertain what is a reasonable period is a difficult matter of degree and is too uncertain in its operation to give the requisite definition to a condition subsequent. Many people, he says, might take a different view as to what in any given circumstances might be a reasonable extension of time. He referred me to a number of authorities which show that in some cases the language which the testator has employed makes the event on which the condition is to take effect incapable from the start of accurate formulation, e.g., to reside in Canada (*Sifton v. Sifton* (4)), to disuse a surname (*Re Bouverie* (8)), or to do something so vague as to have a social or other relationship with a certain named person (see *Re Jones* (9)) and in such cases the condition is void; but there are other cases where the language employed embodies a concept of sufficient certainty, although there may be difficulty in ascertaining in fact whether the condition has occurred. In such cases the condition is not necessarily void (see *Re Gape* (5)). MORRIS, L.J., in that case ([1952] 2 All E.R. at p. 582) cited with approval the following passage from the judgment of JENKINS, J., in *Re Coxen* (10) ([1948] 2 All E.R. at p. 501):

"There is, therefore, nothing in *Sifton v. Sifton* (4) which precludes me from holding the condition here in question to be a valid condition provided I am able to attach a sufficiently definite meaning to it in the context afforded by the codicil, and (as shown by *Re Wilkinson* (11) and *Re Talbot-Ponsonby's Estate* (12)) in deciding whether I am able to do so or not I must keep in mind the distinction between uncertainty as to the events prescribed by the testator as those in which the condition is to operate (which is, generally speaking, fatal to the validity of such a condition) and difficulty in ascertaining whether those events (sufficiently prescribed by the testator as a matter of definition) have happened or not, which is not necessarily fatal to such validity."

In my judgment the present case falls clearly within the latter class. The fact that the decision is given to the trustees cannot give certainty to a clause

which is otherwise uncertain (see *Re Jones* (9)), but the concept that a person is to have six months from attaining a certain age or a reasonable time thereafter to do a particular act seems to me sufficiently certain for the doctrine in question. An obligation to do something within a reasonable time is one of the most familiar concepts in our jurisprudence, and it cannot possibly now be suggested that such an obligation is void for uncertainty. The time must be reasonable having regard to what the appointee has to do and to all the surrounding circumstances of the case. That is known from the moment that the testamentary appointment is made effective by the death of the testator, and I cannot see that there is any uncertainty about it. It may be that different minds may come to a different conclusion as to what, when the condition comes into operation possibly (as in this case) years later, would be a reasonable extension of time; but that is readily determined by the court or by the trustees where (as here) that matter is expressly confided to their discretion. Accordingly, in my judgment, this point fails.

I turn, then, to the main point raised by question (1) of the summons, viz., whether the appointment constitutes a fraud on the power. In considering this matter, the general rule which should guide the court is to be found in the judgment of LORD PARKER OF WADDINGTON in the Privy Council case, *Vatcher v. Paull* (13) ([1915] A.C. at p. 378): see per SIR RAYMOND EVERSHED, M.R., in *Re Dick* (14) ([1953] 1 All E.R. at p. 563). To constitute a fraud on the power

“ it is enough that the appointor's purpose and intention is to secure a benefit for himself, or some other person not an object of the power.”

In this case the appointor's purpose and intention are to be ascertained solely by reference to the contents of his will and codicil; no other evidence as to his intention is available. The general scheme of the testator's will is perfectly simple. He makes out-and-out appointments to his daughter Ida under the first marriage settlement and to the children of the second marriage under the settlement of Apr. 28, 1915. No one, I think, can doubt that those appointments were intended to give real benefits to his children respectively. The testator then gives his own residue to the children of the second marriage and if none of them attained twenty-one years to Ida, and he is careful to settle the daughters' shares of residue. He then provides that the daughters of the second marriage will forfeit their interests in residue unless they settle the shares appointed to them under the settlement of Apr. 28, 1915. He also provides that if, but only if, Ida becomes entitled to the 1915 fund and to residue (in fact she cannot) then she is to settle her appointed interest also if she desires to enjoy her interest in residue. The obvious intention of the testator in making that provision was to try to secure, if he could, that his daughters would settle the shares appointed to them, and that, of course, would benefit non-objects of the power, viz., the issue of daughters none of whom was born in his lifetime.

Is that sufficient to constitute a fraud on the power as defined by LORD PARKER? The matter is not free from authority. In the Irish case, *King v. King* (15), the testatrix appointed certain marriage settlement funds to her three sons and also bequeathed to them certain legacies, and she directed that the funds so appointed to the sons and also the legacies should be settled on the three children for life with remainders to their issue who were non-objects of the power, and if such settlements were not made the legacies were to fall into residue. It was held that the condition was valid, although it does not seem to have been argued that the imposition of such a condition constituted a fraud on the power. Nevertheless, as pointed out by VAISEY, J., in *Re Simpson* (16), it is an express decision in favour of the view that the testator's appointment was valid and not vitiated by fraud. The same view was expressed by FARWELL, J., obiter, in *Re Neave* (17). As the relevant passage in the judgment of FARWELL, J., is fully set out in *Re Simpson* (16) ([1952] 1 All E.R. at p. 966) I do not propose

to repeat it here. Both those authorities were considered by VAISEY, J., in *Re Simpson* (16) and, after referring to *Re Crawshaw* (18), he came to the conclusion that a much greater emphasis is laid today on the doctrine of fraud on the power than formerly, and he held that a condition annexed to the enjoyment of residue, in substance not unlike the present, did constitute a fraud on the power. He said ([1952] 1 All E.R. at p. 967):

"In the present case, it seems to me that the exercise of the power under the marriage settlement was made for the purpose of furthering an object which the testator had in view, which was not confined to the benefits simpliciter of the appointees themselves. I think he was determined that, so far as he could, he would tie up the property with his own property and have it dealt with as if it were his own property."

Counsel for the plaintiffs has referred me to a number of earlier authorities which were not, according to the report, cited to VAISEY, J., and which counsel submits establish this, that the mere imposition of a condition intended to benefit non-objects of the power has never by itself been held to vitiate the appointment as being fraudulent, but the condition where it is attached not to the testator's own property, but to the appointed fund itself, is merely rejected as being an excessive execution of the power; and, he submits that, had those authorities been brought to the attention of VAISEY, J., his decision would have been the other way. Counsel's review of the authorities starts with the example given by SIR THOMAS CLARKE, M.R., in *Alexander v. Alexander* (19) (2 Ves. Sen. at p. 644), and he follows that by a reference to *Sadler v. Pratt* (20). These authorities are sufficiently set out in FARWELL ON POWERS, 3rd ed., p. 343:

"Suppose a power to a man to appoint £1,000 among his children: if the father gives the £1,000 to his children and annexes a condition that they shall release a debt owing to them or pay money over, the appointment of the £1,000 would be absolute, and the condition would be only void."

To the like effect is the case of *Sadler v. Pratt* (20) (5 Sim. 632), where

"A lady having four children by her first husband, and three by her second, and having power to appoint a fund amongst the former only, appointed it amongst all her children equally, and declared that, if her children by her first husband should refuse to share the fund with her other children, the whole fund should go to her youngest child by her first husband. HELD that the appointment was not wholly void, but that the first class of children took, each, one-seventh of the fund under it, and the other shares went to them, as in default of appointment."

The next case is *Churchill v. Churchill* (21), where a testator made appointments in favour of his daughters and then purported to settle the appointed shares in favour of the daughters for life and then on their children who were not objects of the power. It was held that the original appointment was good and the purported settlement was bad. The case is of some interest because it is clear that LORD ROMILLY, M.R., in giving judgment, thought that there would be no objection to annexing a condition as in the case before me, although, of course, his observations on that point were obiter. Having considered two earlier cases, one of which appeared to have turned mainly on the fact that the appointment by the testator was introduced by the words "so far as I lawfully or equitably may or can", he said (L.R. 5 Eq. at p. 49):

"If the testator knew that it was doubtful why did he not couple the gift of the residue with a condition which would have compelled the legatee to give effect to his wishes?"

In these earlier cases it is true to say that the question of a fraud on the power does not seem to have been expressly argued. The question was rather whether the doctrine of election applied; but, in the next case cited to me,

Reuch v. Trood (22), a decision of the Court of Appeal which expressly approved *Churchill v. Churchill* (21), the question of fraud was in the forefront of the plaintiff's case. BAGGALLAY, J.A., who delivered the judgment of the court, said (3 Ch.D. at p. 440):

A "The fact that under the provisions of an appointment, whether such provisions appear upon the face of the instrument itself, or are to be gathered from extrinsic evidence, some persons who are not objects of the power may take interests in the appointed fund, either in conjunction with or in succession to persons who are objects of the power, is not of itself sufficient to invalidate the appointment. The reports abound with cases in which such appointments have been upheld."

B The judgment then went on to consider *Beere v. Hoffmister* (23) and *Wellesley v. Earl of Mornington* (24), which show how narrow is the dividing line between a valid and fraudulent appointment.

C Finally, there was *Re Holland* (25). That was a strong case. A legatee had a power to appoint the income of a fund to her husband on such condition and such restrictions as she should think fit. She appointed the whole income, which amounted to about £600 or £700 a year, to her husband provided that he made certain annual payments of about £100 a year to non-objects. The payment to be made to non-objects was increased to £300 a year by a codicil. SARGANT, J., said ([1914] 2 Ch. at p. 601):

D "In my opinion, the difficulty in these cases is one of fact or of inference rather than of law. The law is fairly well settled in principle, and lays down a clear line of demarcation. If, on the one hand, there is a genuine appointment to an object of the power, coupled with an attempt to impose on that appointment conditions or trusts in favour of persons who are not objects, then the appointment stands good free from the conditions. If, on the other hand, there is no genuine appointment to an object of the power, but the appointment actually made to that object is made for purposes foreign to the power, then the whole appointment fails as being in substance an appointment unwarranted by the power, and that whether the real purposes of the appointment have or have not been communicated to the nominal appointee and assented to by him."

F Having regard to his earlier reference to certain passages in FARWELL ON POWERS, 2nd ed., it is plain the learned judge was referring to the doctrine of a fraud on the power. A little later on he said (*ibid.*):

G "And I cannot doubt that the testatrix had a real genuine desire to benefit her husband by the appointment in question, and that this desire was the real motive and object of the appointment, though there was annexed to it a condition in favour of persons not within the power . . . And, having once arrived at the conclusion that the appointment made by the will was genuine in itself, though burdened or charged with objectionable conditions, I do not think that the mere increase of the burden or charge affords any sufficient indication that the testatrix's real intention had changed from an intention to benefit her husband to an intention to benefit other persons through him."

H Probably that case had not been reported when *Vatcher v. Paull* (13) was argued, but the learned editor of FARWELL ON POWERS, 3rd ed., plainly does not think that its authority was impaired by anything said in *Vatcher v. Paull* (13) (see FARWELL ON POWERS, 3rd ed., pp. 343, 480).

In the light of those authorities I think it is my duty to express my view on the law and not merely to follow VAISEY, J., who, as I have said, did not have those authorities referred to him. With all respect to VAISEY, J., I find nothing in the more recent cases which lays any greater emphasis on the doctrine than

that in one of the earliest of the leading cases, *Duke of Portland v. Lady Topham* (23). LORD WESTBURY, L.C., said (11 H.L.Cas. at p. 54):

"... the appointor under the power, shall, at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power."

I venture to think that VAISEY, J., gave too literal and strict an interpretation to the words, quoted earlier, of LORD PARKER in *Vatcher v. Paull* (13). Those words must be read in the light of the earlier authorities and it must be remembered that LORD PARKER was not dealing with a case where the condition imposed was to be performed by the appointees. In my judgment, "the purpose and intention" of the appointor is to be ascertained as a matter of substance and not solely by analysing the effect of the appointment, although, of course, that is important. One must try to discover his genuine intention. In many cases contemporaneous evidence of memoranda or letters make the real purpose and intention of the appointor clear, as in *Re Crawshaw* (18) and *Re Dick* (14), and vitiate the appointment. In other cases it may be that the phraseology used in the document making the appointment makes clear what was the appointor's real purpose and intention. Possibly that may serve to distinguish *Re Simpson* (16) from this case, although the distinction seems to me one of form rather than of substance. Then, again, the surrounding circumstances by themselves may be sufficient to determine the matter one way or another, as in the cases I have mentioned which were quoted in *Rouch v. Troad* (22). In the absence, however, of such aids to assist in determining the appointor's real purpose and intention, the mere fact that the appointor purports to attach conditions intended to compel the appointees to settle the fund or make certain payments is not, in my judgment, by itself sufficient to constitute a fraud on the power. In such circumstances the appointment to the appointees is valid, and if the condition is attached to the enjoyment of the appointed fund itself it must be rejected as being an excessive execution of the power. If, on the other hand (as here), the condition is annexed, not to the enjoyment of the appointed fund but to the testator's own property, the doctrine of excessive execution is not available. In such a case the appointee is put to his election. He can either enjoy his share of the appointed fund unfettered and forfeit his interest in the appointor's property or he can enjoy his share of the appointor's property on the terms of settling the appointed fund.

In the present case I feel no doubt that the appointments to Ida and to the children of the second marriage were genuine appointments intended to benefit them, although as the price of enjoying residue the testator has imposed conditions with regard to the settlement of the appointed fund. Once that conclusion has been reached and there being no surrounding circumstances and no contemporaneous evidence pointing to a contrary view, then, in my judgment, it necessarily follows that, treated as a matter of substance, the testator's purpose and intention cannot be said to be fraudulent.

For these reasons I propose to declare that the appointment under the powers contained in the 1915 settlement is not fraudulent and void but valid and effectual, and that the condition imposed in cl. 11 of the codicil is also valid and effectual and binding on the first and third plaintiffs.

Declarations accordingly.

Solicitors: *Speechly, Mumford & Craig* (for the plaintiffs and the second defendant); *Routh, Stacey & Castle* (for the remaining defendants).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

LASZCZYK v. NATIONAL COAL BOARD.

[MANCHESTER ASSIZES (Pearson, J.), July 29, 30, 1954.]

Coal Mining—Breach of statutory duty by employer—Breach by employee of statutory directions—Negligence of employer—Contributory negligence of employee—Apportionment of liability—Coal Mines Act, 1911 (c. 50), s. 74—Coal Mines (Training) General Regulations, 1945 (S.R. & O., 1945, No. 1217), reg. 4 (1) (c).

Negligence—Contributory negligence—Apportionment of liability—Coal mining accident—Breach of statutory duty by employers and of statutory directions by employee—Law Reform (Contributory Negligence) Act, 1945 (c. 28), s. 1 (1).

The plaintiff, when employed by the defendants on work at their coal mine, was injured as result of the negligence of a shot-firer's sentry and for that injury the defendants, who employed the sentry, were liable. At the time of sustaining the injury the plaintiff, though acting in accordance with instructions of a deputy who was his immediate superior, was acting in contravention of directions (having statutory authority under s. 74 of the Coal Mines Act, 1911) given by the colliery training officer, and thus was guilty of contributory negligence. In addition the employment of the plaintiff on work at the place where he was when he sustained injury was in breach of the Coal Mines (Training) General Regulations, 1945, reg. 4 (1). On the question of liability in respect of the accident being apportioned in view of the plaintiff's contributory negligence and breach of directions,

HELD: the plaintiff's share of responsibility for the accident was small since he was acting on the order of his immediate superior, and, therefore, the proportion of the damage attributable to him was assessed at five per cent.

FOR THE COAL MINES ACT, 1911, s. 74, see HALSBURY'S STATUTES, Second Edn., Vol. 16, p. 144; and FOR A SUMMARY OF THE COAL MINES (TRAINING) GENERAL REGULATIONS, 1945, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 14, p. 74.

FOR THE LAW REFORM (CONTRIBUTORY NEGLIGENCE) ACT, 1945, s. 1, see HALSBURY'S STATUTES, Second Edn., Vol. 17, p. 12.

Cases referred to:

- (1) *National Coal Board v. England*, [1954] 1 All E.R. 546.
- (2) *Walsh v. National Coal Board*, (May 11, 1954), unreported.

ACTION for damages for negligence and breach of statutory duty.

The plaintiff, a miner employed by the defendants, the National Coal Board, claimed damages for personal injuries which he alleged were due to the negligence of a servant of the defendants in failing to give due warning of a shot about to be fired at the coal face, and to a breach of the Coal Mines (Training) General Regulations, 1945, reg. 4 (1).

D. J. Brabin, Q.C., and R. Lambert for the plaintiff.

J. R. D. Crichton, Q.C., and C. M. W. Elliott for the defendants.

PEARSON, J.: The plaintiff, Mr. Herbert Laszczyk, claims against the defendants, the National Coal Board, damages for negligence and breach of statutory duty in respect of a shot-firing accident which occurred on Mar. 11, 1953, at the defendants' Bickershaw Colliery. The plaintiff, who is of Polish origin, came to England in 1947, having previously had some one and a half years' experience as a coal miner. He was then trained in Wales as a haulage worker, but was not trained as a coal face worker. After some work at other mines he came to the Bickershaw Colliery about three years prior to the accident, which would be early in 1950, and he worked there as a haulage worker. The combined team of haulage workers would, no doubt, on some occasions be bringing the extracted coal back from the coal face along the main roads, but at

other times they would be bringing the materials required—timber and iron bars—from what may be called the underground “tramway terminus” along the main roads to a place near the coal face, and then one or more would have to bring the materials along to the coal face to give them to the working colliers who needed such materials. The plaintiff, throughout the three years’ period up to and including Mar. 11, 1953, when the accident occurred, did, in fact, from time to time execute some of this work of bringing materials along the coal face and distributing them to the persons working there. On Feb. 11, 1953, the Bickershaw Colliery training officer found the plaintiff at the coal face and told him that he had no right to be there, explaining, in effect, the safety requirements under the appropriate training regulations. He then took the plaintiff to some place on the main haulage road and pointed out a particular mark or position beyond which, he told the plaintiff, he must not go. A

The plaintiff worked on certain parts of two different shifts. On part of the afternoon shift he was under a deputy or fireman whose name was Mr. Sinclair, and on part of the day or morning shift he worked under another officer of the same rank, Mr. Thompson. On that same day, Feb. 11, 1953, the colliery training officer left for the first of these deputies, Mr. Sinclair, this note: B

“H. Laszczyk is being used on the face. He is not face trained in any respect. Please avoid using him on the face.” C

Mr. Sinclair received this message and I think that he probably did pass it on to the plaintiff. The attitude of Mr. Thompson, the other deputy, was quite different. He, in fact, instructed the plaintiff to continue doing the same work of distributing the required materials at the coal face, but to keep out of the way of the colliery training officer if he should happen to be there. The plaintiff carried out these instructions, although he and Mr. Thompson knew that this was in breach of the mine’s safety requirements. Preferring the evidence of the plaintiff to that of Mr. Thompson, I find that these instructions were given after the colliery training officer’s conversation with the plaintiff. D

On Mar. 11, 1953, a shot-firer, named Melling, was about to fire a shot in the stint of a miner called Burton, and in accordance with the relevant shot-firing regulations he posted himself for security at one end of the determined danger zone and he posted Burton at the other end. Burton gave the necessary warning to another miner, but failed to give any warning to the plaintiff, who was coming along the coal face in the direction of the determined danger zone. Burton was not keeping a proper look-out and not performing his duty as a shot-firer’s sentry with diligence, and failed to see the plaintiff. The plaintiff went on into the danger zone and was severely injured when the shot was fired. E
The accident was plainly caused by the negligence on the part of that sentry, Burton, and for his negligence the defendants must be held responsible. But there is a question whether some deduction should be made from the full amount of damages by reason of the contributory negligence on the part of the plaintiff. F
Section 74 of the Coal Mines Act, 1911, provides: G

“Every person shall observe such directions with respect to working as may be given to him with a view to comply with this Part [Part II] of this Act or the regulations of the mine or with a view to safety.”

The colliery training officer had given to the plaintiff directions with a view to safety, and I think that these directions could also be regarded as being given with a view to complying with Part II* of the Act and with the relevant training regulations. At any rate the directions were given with a view to safety and they were disobeyed by the plaintiff, acting under the instructions of the deputy, Mr. Thompson. H

* Part II of the Coal Mines Act, 1911, is headed “Provisions as to Safety”, and includes s. 29 to s. 75.

There are also to be taken into account the Coal Mines (Training) General Regulations, 1945. Regulation 1 provides:

"No person shall be employed in or about a mine on any work on which he has not been employed before [Jan. 1, 1947], except under competent instruction and supervision, unless and until he has been adequately trained and is competent to do the work without supervision."

A Regulation 4 (1) provides:

"Without prejudice to the generality of the provisions of reg. 1 of these regulations, no person who has not been employed on work at the coal face . . ."

—which, I think, looking back at reg. 1, must mean not so employed before Jan. 1, 1947—

B

"shall be employed, otherwise than at a training face, on such work until . . ."

The regulation goes on to specify certain conditions which have to be fulfilled, the third of which is:

C

"(c) there has been issued by a training officer appointed under these regulations a certificate (in the prescribed form) that such person has duly received such training as aforesaid and is competent to be employed at the coal face."

No such certificate had been issued in the case of the plaintiff. In reg. 17 (1) the expression "work at the coal face" is defined in this way:

D

"'Work at the coal face' includes any work performed within ten yards of a face (other than work performed by any person employed on the haulage or on a conveyor-loader in handling or filling tubs, or as a conveyor-engine attendant, in any part of the area comprised within the face and the sides of a road as if the sides were extended to the face) but does not include work performed at a training face".

E

In this case the plaintiff was working within ten yards of the coal face and, therefore, the work which he was doing was work within that definition of "work at the coal face" unless the parenthesis applies. He was employed on the haulage but not, at the material time, in any part of the area comprised within the face and the sides of a road as if the sides were extended to the face. As I understand the expression, therefore, he was being employed on "work at the coal face" in breach of reg. 4, and in that breach—primarily an employers' breach—he was abetting.

F

There is then the question: Was the plaintiff's breach of s. 74 of the Act of 1911 and of reg. 4 (1) of the regulations of 1945 one cause of the accident? On this point there was reference to *National Coal Board v. England* (1), and there was also produced to me the shorthand transcript of the decision of the Court of Appeal in *Walsh v. National Coal Board* (2). Having regard to the lines of reasoning in those cases, I hold that the plaintiff was wrongfully working at the coal face and there was sufficient proximity for the wrongful working to be regarded as one cause of the accident. The next question which arises is what proportion represents the plaintiff's share of responsibility for the accident on the facts of this case, when he had been allowed and ordered wrongfully to be working at the coal face over the whole period of three years? He had been instructed by the official—the deputy who was his "boss" for the time being—to continue this wrongful working and to keep out of the way of the colliery training officer if he should happen to be there. I hold that the proper share in this case must be quite small and I assess it at five per cent.

H

[His LORDSHIP reviewed the evidence in regard to the plaintiff's injuries, and continued:] I assess the general damages at £5,500, and to that there has to be added the agreed special damages, £229 5s. 7d., which makes the full amount

£5,729 5s. 7d. Five per cent. of that is £286 9s. 3d. and this subtracted leaves £5,442 16s. 4d.

Judgment accordingly.

Solicitors: *Adam F. Greenhalgh & Co.*, Bolton (for the plaintiff); *C. R. Hodgson*, Manchester (for the defendants).

[*Reported by* DENISE CHORLTON, *Barrister-at-Law.*]

SPICER v. SPICER (RYAN intervening).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), June 15, 16, 17, 1954.]

Divorce—Cruelty—Wife's cruelty—Lesbianism alleged—Persistent friendship with other woman—Injury to husband's health.

The husband petitioned for divorce on the ground of the wife's cruelty, alleging that she had formed an unnatural relationship with the intervener by reason whereof he had been compelled to leave the matrimonial home, and that although the parties became reconciled the wife resumed and, despite his pleas to her, continued the unnatural relationship. The unnatural relationship was alleged to be lesbianism. Both the wife and the intervener denied any unnatural relationship. During the hearing of the suit the wife while maintaining her denial stated that she would submit to a finding that her admitted persistent friendship with the intervener had amounted to cruelty.

HELD: the wife, having admittedly formed an affection for another woman such as to give her husband grave cause for anxiety as to the precise nature of that association, persisted in that association against the husband's entreaties; in so doing she had, on the evidence, occasioned the husband actual physical injury as well as a reasonable apprehension of future injury to his health, and the husband was entitled to the decree which he sought; and, there being no finding of any physical relationship between the wife and the intervener, the intervener would be dismissed from the suit.

AS TO CRUELTY ON THE PART OF THE WIFE, see HALSBURY, Hailsham Edn., Vol. 10, p. 650, para. 955; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 307, 308, Nos. 2538-2552.

PETITION by the husband for divorce on the ground of the wife's cruelty.

By his petition the husband alleged, inter alia, that the wife had treated him with great unkindness and cruelty:

"6. That from some time early in the year 1951 up to the present time, the [wife] has shared an unnatural relationship with [the intervener]; that by reason thereof the husband had been compelled to leave the matrimonial home and that he returned when told by the wife that she had completely broken with the intervener, and

"9. That in or about the month of January, 1952, the [wife] resumed her unnatural relationship with the [intervener] and despite the constant pleas by the [husband], the [wife] has thereafter continued the said relationship, thus causing the [husband] great agony of mind."

In further and better particulars, it was stated that the unnatural relationship "was and is lesbianism". The wife denied that she had been guilty of cruelty and denied the charge of an unnatural relationship.

The intervener denied that she had had an unnatural relationship with the wife.

On June 15 the suit came before KARMINSKI, J., and on June 17, during the wife's evidence, counsel for the wife stated that while continuing her denial of

the charge of lesbianism she was prepared to submit to a finding that her persistent friendship with the intervener had amounted to cruelty to the husband.

Melford Stevenson, Q.C., and Victor Williams for the husband.

Ifor Lloyd, Q.C., and King Anningson for the wife.

P. R. Hollins for the intervener.

A **KARMINSKI, J.:** I think I can deal with this case on the evidence before
me as it stands. I emphasise the words "as it stands", because I have not heard
yet the evidence of the intervener, who was at all times, I understand, denying
the charges of lesbian practices between herself and the wife, and was prepared
to go into the witness-box and deny them on oath. Counsel for the wife has
indicated that the case alleged by the husband against the wife is cruelty.
B I have had a good deal of evidence that the wife admittedly formed for another
woman an affection of such a kind as to give her husband grave cause for anxiety
as to the precise nature of that association. More important still, when his
suspicions were aroused and he was anxious, and properly anxious, that she
should discontinue that association, she persisted in it against his entreaties and
against his best endeavours. In so doing I am satisfied beyond any doubt what-
C soever that she occasioned him actual physical injury as well as a reasonable
apprehension of future injury to his health should her conduct continue. There
was medical evidence before me from a doctor which left no doubt in my mind
as to the injury and the extent of the injury.

D So far as the precise nature of the association between the wife and the inter-
vener is concerned, I make no finding, nor is it necessary for me, as I see it, so
to do. I bear in mind once more the important fact that not only has the wife
denied any physical association, and has denied it on oath, but that the intervener
has taken an active part in the suit in the sense that she intervened, instructed
counsel on her behalf and has pursued her denials up to this moment, and still
maintains them. That being so I want to make it absolutely clear that in finding
cruelty proved I am making no finding of any physical relationship between the
E wife and the intervener. On the extensive evidence before me, however, I have
no doubt that I can and ought to find that the cruelty alleged in the petition
has been proved. I, therefore, pronounce a decree nisi.

[Counsel for the intervener having submitted that the intervener was entitled
to be dismissed from the suit, and there having been discussion on what accepted
practice, if any, there was in cases where a woman who had not been named
F in relation to charges of this kind had intervened, HIS LORDSHIP said:] Where
charges of this kind are not proved (I use that term, of course, in the technical
sense) it seems to be right that some order of the kind indicated by counsel for
the intervener should be made. I dismiss the intervener from the suit.

Decree nisi granted; intervener dismissed from suit.

Solicitors: *Allen & Overy* (for the husband); *Reid Sharman & Co.* (for the
wife); *Bower, Cotton & Bower* (for the intervener).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

TOVEY v. TYACK.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Hodson and Romer, L.J.J.),
October 4, 5, 1954.]

Rent Restriction—Shared accommodation—Kitchen shared by two tenants, one being landlord's son—Son becoming landlord—Right to possession against other tenant—Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 8 (1) (b). A

In 1948 the plaintiff's father granted to the defendant a tenancy of three rooms in a house and the right to share the use of the kitchen with the plaintiff, who shortly afterwards became the tenant of the remaining rooms in the house. But for the sharing of the kitchen the defendant's tenancy would have been of a dwelling-house to which the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, applied. On Apr. 30, 1951, the father by deed of gift conveyed the freehold of the premises to the plaintiff. In February, 1954, the plaintiff, having served on the defendant a notice to quit, commenced proceedings for possession of the premises occupied by the defendant. The defendant relied on s. 8 (1) (b) of the Landlord and Tenant (Rent Control) Act, 1949, but the county court judge held that the section did not apply and made an order for possession. On appeal. B

Held: the separate accommodation, viz., the three rooms, which the defendant occupied, were not a dwelling-house to which the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, applied by virtue of s. 8 (1) of the Act of 1949 because the question whether she held the separate accommodation on terms which were within s. 8 (1) (b), i.e., whether the terms included the use of the kitchen "in common with another person . . . not being . . . the landlord," was to be determined at the date when the proceedings were commenced, and at that date the plaintiff, with whom the defendant was to share the kitchen, was the landlord; and, therefore, the plaintiff was entitled to possession. C

Littlechild v. Holt ([1949] 1 All E.R. 933), distinguished. D
Appeal dismissed. E

FOR THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949, s. 8 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1103.

Cases referred to:

- (1) *Lockwood v. Lowe*, [1954] 1 All E.R. 472. F
- (2) *Littlechild v. Holt*, [1949] 1 All E.R. 933; [1950] 1 K.B. 1; [1949] L.J.R. 1299; 31 Digest, Replacement, 707, 7953.
- (3) *Lucas v. Lincham*, [1950] 1 All E.R. 586; [1950] 1 K.B. 548; 2nd Digest Supp.

APPEAL by the defendant, the tenant, from an order of His Honour JUDGE PATON, made at Bristol County Court on May 25, 1954, whereby the plaintiff, the landlord of a dwelling-house, was granted possession of certain rooms therein which were occupied by the defendant. G

J. A. Cox for the defendant.

M. Littman for the plaintiff.

SIR RAYMOND EVERSLED, M.R.: In my judgment the decision of His Honour JUDGE PATON was quite correct. The learned judge expressed some sympathy for the defendant, the appellant in this court, and I dare say that it is proper that some sympathy should be felt for anybody who has had an order for possession made against him or her. I do not, however, feel that this case is one of great hardship in all the circumstances, on any view of it. What happened was that the defendant found herself in occupation of the premises with which we are concerned in Meyrick Street, Barton Hill, Bristol, on the death of her H

mother in July, 1948. As the defendant's mother had acquired a right of occupation under s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, it is clear that the defendant could not, in her turn, claim a similar privilege; in other words, it follows that on the unhappy death of the defendant's mother the defendant had no right to remain in the premises. The plaintiff's father, who was at that time the landlord of the premises, was, however, not unsympathetic, and, following occasions on which he called for the purpose of expressing his condolences, a bargain was made between the plaintiff's father and the defendant. The finding of the county court judge as to what the exact terms of that bargain were seem to me tolerably clear. In his judgment I find this passage:

"I have come to the conclusion on the whole of the evidence [including a certain document to which he alluded] that I ought to accept the evidence of Mr. Tovey senior [the plaintiff's father] and hold that the defendant agreed to take a tenancy of the two rooms specified in the document, one of the attic rooms and the right to share the use of the kitchen with the plaintiff to whom Mr. Tovey [the father] was going to let the remaining rooms."

At that date it did not, in fact, matter what capacity the plaintiff might thereafter occupy in relation to the premises. If the accommodation which the defendant was going to take from the plaintiff's father included, as part of the essential accommodation, accommodation which the defendant had merely a right to share with someone else, then, as the law stood, the defendant would not be a protected tenant. After this bargain had been made, however, the Landlord and Tenant (Rent Control) Act, 1949, was passed. Section 8 of that Act, in certain circumstances, gives to what I will call a sharing tenant a right of protection under the Rent Restrictions Acts which such a tenant did not possess before. I shall in a moment have to consider the language of that section.

The findings of fact which I have read are findings of fact which counsel for the defendant has not thought fit, quite rightly in my opinion, to challenge.

The bargain included the term that the defendant should have the privilege or right of sharing the kitchen with a specific individual, namely, the plaintiff, and with no other individual. It was then contemplated, as the findings set out, that the plaintiff's father would grant a tenancy of the other parts of the house, with a correlative right of sharing the kitchen, to his son who was at that time about to be married. This tenancy was granted. One of the reasons for the arrangement was that the defendant felt unable to continue in occupation of the whole house alone and desired to have some younger persons present there, and that problem was solved by the arrangement for the plaintiff and his wife to come in.

I turn to s. 8 of the Landlord and Tenant (Rent Control) Act, 1949. Section 8 (1) reads:

"Where—(a) a tenant has the exclusive occupation of any accommodation (in this section referred to as 'the separate accommodation'), (b) the terms as between the tenant and his landlord on which he holds the separate accommodation include the use of other accommodation (in this section referred to as 'the shared accommodation') in common with another person or other persons, not being or including the landlord, and (c) by reason only of the circumstances mentioned in para. (b) of this sub-section, the separate accommodation would not apart from this section be a dwelling-house to which the principal Acts apply, the separate accommodation shall be deemed to be a dwelling-house to which those Acts apply . . ."

The action having been brought, the defendant raises the question, which has been debated before us, that the accommodation which she had, that is the two downstairs rooms plus the attic room plus the right to share the kitchen with the

plaintiff, constitute a dwelling-house to which the Rent Restrictions Acts apply, and, if she is right, then it is conceded that no such events have happened as would justify the making of an order for possession.

The event which has given rise to the problem is this. On Apr. 30, 1951, the plaintiff's father by a deed of gift granted absolutely to the plaintiff the father's interest in the dwelling-house, so that, beyond a peradventure, thereafter the plaintiff became the landlord of the defendant quoad the accommodation let to the defendant. At the date when the arrangement between the plaintiff's father and the defendant was made, the Act of 1949 had not been passed, and I assume—I think rightly—that, having regard to the arrangement, the defendant did not then acquire a dwelling-house protected by the Rent Acts. If the proceedings with which we are concerned had been commenced by the plaintiff's father after the coming into operation of the Act of 1949 and before the deed of gift to the plaintiff, it would appear that the defendant would have had a good case. She would have said: "The terms as between me and the landlord", that is, the plaintiff's father, "include the use of other accommodation, namely, the kitchen, in common with somebody else, not being you, the landlord, but being your son, the tenant of the other part of the house". Those are not, however, the circumstances now. The learned judge held, and, in my view, rightly held, that the question had to be determined at the date when the proceedings commenced. As the judge pointed out, and as ROMER, L.J., emphasised in his judgment in *Lockwood v. Lowe* (1) ([1954] 1 All E.R. at pp. 473, 474), the words of s. 8 (1) of the Act of 1949 are:

"Where . . . (b) the terms as between the tenant and his landlord on which he holds the separate accommodation . . ."

It is, indeed, a general conception with regard to the Rent Restrictions Acts that one tests their applicability at the time when the proceedings are commenced. I think that one is required by s. 8 of the Act of 1949 to look at that date [which, in the present case, was in February, 1954], to see what were the terms on which the tenant was then holding the accommodation. We know what they were in this case. The judge has found that the defendant's rights were to exclusive, or separate, accommodation of three rooms, together with a right of sharing the kitchen with one named person, namely, the plaintiff, and no other person. At the date when the proceedings were commenced the plaintiff was the landlord. There were no persons other than the landlord with whom she was entitled to share the kitchen. In those circumstances the defendant fails, I think, to show that the words of s. 8 (1) (b) apply to her and, therefore, fails to show that at the vital date the separate accommodation which she occupied was a dwelling-house protected by the rent restriction legislation.

Counsel for the defendant put his case by way of analogy, relying on the principles which he derived from *Littlechild v. Holt* (2) and *Lucas v. Lincham* (3). In *Littlechild v. Holt* (2) a landlord sought possession of a certain dwelling-house and was faced with the difficulty that he had acquired the reversion to the tenancy after Dec. 6, 1937. I think I am right in saying it was not the case of a "new control" house. He, therefore, was faced with the bar which is to be found in the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (h) (as amended by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, s. 7 (7) and sched. II), the language of which is:

"A court shall, for the purposes of s. 3 of this Act, have power to make or give an order or judgment for the recovery of possession . . . without proof of suitable alternative accommodation . . . if . . . (h) the dwelling-house is reasonably required by the landlord (not being a landlord who has become landlord by purchasing the dwelling-house or any interest therein after Dec. 6, 1937) . . ."

A The landlord died during the pendency of the action and his widow, who was also his universal devisee and legatee, wished to carry on the proceedings. Her case was that she was free from that limiting bar as she was not a landlord who had become landlord by purchasing the dwelling-house: she had become landlord by virtue of the will of her late husband. This court, however, held that a person in the position of the widow, proceeding with that action, was not, and could not be treated as being, in any better position than the person from whom she voluntarily derived her title.

B Counsel for the defendant argued before us that since, from the date of the coming into operation of the Act of 1949 until the date of the gift of the dwelling-house by the plaintiff's father to the plaintiff, the father could not have obtained an order for possession, so, by making a gift to the plaintiff, the father could not confer on the plaintiff any better right to recover possession than the father himself had. In my judgment, the analogy is not a true one. This is not a case in which the plaintiff's father was subjected to some special statutory prohibition or bar. The right of the defendant to remain in possession always depended on whether at the relevant date she could prove the existence of certain facts, namely, a right to share accommodation with persons other than the landlord. C By the time when these proceedings started the plaintiff had become the landlord. He had not been given by his father something which the father had not got, but he was the person with whom, and with whom alone, the defendant had contracted to share the kitchen. By the time when the proceedings started he happened to be the landlord and, therefore, the words of s. 8 (1) (b) of the Act of 1949 ceased to protect the defendant's dwelling-house. I think that the considerations to be applied in this case are different from those which were considered in *Littlechild v. Holt* (2) and that no valid analogy can be derived from the judgment in that case. D I think, as I said earlier, that the learned judge was right in the conclusion at which he arrived and that this appeal, therefore, fails.

HODSON, L.J.: I agree and have nothing to add.

E **ROMER, L.J.:** I also agree and have nothing to add.

Appeal dismissed.

Solicitors: *Rider, Heaton, Meredith & Mills*, agents for *Bobbett Bros.*, Bristol (for the defendant); *Ralph Bond & Rutherford*, agents for *Veale & Co.*, Bristol (for the plaintiff).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

EASTAUGH AND OTHERS v. MACPHERSON.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Hodson and Romer, L.J.J.),
October 6, 1954.]

*Landlord and Tenant—Notice to quit—Construction—Vacate office “by the date”
—Ambiguity.*

Landlords let to a tenant an office on a yearly tenancy commencing on Apr. 1, 1953, liable to be determined by three months' notice expiring at the end of any year. On Dec. 23, 1953, the landlords wrote to the tenant: “At a recent meeting the executive committee reviewed the question of your tenancy of the small office . . . which we agreed you should rent until Mar. 31, 1954 . . . [We] must ask you . . . to accept three months' notice to vacate the office by the date (i.e. Mar. 31, 1954).” On the question of the validity of the notice to quit,

HELD: in its context, the phrase “by the date” meant “on or before the date” and not “before the date”, and the notice so construed was unambiguous and valid.

Appeal allowed.

AS TO DATE OF EXPIRATION OF NOTICE TO QUIT, see HALSBURY, Hailsham Edn., Vol. 20, p. 133, para. 142; and FOR CASES, see DIGEST, Replacement Vol. 31, pp. 487, 488, Nos. 6127-6140.

Case referred to:

(1) *Munro (J. H.) v. Vancouver Properties, Ltd.*, [1940] 2 W.W.R. 32; Digest Supp.

APPEAL by the landlords from an order of His Honour JUDGE BLAGDEN at Westminster County Court, dated June 22, 1954, dismissing the landlords' action for possession on the ground that the notice to quit was bad.

The facts appear from the judgment.

J. R. Phillips for the plaintiffs, the landlords.

The tenant appeared in person.

SIR RAYMOND EVERSHERD, M.R.: The only point which we are called on to decide in this case is a curious one with regard to the meaning and effect of an alleged notice to quit consisting of a letter addressed on behalf of the plaintiffs to the defendant, Dr. Macpherson, on Dec. 23, 1953. The action relates to an office at 38 Grosvenor Hill, in London, and according to the judge's notes and his findings of fact, which must stand, that office was let by the plaintiffs to the defendant on a yearly tenancy beginning on Apr. 1, 1953, liable to be determined by three months' notice on either side expiring at the end of any year. In that state of affairs, on the day I have mentioned, Dec. 23, 1953, the following letter was written to the defendant on the plaintiffs' behalf:

“At a recent meeting the executive committee reviewed the question of your tenancy of the small office at 38 Grosvenor Hill, which we agreed you should rent until Mar. 31, 1954. After some discussion it was decided that, as we now need the accommodation which you occupy, we have to terminate the arrangement and I must ask you, therefore, to accept three months' notice to vacate the office by the date (i.e. Mar. 31, 1954). Yours sincerely.”

The point was taken by the learned judge at the trial that the word “by” immediately before “the date (i.e. Mar. 31, 1954)” must mean that this notice called on the defendant to have left the office not later than midnight on Mar. 30/31, 1954. In other words, it purported to cut off the last day of the tenancy and, therefore, was a bad notice.

In the course of his judgment, the learned judge gave an example or two, though he said that he did not think they were much help because they were

rather examples of the use of the word in relation to a particular point of time:

"If I say 'I hope to have finished my list by 4.30' that must mean 'I hope I won't be sitting one moment after 4.30'."

I venture to think, however, that he misled himself by looking up the word "by" in the dictionary which he had available and quoting what must have been its use in relation to place and not to time: thus—"by: at the side of: near to".

A The learned judge said:

"Fusing these definitions would make it equivalent to 'on the near side of', i.e., exclusive of, or before, Mar. 31, 1954."

B We were referred by counsel for the plaintiffs to the definition in the SHORTER OXFORD ENGLISH DICTIONARY, and in relation to time the definition given by the lexicographers is: "in the course of, at, in, or on"; and the example given is: "by day" or "by night", which is, perhaps, not very helpful in this case. Later appears "on or before: not later than: within". As a matter of definition, therefore, I should be inclined to think that "by the date" ought to mean "on or before the date". In any case, however, this phrase must be construed in the light of the letter as a whole. It is conceded by the defendant that the sense of the first paragraph is that the tenancy should continue up to and including Mar. 31. In light of that, when the writer, in the very next sentence, speaks of "vacating the office by the date (i.e. Mar. 31, 1954)", I must confess that it seems to me clear beyond all reasonable doubt that he is stating that he is giving notice to determine the tenancy on the date when it was liable to be determined, viz., Mar. 31. He is, in other words, saying: "Accept three months' notice to vacate the office on or before Mar. 31". The view that I take finds support in the view taken of a somewhat similar use of language by the majority of the Court of Appeal of the Province of British Columbia in *J. H. Munro v. Vancouver Properties, Ltd.* (1). I think, with all respect to the learned judge, that this document has to be read in the sense I have stated.

E The defendant says fairly enough: "Well, the judge took one view and you are inclined to take another. That at least shows there is a measure of ambiguity". In one sense, no doubt, that is true. When, however, it is said that a notice must be unambiguous it means, of course, when the notice is properly construed. I fear that the construction which we place on it must prevail over the construction which the learned judge took, and the construction which we place on it makes it an unambiguous notice. There is no answer to the plaintiffs' claim. I think, therefore, that the appeal must be allowed and that an order as asked for should have been made.

HODSON, L.J.: I agree and have nothing to add.

ROMER, L.J.: I also agree.

Appeal allowed.

Solicitors: *Ellis, Bickersteth & Co.* (for the plaintiffs).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

JAMES PATRICK & CO. PROPRIETARY, LTD. v. SHARPE.

[PRIVY COUNCIL (Lord Porter, Lord Oaksey, Lord Reid, Lord Tucker and Lord Asquith of Bishopstone*), June 23, 24, 28, 29, 30, July 1, October 4, 1954.]

Privy Council—Australia—Workmen's compensation—“Injury by accident arising out of or in the course of the employment”—Death of worker on way to work due to auricular fibrillation—Whether need for external event—Workers' Compensation Act, 1928 (Victoria) (No. 3806 of 1928), s. 5 (1), as amended by Workers' Compensation Act, 1946 (Victoria) (No. 5128 of 1946), s. 3. A

By the Workers' Compensation Act, 1928 (Victoria), s. 5, as amended by the Workers' Compensation Act, 1946 (Victoria), s. 3: “(1) If in any employment personal injury by accident arising out of or in the course of the employment is caused to a worker his employer shall . . . be liable to pay compensation in accordance with the provisions of the Workers' Compensation Acts . . . (5) . . . an injury by accident to a worker shall be deemed to arise out of or in the course of the employment if the accident occurs . . . (b) while the worker—(i) is travelling between his place of residence and place of employment . . . ;” and by s. 3 (1) as amended by s. 3 of the Act of 1946: “‘Disease’ includes any physical . . . ailment disorder defect or morbid condition whether of sudden or gradual development and also includes the aggravation acceleration or recurrence of any pre-existing disease . . . ‘Injury’ means any physical . . . injury or disease and includes the aggravation acceleration or recurrence of any pre-existing injury or disease . . .” B C D

In December, 1950, the respondent's husband, while travelling between his place of residence and his place of employment, suffered an auricular fibrillation as a direct result of which he died. For some years prior to his death he suffered from atherosclerosis and degenerative and progressive heart disease, but his pathological condition was not known to, or suspected by, him. The onset of the auricular fibrillation was a sudden physiological change which was unexpected and not designed by him. E

Held: it was not necessary to prove that some external event, or some action of the deceased, had caused the sudden physiological change to happen when it did, and, therefore, personal injury by accident was caused to the deceased within the meaning of s. 5 (1), reading into that sub-section the definitions of “disease” and “injury” contained in s. 3 (1); accordingly, the appellant was liable to pay compensation. F

Willis v. Moulded Products (Australia), Ltd. ([1951] V.L.R. 58), approved. Appeal dismissed. G

EDITORIAL NOTE. The Workers' Compensation Act, 1928 (Victoria) (No. 3806 of 1928), as amended was repealed by the Workers' Compensation Act, 1951 (Victoria) (No. 5601 of 1951) s. 2 and schedule. For s. 3 and s. 5 of the Act of 1928, see now s. 3 and ss. 5, 6 and 8 of the Act of 1951.

AS TO INJURY ARISING FROM ACCIDENTS, see HALSBURY, Hailsham Edn., H Vol. 34, pp. 816-822, paras. 1154-1159; and FOR CASES, see DIGEST, Vol. 34, pp. 271-275, Nos. 2302-2329.

Cases referred to:

(1) *Fenton v. Thorley & Co., Ltd.*, [1903] A.C. 443; 72 L.J.K.B. 787; 89 L.T. 314; 34 Digest 266, 2264.

* LORD ASQUITH OF BISHOPSTONE died on Aug. 24, 1954.

- (2) *Walker v. Bairds & Dalmellington, Ltd.*, 1935 S.C. (H.L.) 28; 153 L.T. 322; Digest Supp.
- (3) *Fife Coal Co., Ltd. v. Young*, [1940] 2 All E.R. 85; [1940] A.C. 479; 109 L.J.P.C. 49; 162 L.T. 344; 2nd Digest Supp.
- (4) *Clover, Clayton & Co., Ltd. v. Hughes*, [1910] A.C. 242; 79 L.J.K.B. 470; 102 L.T. 340; 34 Digest 273, 2316.
- A (5) *Falmouth Docks & Engineering Co., Ltd. v. Treloar*, [1933] A.C. 481; 102 L.J.K.B. 708; 148 L.T. 507; Digest Supp.
- (6) *Partridge Jones & John Paton, Ltd. v. James*, [1933] A.C. 501; 102 L.J.K.B. 760; 148 L.T. 553; Digest Supp.
- (7) *Roberts v. Dorothea Slate Quarries Co., Ltd.*, [1948] 2 All E.R. 201; [1948] L.J.R. 1409; 2nd Digest Supp.
- B (8) *Slazengers (Australia) Pty., Ltd. v. Burnett*, [1951] A.C. 13; 2nd Digest Supp.
- (9) *Kellaway v. Broken Hill South, Ltd.*, (1944), 44 S.R.N.S.W. 210; 61 W.N. 83; 2nd Digest Supp.
- (10) *Hetherington v. Amalgamated Collieries of W.A., Ltd.*, (1939), 62 C.L.R. 317; 13 A.L.J. 379; 45 A.L.R. 485.
- C (11) *Willis v. Moulded Products (Australia), Ltd.*, [1951] V.L.R. 58; A.L.R. 78.

APPEAL by the employer from an order of the Full Court of the Supreme Court of Victoria, dated Oct. 21, 1952, on a Case Stated at the request of the appellant by the Workers' Compensation Board of Victoria, dated June 12, 1952.

- The facts, as found by the Workers' Compensation Board, were as follows:—
- D (a) the deceased, Sydney Allan Sharpe, late of 39 St. Vincent Street, Albert Park, shore shipwright aged fifty-one years, was at all times material a worker within the meaning of the Workers' Compensation Acts of the State of Victoria, and on Dec. 4, 1950, was in the employ of the appellant; (b) the deceased worker left a widow (the respondent) and one child under the age of sixteen years, both of whom were totally dependent on the earnings of the deceased worker;
- E (c) while travelling between his place of residence and his place of employment on Dec. 4, 1950, the worker suffered an auricular fibrillation; (d) as a direct result of such auricular fibrillation, the worker died on Dec. 4, 1950, at his home;
- F (e) the post mortem disclosed microscopic evidence of degenerative changes in the heart muscle not specific of any disease. No other abnormality was observed;
- (f) the worker for some years prior to his death suffered from atherosclerosis and a degenerative and progressive heart disease; (g) the worker's pathological condition was not known to, or suspected by, him; (h) the onset of the auricular fibrillation was a sudden physiological change unexpected and not designed by the worker.

- The Board found that the deceased worker died as a result of personal injury arising out of or in the course of his employment with the appellant, and made an award of £1,025 to the respondent, Dacie Ethel Sharpe, the deceased worker's widow.

Sir Garfield Barwick, Q.C., C. J. Menhennitt (both of the Australian Bar) and *P. R. Oliver* for the appellant.

- H *R. M. Eggleston, Q.C.* (of the Australian Bar), and *Harold Brown* for the respondent.

LORD REID: This is an appeal from a judgment of the Full Court of the Supreme Court of Victoria dated Oct. 21, 1952, on a Case Stated by the Workers' Compensation Board of the State of Victoria dated June 12, 1952. The appellant was the employer of the late Sydney Allan Sharpe and the respondent is his widow. [His LORDSHIP stated the facts and continued:] The question of law

submitted for the opinion of the Full Court was whether, on these findings of fact, it was open to the Board to find that the deceased died

“ as the result of injury by accident arising out of or in the course of his employment ”

with the appellant. The court answered this question in the affirmative.

The respondent's claim was made under the Workers' Compensation Act, 1928, of the State of Victoria, as amended from time to time, and particular importance attaches to the amendments made by the Workers' Compensation Act, 1946 (No. 5128 of 1946), s. 3. At the relevant date, the material statutory provisions were:

“ 5 (1). If in any employment personal injury by accident arising out of or in the course of the employment is caused to a worker his employer shall subject as hereinafter mentioned be liable to pay compensation in accordance with the provisions of the Workers' Compensation Acts . . .

(5) Without limiting the generality of the provisions of sub-s. (1) but subject to the provisions of para. (c) of sub-s. (2) of this section, an injury by accident to a worker shall be deemed to arise out of or in the course of the employment if the accident occurs—(a) while the worker on any working day on which he has attended at his place of employment pursuant to his contract of employment—(i) is present at his place of employment; or (ii) having been so present, is temporarily absent therefrom on that day during any ordinary recess and does not during any such absence voluntarily subject himself to any abnormal risk of injury; or (b) while the worker— (i) is travelling between his place of residence and place of employment; or (ii) is travelling between his place of residence or place of employment and any trade technical or other training school which he is required to attend by the terms of his employment or as an apprentice or which he is expected by his employer to attend, or is in attendance at any such school: Provided that any injury incurred while so travelling is not incurred during or after— any substantial interruption of or substantial deviation from his journey made for a reason unconnected with his employment or unconnected with his attendance at the school, as the case may be; or any other break in his journey which the Board, having regard to all the circumstances, deems not to have been reasonably incidental to any such journey . . .

“ 3 (1). In this Act unless inconsistent with the context or subject-matter . . . ‘ Disease ’ includes any physical or mental ailment disorder defect or morbid condition whether of sudden or gradual development and also includes the aggravation acceleration or recurrence of any pre-existing disease as aforesaid . . . ‘ Injury ’ means any physical or mental injury or disease and includes the aggravation acceleration or recurrence of any pre-existing injury or disease as aforesaid . . . ”

The nature and cause of auricular fibrillation do not appear from the findings of the Board. It appears to have been agreed between the parties that the Full Court should inform themselves on this matter by consulting medical works, and a number of passages from such works are set out by SHOLL, J., in his judgment. This is the only material now available to their Lordships, and from this material it appears that by auricular fibrillation is meant a condition in which the auricles of the heart cease to contract rhythmically as a whole in a series of orderly beats but the muscles contract in an incoordinated manner so that the blood circulation is impaired, the beat of the heart becoming irregular. The cause of this condition does not appear to be known, but it is known to occur with certain types of heart disease. The Board, in its findings, stated that the

post mortem disclosed evidence of degenerative changes in the heart muscle not specific of any disease, but that the deceased had for some years suffered from atherosclerosis and a degenerative and progressive heart disease. It is not at all clear from these findings whether the Board meant to find that the auricular fibrillation was a further stage in a progressive disease which had already become established or that the auricular fibrillation was a new disorder not related to the disease which had already become established. But it is not necessary, in their Lordships' view, to pursue this question because their Lordships would reach the same conclusion on either interpretation of the Board's findings. Their Lordships agree with SHOLL, J., that it must be held that the deceased died as the result of a sudden and unexpected onset of a functional failure of the heart muscle resulting in a functional failure of the vital organs and that the deceased simply died because his heart suddenly ceased to function properly.

The question for decision in this case, therefore, is whether, by the occurrence of this auricular fibrillation, personal injury by accident was caused to the deceased within the meaning of s. 5 (1) of the Act, reading into that section the definitions of "disease" and "injury" contained in s. 3. If it was, then the requirements of s. 7 are satisfied, because the Case Stated contains a finding that, as a direct result of the auricular fibrillation, the deceased died on the same day at his home, and the requirement of s. 5 that the injury by accident must arise out of or in the course of the employment is satisfied because s. 5 (5) deems the injury by accident to have arisen out of or in the course of the employment if the accident occurs while the worker is travelling between his place of residence and place of employment.

Before the passing of the Act No. 5128 the law in Victoria on questions material to this case was the same as it was in the United Kingdom under the Workmen's Compensation Acts. The injury by accident had "to arise out of and in the course of the employment", there was no statutory definition of injury corresponding to the definition in s. 3, and there was nothing corresponding to s. 5 (5). There is no dispute in this case about the applicability of s. 5 (5). This case turns on the extent of the changes made by the enactment of the definitions of "injury" and "disease" and by the substitution of "or" for "and" in the phrase "arising out of or in the course of the employment".

To determine the meaning and effect of these amendments, it is necessary to have in mind the state of the law before they were enacted. There was little controversy about this except on one point, and their Lordships will not make any extensive examination of the authorities. The relevant words in the statutes were

"personal injury by accident arising out of and in the course of the employment".

With regard to these words, LORD MACNAGHTEN said in the early case of *Fenton v. Thorley & Co., Ltd.* (1) ([1903] A.C. at p. 448):

"Now the expression 'injury by accident' seems to me to be a compound expression. The words 'by accident' are, I think, introduced parenthetically as it were to qualify the word 'injury', confining it to a certain class of injuries, and excluding other classes, as, for instance, injuries by disease or injuries self-inflicted by design. Then comes the question, do the words 'arising out of and in the course of the employment' qualify the word 'accident', or the word 'injury', or the compound expression 'injury by accident'? I rather think the latter view is the correct one."

That view has been accepted but

"the phrase 'injury by accident' as used in successive Workmen's

Compensation Acts has been the subject of repeated and elaborate discussion, and in the course of the forty years or more which have passed since the first decisions under the Act of 1897, it is possible, as LORD TOMLIN pointed out in *Walker v. Bairds & Dalmellington, Ltd.* (2), to trace a gradual but steady extension of its meaning "

(per VISCOUNT CALDECOTE, L.C., in *Fife Coal Co., Ltd. v. Young* (3) ([1940] 2 All E.R. at p. 87)).

This extension is particularly notable in cases dealing with disease. In *Walker v. Bairds & Dalmellington, Ltd.* (2) (1935 S.C. (H.L.) at p. 32), LORD TOMLIN, in reviewing the authorities, said, with regard to *Clover, Clayton & Co., Ltd. v. Hughes* (4):

" This case seems to me to establish that there may be personal injury by accident, even though the employee's work has proceeded in the normal way, and even though the injury is due to the presence of a special condition in the employee's body "

Later in the same speech he said (*ibid.*, at p. 33):

" The latest stage in the progression was reached in the cases of *Falmouth Docks & Engineering Co., Ltd. v. Treloar* (5) and *Partridge Jones & John Paton, Ltd. v. James* (6). In each of these cases a man with heart disease died at his work which he was or had been doing in the ordinary way, this work being found to have contributed to his death. There was in neither case any distinct event or occurrence which, taken by itself, could be recognised as an accident. Each case was held to be within the Act."

But death or disability which was merely the result of a continuous process over a period, there being no particular change in the man's condition at any one time, was never held to be due to injury by accident. This was finally decided in *Roberts v. Dorothea Slate Quarries Co., Ltd.* (7). In view of one argument submitted for the appellant in the present case, their Lordships will quote a passage from the speech of VISCOUNT CALDECOTE, L.C., in *Fife Coal Co., Ltd. v. Young* (3), where, having approved of earlier cases on this point, he said ([1940] 2 All E.R. at p. 88):

" In all of them the facts were such as to make it impossible to identify any event which could, however loosely, be called an accident. In these cases, the workmen failed, not because a disease is outside the purview of the Workmen's Compensation Act altogether, but because the burden of proof that there had been an accident was not discharged. When the workman's claim is in respect of a progressive disease, the difficulty of pointing to a definite physiological change which took place on a particular day is, in general, likely to be almost insuperable, and in 1906 Parliament, in the case of certain diseases, and later, by an enlargement of the schedule of industrial diseases, relieved the workman in the specified cases of this obligation. If, however, the circumstances of any claim in respect of incapacity due to disease are such as to make it possible to discharge this burden, I see no reason for thinking that what is called a disease is different in principle from a ruptured aneurism, as in *Clover, Clayton & Co., Ltd. v. Hughes* (4), or heart failure, as in *Falmouth Docks & Engineering Co., Ltd. v. Treloar* (5)."

In all cases in the United Kingdom and in Victoria before 1946, it was necessary to prove that some external event, or some action of the deceased, had caused the sudden physiological change to happen when it did. In the present case, the worker's death was due to a sudden physiological change which happened at a time deemed to be in the course of his employment, but

there is no finding that any external event or any action of the deceased played any part in causing the fibrillation to happen when it did, and their Lordships must deal with the case on the footing that the fibrillation was due solely to the onset or progress of some disease within the man's body.

A The question now to be decided is whether the effect of the amendments made by the Act No. 5128 is to make it no longer necessary to associate the sudden physiological change with any external event or any action by the deceased. That question depends on the reason why such an association had formerly to be proved. Undoubtedly, one reason was that, as the injury by accident had always to arise out of the employment, a causal connection between the injury and the employment had to be proved, and that could only be done by associating the injury with something which the man did, or something which B befell him in connection with the employment. If that was the only reason, then it is no longer necessary to establish that association in cases where the injury occurred, or is deemed to have occurred, in the course of the employment because in those cases it is no longer necessary to prove that the injury arose out of the employment. But it is maintained for the appellant that that was C not the only reason: it was argued that the authorities show that "injury by accident" means injury brought about by something external, and excludes any injury due solely to the onset or development of disease. The statute still requires injury by accident if the employer is to be liable under s. 5, and if that phrase has that meaning then the appellant would not be liable in this case.

D It is not easy to determine from the authorities whether any precise meaning had become attached to the words "injury by accident" taken by themselves, because it was never necessary to consider those words in isolation from the whole phrase "injury by accident arising out of and in the course of the employment." In a number of passages cited by counsel for the appellant, the words "injury" or "accident" or "injury by accident" may appear to be interpreted E in the sense for which the appellant contends, but in at least most of those passages it appears to their Lordships that there was no intention to consider these words in isolation and that what was really being considered was the meaning of the whole phrase.

F The word "injury" has now been defined by the Act No. 5128 and effect must be given to this definition on its true interpretation. The obvious purpose of this Act was to extend the scope of statutory compensation, and it may well be that the enactment of this definition has altered or widened the meaning of the phrase injury by accident. By definition the word injury now means, inter alia, any disease, and disease includes, inter alia, any physical ailment disorder defect or morbid condition whether of sudden or gradual development and also includes the aggravation acceleration or recurrence of any pre-existing disease. G If the words of these definitions are given their natural meanings then, undoubtedly, the deceased suffered injury at a time deemed to be in the course of his employment. But it was argued for the appellant that a narrower meaning must be given to those words and, in particular, that "disease" in the definition of injury means the contraction of disease from some external cause, and that H "aggravation acceleration or recurrence" of a disease means aggravation, acceleration or recurrence brought about by some external event: if the first onset of a disease or its subsequent aggravation, acceleration or recurrence is due solely to conditions within the man's body then it was argued that that is not covered by the definition. This argument appeared to their Lordships to be based on three main grounds. In the first place it was said that otherwise there is a conflict with s. 8 (1) of the Act No. 5128 (now s. 12 of the Workers' Compensation Act, 1951, and hereafter referred to as s. 12). Then it was said that the

definitions ought, if possible, to be read as not altering the existing law. And finally it was said that to give to the definitions their full natural meaning would so extend the scope of the Act as to make it apply to cases which could not have been intended to involve liability to pay compensation. Even if there were force in these reasons, their Lordships would have great difficulty in holding it possible to construe these definitions in this way. But in their Lordships' judgment there is little or no substance in these reasons.

Section 12 provides:

" (1) Where ... (b) the death of a worker is caused by any disease—and the disease is due to the nature of any employment in which the worker was employed at any time prior to the date of disablement, then subject to the provisions hereinafter contained the worker or his dependants shall be entitled to compensation under this Act as if the disease were a personal injury by accident arising out of or in the course of that employment and the disablement shall be treated as the happening of the accident."

It is said that the latter part of this sub-section shows that a disease by itself is not a personal injury by accident and that a disablement by such a disease is not an accident. But this argument leaves out of account the fact that the statute requires not merely injury but injury by accident. The words "by accident" are not defined in the statute and must, therefore, be interpreted in light of the authorities. Their Lordships have already noted that a disease of gradual development, even though brought on by the man's work, cannot be held to be injury by accident and, on any view, the provisions of s. 12 (1) (b) were necessary to deal with disablement which did not happen suddenly. It is true that, if the natural meaning is given to the definition of injury, s. 5 and s. 12 will overlap, and cases of sudden disablement may be covered by both provisions. But that is no sufficient reason for giving a limited meaning to the definition of injury.

Then it was said that the definition ought, so far as possible, to be read as setting out the existing law and not as extending it. But the Act by which they were enacted was an Act designed to extend the scope of compensation, and there is no reason why such an extension should not be made in this way. Finally it was said that so wide an extension cannot have been intended because it might involve liability to pay compensation for disablement caused by some gradual failure of strength due solely to advancing age. But it does not appear to their Lordships that the words of the definition of disease can easily bear that interpretation. Disease is defined as including any ailment, disorder defect or morbid condition, but all these words must be read in their context and the context does not suggest that interpretation to their Lordships. But it is not necessary to decide that question because in Victoria there must not only be injury, but injury by accident, and that limitation is sufficient to exclude the class of case on which this argument was based.

Their Lordships must now deal with certain Australian cases relied on by the appellant. *Slazengers (Australia) Pty., Ltd. v. Burnett* (8), was an appeal from the Supreme Court of New South Wales. The Workers' Compensation Act in that State differs materially from the Act in Victoria. The injury need not be by accident but injury is more narrowly defined: in particular, the definition only includes a disease to which the employment was a contributory factor. The decision of their Lordships turned on the applicability of that definition in a certain sub-section, and the grounds of decision have no application in the present case. It is true that the question whether a disease not induced by an outside event could be an injury was raised in argument, but it was not dealt with by their Lordships. The appellant founded on the reference in the judgment to *Kellaway*

v. *Broken Hill South, Ltd.* (9), but that reference is somewhat cryptic ([1951] A.C. at p. 21):

A "A worker who, having reached his place of employment, dies of a coronary occlusion, being the result of a disease to which the employment was not a contributing factor, is not entitled to compensation: see *Kellaway v. Broken Hill South, Ltd.* (9), a case clearly decided correctly, though some of the reasoning may be open to criticism."

B The reasoning of JORDAN, C.J., was different from that of ROPER, J., and ROPER, J., expressed the opinion that an autogenous disease was not an injury. It was argued that it could be inferred that it was the reasoning of the Chief Justice which was doubted and that, therefore, the opinion of ROPER, J., must have been approved. Their Lordships are doubtful whether that is the correct inference and, in any event, ROPER, J., was dealing with a definition of injury which differed materially from that in force in Victoria.

C Then the appellant founded on *Hetherington v. Amalgamated Collieries of W.A., Ltd.* (10), a case from Western Australia, where, as in Victoria, it is necessary to prove injury by accident but the injury need only arise out of or in the course of the employment. In that case it was found that the man's exertion at his work had contributed to his death and so there was an external event, and the point at issue in the present case was neither decided nor specifically considered. But the judges of the High Court made an elaborate examination of the authorities, and it was pointed out for the appellant that, if they had thought that an external event was unnecessary and that a sudden physiological change by itself could be an injury by accident, it would have been much easier to decide the case on this ground. That may be true, but their Lordships cannot infer from it that any of the learned judges had formed a definite opinion that a sudden physiological change by itself could not be injury by accident. EVATT, J., pointed out (62 C.L.R. at p. 337) that the appeal could be disposed of merely by reference to the accepted principles laid down in the English cases, and that, where it was necessary, the introduction of the disjunctive form of expression would require further consideration, but in that case this was not necessary. In that case, there was nothing accidental about the event which led to the man's death occurring when it did. His disease was such that ordinary exertion at his work led to his death. The only thing which could be said to be accidental or unexpected was his sudden death at that particular time. On that matter, F DIXON, J., said (*ibid.*, at p. 332):

G "Surprising as it may seem, such a cause of death falls within the definition of injury by accident arising out of the employment. As a matter of common speech, the expression 'injury by accident' appears inappropriate and inapplicable. But a long course of judicial decisions has extracted from the expression latent implications which make the test of the employer's liability independent of such things as external mishap, traumatic injury and unusual or unexpected incidents of work or duty."

H The appellant accepted that passage as stating the law accurately. It was admitted that in Victoria it is now unnecessary to have an external event of an accidental or unexpected character, or an event connected with the man's work or, in a case to which s. 5 (5) applies, connected with his journey. But it was argued that it is still necessary to have an external event of some kind without which the physical breakdown would not have occurred when it did. It was admitted that the event need only have been the last straw and, indeed, counsel for the appellant ultimately admitted that it may not be necessary always to

prove just what the event was. If the man has died and there is no direct evidence of what happened just before the physical breakdown, it was admitted that it would be enough if the Workers' Compensation Board were satisfied by medical evidence that in all probability the breakdown would not have occurred at that particular time unless something external had happened to cause it to occur then. That being so, it is very difficult to suppose that it could have been intended to retain the need to prove some external event in every case, and their Lordships would only be prepared to accept the appellant's contentions if the words used by the legislature compelled that conclusion. But, far from compelling that conclusion, in their Lordships' judgment the terms of the statute point almost irresistibly to the opposite conclusion.

The first case in which it was necessary to decide the present question was *Willis v. Moulded Products (Australia), Ltd.* (11). In that case, the worker died as a result of cerebral haemorrhage which occurred while he was travelling to his work. His physical condition was such that the strain of his normal living or activity of any kind was likely to cause such a haemorrhage, but its occurrence at the time when it did occur was unexpected. It was argued that there could be no injury by accident unless there was shown to be some agency or some circumstance extraneous to the worker which brought about the injury but the Full Court held that the employer was liable to pay compensation. That case is indistinguishable from the present case, and the present case was brought before the Full Court with the object of having the decision in *Willis' case* (11) reconsidered. But the court decided to follow the decision in *Willis' case* (11). In both *Willis' case* (11) and the present case the authorities were fully reviewed particularly by SHOLL, J., and their Lordships agree with the decisions. Their Lordships will, therefore, humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Nicholas Williams & Co.* (for the appellant); *Waterhouse & Co.* (for the respondent).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

R. v. LANCASHIRE QUARTER SESSIONS APPEAL
COMMITTEE. *Ex parte* HUYTON-WITH-ROBY URBAN
DISTRICT COUNCIL.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Lysky and Parker, JJ.),
October 13, 1954.]

*Public Health—Appeal to quarter sessions—"Person aggrieved"—Costs not
given to successful party before magistrates—Certiorari to quarter sessions
refused—Public Health Act, 1936 (c. 49), s. 301.*

On July 29, 1953, the applicants (the Huyton-with-Roby Urban District Council) served on the respondents (who were agents managing the property in question) a statutory notice under the Public Health Act, 1936, s. 75, requiring them to provide a dustbin for a house at 16 Longview Drive, Huyton. The respondents having requested that the notice be withdrawn, on the ground that the requirement should have been made of the tenant and not the landlord, the applicants referred the respondents to their rights of appeal under the Public Health Act, 1936. The respondents appealed to the justices under the Public Health Act, 1936, s. 300, and on Sept. 29 the justices heard the matter and decided that the tenant should provide the dustbin, and made an order accordingly. On counsel for the respondents asking for costs the chairman of the court said, "the magistrates have considered the question of costs and make no order". The respondents then appealed to quarter sessions, under s. 301 of the Act of 1936 as being persons aggrieved, against the refusal of the justices to grant them their costs. The appeal was by way of re-hearing and quarter sessions varied the justices' order by allowing the respondents their costs and allowed the appeal with costs. On a motion by the applicants for an order of certiorari,

HELD: a successful party before justices who is deprived of his costs without the question being considered judicially by the justices is a person aggrieved within the meaning of the Public Health Act, 1936, s. 301, and consequently had a right to appeal to quarter sessions; as in this case there was no evidence to show that the justices could properly have exercised their discretion judicially in refusing the respondents their costs, quarter sessions had jurisdiction to deal with the matter and the court would dismiss the motion.

FOR THE PUBLIC HEALTH ACT, 1936, s. 301, see HALSBURY'S STATUTES, Second Edn., Vol. 19, p. 474.

Case referred to:

(1) *R. v. Surrey Quarter Sessions, Ex p. Lilley*, [1951] 2 All E.R. 659; [1951] 2 K.B. 749; 115 J.P. 507; 2nd Digest Supp.

MOTION for certiorari to remove and quash an order of the appeal committee for the County Palatine of Lancaster.

In or about June, 1953, Mrs. McLoughlin, the tenant of a house at 16 Longview Drive, Huyton, complained to the applicants (the Huyton-with-Roby Urban District Council) of a bad smell in the house. An informal notice was thereupon served on Messrs. G. H. Edwards (the respondents) who managed the property on behalf of the owners, Messrs. Grace and Co. (Builders), Ltd. to remedy a defective drain and to replace a defective dustbin. The drain was repaired but the dustbin was not replaced. On July 29, 1953, the applicants served on the agents a statutory notice under the Public Health Act, 1936, s. 75, requiring them to provide a dustbin. The respondents requested the withdrawal of the notice on the ground that the dustbin should have been provided by the tenant and the applicants pointed out to the respondents their rights of appeal under the Act. Accordingly, on Sept. 4, 1953, the agents appealed to petty sessions for the Present division of the County Palatine of Lancaster. On Sept. 29 the case

was heard and the justices determined that the tenant and not the landlord should provide the dustbin. On counsel for the respondents applying for costs, the chairman replied: "The magistrates have considered the question of costs and make no order". On Oct. 9 the respondents gave notice of appeal to quarter sessions against the justices' refusal to give them their costs. The applicants also gave notice of appeal against the decision of the justices but later withdrew their appeal. At the hearing on Jan. 8, 1954, it was contended on behalf of the applicants that the appeal committee had no jurisdiction to hear an appeal against refusal of costs without reason given by a court of petty sessions, and that the respondents were not persons aggrieved. The appeal committee proceeded by way of a re-hearing of the case and ordered that the order of the court of petty sessions should be varied by providing for payment by the applicants of the costs of the proceedings in the court of petty sessions and allowed the appeal with costs.

Paul Wrightson for the applicants.

B. E. Nield, Q.C., and G. B. H. Currie for the respondents.

LORD GODDARD, C.J.: I will ask **LYNSKEY, J.**, to give the first judgment.

LYNSKEY, J., stated the facts and continued: This application is made on behalf of the local authority really on one ground, the ground being that the appeal committee of quarter sessions had no jurisdiction to hear the appeal. It was said that there was no power in the quarter sessions to hear the appeal because the appellants were not persons aggrieved. The Public Health Act, 1936, which gives the right of appeal in s. 300 (1), provides:

"Where any enactment in this Act provides—(a) for an appeal to a court of summary jurisdiction against a requirement, refusal or other decision of a council; or (b) for any matter to be determined by, or an application in respect of any matter to be made to, a court of summary jurisdiction, the procedure shall be by way of complaint for an order, and the Summary Jurisdiction Acts shall apply to the proceedings."

Section 301 provides:

"Subject as hereinafter provided, where a person aggrieved by any order, determination or other decision of a court of summary jurisdiction under this Act is not by any other enactment authorised to appeal to a court of quarter sessions, he may appeal to such a court."

Of course, it is quite clear that under the words of those two sections the proceedings should be by way of proceedings under the Summary Jurisdiction Acts*; and it is equally clear, that being the case, that the Summary Jurisdiction Acts and the Magistrates' Rules made thereunder are applicable to those appeals in so far as they can apply. In so far as they do not apply, the second half of s. 301 gives a right of appeal to quarter sessions.

It is said that the respondents were not persons aggrieved, and it was sought to say that, where a person who has been a party to proceedings before the justices and has been successful but is refused his costs, it is not an order which aggrieves him because it does not affect his rights or property and that before a person can be aggrieved there must be an infringement of some right. It is said on behalf of the local authority that there was no right here to costs and, therefore, a person who is refused his costs in the discretion of the magistrates cannot be an aggrieved person. In my view, that is not a correct way of looking at the matter. It is not the way in which the matter was regarded in the case of *R. v. Surrey Quarter Sessions, Ex p. Lilley* (1). The position seems to

*The reference is now to the Magistrates' Courts Act, 1952, 32 HALSBURY'S STATUTES (2nd edn.), 416; see the Interpretation Act, 1889, s. 38 (1), 24 HALSBURY'S STATUTES (2nd edn.), 229.

me to be that a successful appellant before magistrates from a decision of a local authority has a legal right, viz.: that he is entitled to ask for his costs and that that application or demand for costs shall be considered by the magistrates in a judicial manner and unless in the exercise of that discretion they feel bound on proper reasons to refuse costs, he is entitled to them.

In this case the question arises whether the justices really exercised their discretion here at all. If they did exercise their discretion and exercised it judicially it may very well be that this court would not interfere, but on the information before us the respondents were invited to bring this dispute before the magistrates at petty sessions. The justices heard the case. There has been no evidence put before us on behalf of the applicants that there was any material on which the justices could exercise their discretion judicially and properly refuse the respondents their costs. That being so, if there was no such material, the magistrates have not exercised their discretion judicially and, not having exercised their discretion judicially, the respondents have been deprived of one of their legal rights. They are persons aggrieved and in those circumstances, in my view, they were entitled to go to quarter sessions to have this question dealt with under the Act.

The only other point that arises in the case is whether where a court is given a discretion to act, a superior court can interfere. Normally a superior court will not interfere if there are grounds on which the court of first instance exercise that discretion, however different the view of the superior court might be: but if a court of first instance without any material exercises or purports to exercise a discretion when no facts are adduced which justify that exercise, this court is bound to say that it is an appealable matter because the magistrates have not exercised the discretion which they ought to have exercised and, therefore, they have aggrieved the party before them. In those circumstances, in our view, the court of quarter sessions had jurisdiction to deal with this matter and, having jurisdiction, we cannot interfere with their decision.

LORD GODDARD, C.J.: I agree.

PARKER, J.: I agree.

Motion dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *H. E. H. Lawton, Huyton* (for the applicants); *Purchase, Clark & Treadwell*, agents for *Rollo & Mills-Roberts, Liverpool* (for the respondents).

[*Reported by* MICHAEL MALONEY, Esq., *Barrister-at-Law.*]

MONSON (LORD) AND OTHERS v. BOUND.

[QUEEN'S BENCH DIVISION (McNair, J.), October 7, 8, 11, 1954.]

Agriculture—Agricultural holding—Land leased for horticultural purposes—One-third of land cultivated but land used chiefly for the purposes of a retail shop—Agricultural Holdings Act, 1948 (c. 63), s. 1 (1).

Land comprising one-third of an acre was let to the tenant for a term of years, the tenant covenanting not to use the premises for any purpose other than that of a horticulturist without the consent of the landlords. The premises included a retail shop and an old dwelling-house used as an office and store, a glass conservatory in which flowers and plants were displayed for sale, a wreath-making room, greenhouses, and sheds, and about one-third of the total area was cultivated ground. The lease having expired, the tenant remained in possession and claimed that the land was an agricultural holding of which he had become tenant from year to year by virtue of the Agricultural Holdings Act, 1948, s. 3. In an action by the landlords to recover possession, it was found as a fact that the premises as a whole were being used for the purpose of a retail shop for the sale of horticultural products and that the raising, caring for and culture of horticultural products (which represented only ten per cent. of the turnover) on part of the land was merely ancillary to its main use.

HELD: the land did not constitute an "agricultural holding" within s. 1 (1) of the Act because the tenancy as a whole was not in substance a tenancy of agricultural land and, therefore, the tenancy did not, on the expiration of the lease, continue by virtue of s. 3 of the Act as a tenancy from year to year.

Howkins v. Jardine ([1951] 1 All E.R. 320), applied.

Dunn v. Fidoe ([1950] 2 All E.R. 685), considered.

EDITORIAL NOTE. The decisions of the Court of Appeal in *Howkins v. Jardine* ([1951] 1 All E.R. 320) and *Dunn v. Fidoe* ([1950] 2 All E.R. 685) are not easy to reconcile. McNAIR, J., follows *Howkins v. Jardine* in preference to *Dunn v. Fidoe*, which he regards as a decision turning on its peculiar facts (see p. 231, letter A, post). Thus he accepts the law as being that to decide whether there is a tenancy of an agricultural holding one must look at the substance of the matter and determine whether the land comprised in the tenancy, viewed as a whole, is agricultural land as defined in the Agricultural Holdings Act, 1948. If a substantial part of the land is not agricultural land, the holding is not an agricultural holding. The English view of the law runs counter to that preferred in Scotland, where the severance or excision of agricultural land from non-agricultural land comprised in a holding has been upheld for certain purposes; see *McNeill v. Duke of Hamilton's Trustees* (1918 S.C. 221) cited in *McGhie v. Lang* (1952) (102 L.Jo. 365), a decision of the Scottish Land Court.

AS TO MIXED TENANCIES OF AGRICULTURAL AND OTHER LAND, see HALSBURY, Simonds Edn., Vol. 1, p. 254, para. 553.

FOR THE AGRICULTURAL HOLDINGS ACT, 1948, s. 1 and s. 94, see HALSBURY'S STATUTES, Second Edn., Vol. 28, pp. 29 and 93-95.

Cases referred to:

(1) *Howkins v. Jardine*, [1951] 1 All E.R. 320; [1951] 1 K.B. 614; 2nd Digest Supp.

(2) *Dunn v. Fidoe*, [1950] 2 All E.R. 685; 2nd Digest Supp.

Action by the landlords for possession of premises and land at 112 and 114 Station Road, Redhill, Surrey, and for mesne profits. The facts are set out in the judgment.

H. S. Ruttle for the plaintiffs, the landlords.

L. A. Blundell for the defendant, the tenant.

Cur. adv. vult.

Oct. 11. McNAIR, J., read the following judgment. This case raises

some interesting and difficult questions under the Agricultural Holdings Act, 1948. By a lease made on Sept. 28, 1942, between the predecessors in title of the plaintiffs of the one part and the defendant, George William Bound, of the other part, the defendant acquired a leasehold interest for a term of ten years from June 24, 1942, of certain premises known as Nos. 112 and 114 Station Road, Redhill, Surrey. By cl. 11 of the lease the lessee covenanted not to use the demised premises for any purposes other than that of a horticulturist without the previous consent in writing of the lessors. Subject to the effect of the Agricultural Holdings Act, 1948, if applicable, this lease expired by effluxion of time on June 24, 1952, but notwithstanding such expiry the defendant has remained and continues to remain in possession. Accordingly, the plaintiffs claim possession and mesne profits by a writ dated June 29, 1953.

The defendant contends that the land and premises comprised in this lease are an agricultural holding within the meaning of that Act and that, accordingly, on the expiry of the lease on June 24, 1952, he became a tenant from year to year of the holding by reason of the operation of s. 3 of the Act and that such tenancy has not been determined. It is not contended by the plaintiffs that, if contrary to their contention s. 3 of the Act applies, any step has been taken to determine the statutory tenancy from year to year. The sole question, accordingly, which I have to determine is whether or not on June 24, 1952, the land and premises comprised in the lease were or were not an agricultural holding within the meaning of that Act, and it is agreed that the onus of proving the affirmative lies on the defendant.

Before considering the terms of the Act and the decisions on it, it is convenient that I should first state my findings of fact as to the nature of the land and premises and their user. The demised land consisted of a rectangular plot of land with a frontage of forty-eight feet on to Station Road, Redhill, and with a depth of some 340 feet comprising in all an area of about 16,500 square feet or about one-third of an acre. On the frontage on to Station Road, which is in the middle of a row of small retail shops, there is a one-storey shop built on to the front of an old residence now used as an office and for storage purposes and, in addition, a glass conservatory in which flowers and plants are displayed for sale. The shop and the conservatory present an attractive shop front such as is commonly used by good class florists and seedsmen in the suburbs. Behind the conservatory there is a wreath-making room and two heated greenhouses. Further back lie further store rooms, a garage and a stokehole, together with two more greenhouses, one of which is derelict, a potting shed and a number of cold frames and forcing sheds in a semi-derelict condition. Finally, at the rear of all the buildings, there is an area of open ground described in the plan as a cultivated stock garden, which itself comprises about one-third in area of the whole of the demised land.

The defendant with his father before him has occupied the premises for many years for the purposes of his business, which in May, 1949, he described, as I think accurately, as the business of florists, seedsmen, horticultural sundriesmen and nurserymen. At the material date the business consisted in substance of the retail sale of horticultural products and horticultural sundries. Sixty-five per cent. of the turnover came from the sale of cut flowers, pot plants, shrubs and wreaths. By reason of the fact that some of the plants and shrubs purchased outside were grown on the premises, either because they did not meet a ready sale as purchased, or because as a matter of policy it was desired to bring them on from an immature condition until fit for sale, it was difficult to form any very accurate figure as to the proportion of final products which could be said to result from growth or raising on the premises. However, I consider that a fair figure to take for the value of the growth or raising on the premises is about one-sixth of this sixty-five per cent. of the total turnover, which is equivalent to about one-tenth of the total turnover. The remainder of the turnover represented the purchase and sale of other horticultural products such as seed

potatoes, fertilisers and horticultural sundries, including seeds packaged on the premises in the defendant's own containers after some testing on the premises.

The stores were for the most part used for the storage of the seed potatoes, fertilisers and horticultural sundries, though part was used on occasion for the packaging of seeds. The greenhouses were used both for the holding and growing of all plants purchased from outside and for the raising of seedlings and cuttings raised on the premises and the growing from bulbs of cut flowers for sale. The open ground at the rear was used according to the season for bulbs of chrysanthemum, gladioli and geranium and for raising some potting-out plants and vegetable plants and for raising flowering shrubs purchased elsewhere.

Of the staff of about six men and women employed, one man worked a little over half time in the nursery, with occasional help from an odd job man and from the girls in the wreath-making department. Though undoubtedly horticultural processes were carried on in substantially the whole of the premises, if the proportion for sale of products grown in the premises is included in the term "horticultural process", my conclusion, viewing the matter broadly as a matter of substance, is that the premises as a whole were at the material time being used for the purpose of a retail shop for the sale of horticultural products and that the raising, caring for and culture of horticultural products on part of the land was merely ancillary to its main use.

I next have to consider whether on the facts so found the demised premises are in law an agricultural holding. The relevant provisions of the Agricultural Holdings Act, 1948, omitting immaterial words, are as follows. Section 1 provides:

"(1) In this Act the expression 'agricultural holding' means the aggregate of the agricultural land comprised in a contract of tenancy . . . (2) For the purposes of this and the next following section, the expression 'agricultural land' means land used for agriculture which is so used for the purposes of a trade or business . . ."

Finally s. 94 (1) provides:

"In this Act . . . 'agriculture' includes horticulture, fruit growing, seed growing . . . the use of land as . . . market gardens and nursery grounds . . . and 'agricultural' shall be construed accordingly."

Unfettered by authority I should be disposed to hold that the inclusion of the word "aggregate" in the definition of "agricultural holding", in s. 1 (1) necessarily involved that in the case of a tenancy which comprised both land, whether in one or more parcels, used for agricultural purposes and land not so used, the aggregate of the land used for agricultural purposes constituted an "agricultural holding" and the remainder of the land was excluded. Admittedly, this construction involves very serious difficulties in its application to further sections of the Act, in particular to s. 3. It is clear, however, from the decision of the Court of Appeal in *Howkins v. Jardine* (1), that this construction is not open to me and that the definition referred to does not, in the case of a composite or mixed holding, work a severance into agricultural land and non-agricultural land. I consider, too, that the reasoning underlying this decision also leads to the conclusion that the Act only applies if the tenancy as a whole is in substance a tenancy of agricultural land: see the judgment of SOMERVELL, L.J. ([1951] 1 All E.R. at p. 322) and the judgment of JENKINS, L.J. (*ibid.*, at p. 329). If this is the correct reading of the effect of this authority, then on my findings the defendant must fail.

Counsel for the defendant, however, contends that the principle stated in *Howkins v. Jardine* (1) only applies to take agricultural land out of the protection of the Act if there is comprised in the holding some part which is not used for any agricultural purposes at all and that, if on the facts of any particular case it is found that substantially all parts of the land comprised in the tenancy are used in connection with, though not mainly or primarily for the purposes of, those parts of the land which are purely agricultural, then the case falls within the protection

of the Act. For this principle counsel for the defendant cites the decision in *Dunn v. Fisher* (2). In my judgment, this decision cannot be regarded as laying down any such general principle. TUCKER, L.J., having reached the conclusion that the findings of the county court judge clearly indicated that he regarded the premises in which the tenant lived as a necessary part of the agricultural land, was content to hold that on the facts as found the tenancy as a whole was an agricultural holding. With this view of the facts the remaining members of the court agreed and refrained from expressing any view of the law. I treat the decision in *Dunn's* case (2) as strictly a decision on the very peculiar facts of that case. If, however, contrary to my view, any statement of principle is to be deduced from *Dunn's* case (2) which is contrary to the principle stated in *Howkins v. Jardine* (1), the distinction between the two cases is, in my opinion, too fine for practical application and I feel bound to follow the later and considered judgment of the Court of Appeal in *Howkins v. Jardine* (1). I accordingly hold that the land demised here in question taken as a whole was in substance not land used for agriculture. The result is that the plaintiffs are entitled to judgment for possession and mesne profits.

Judgment for the plaintiffs.

Solicitors: *Patersons, Snow & Co.*, agents for *Mole, Rosling & Vernon*, Reigate (for the plaintiffs); *Loxley & Preston*, agents for *G. Lewis F. Grece*, Redhill (for the defendant).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

Re BURTON'S SETTLEMENT TRUSTS. PUBLIC TRUSTEE v. MONTEFIORE AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), October 8, 1954.]

Settlement—Rule in Lassence v. Tierney—Trustees directed to divide the trust fund or without actual division to treat the same as divided into two equal parts and to appropriate one of such parts as the share of each of settlor's two daughters—Daughter's share not to vest absolutely in her—Life interest to daughter with remainder to issue—Accruer clause—Both daughters dying without issue—Destination of trust fund.

By a settlement, made on Apr. 10, 1919, the settlor settled certain investments for the benefit of his two daughters, A.B. and I.B. By cl. 2 the trustees of the settlement were directed to stand possessed of the trust fund and of the annual income thereof "upon trust to divide the trust fund or without actual division to treat the same as divided into two equal parts and to appropriate one of such parts as the share of each" of the two daughters, A.B. and I.B., respectively. By cl. 3, "the share of the trust fund of each of the said two daughters" was not to vest absolutely in such daughter but should be retained by the trustees on trust during the life of such daughter to pay the income of such share to her, and, after the death of such daughter, on trust for her issue. By cl. 4 it was provided, "If the trusts hereinbefore declared concerning the share of either such daughter shall fail then . . . such share shall go and accrue by way of addition to the share of such other daughter and shall be held upon the trusts and subject to the powers and provisions herein declared and contained concerning her original share or as near thereto as circumstances will admit." On Aug. 31, 1927, A.B. died a spinster. In 1932 the settlor died. On Sept. 25, 1952, I.B. died, also a spinster. On an application to the court by the trustee of the settlement to determine the destination of the trust fund,

HELD: on the true construction of the settlement, there was no initial absolute gift to the daughters and the direction for division of the trust

fund expressed in cl. 2 of the settlement was an administrative direction which did not create beneficial interests; therefore the rule in *Lassence v. Tierney* (1849) (1 Mac. & G. 551) and *Hancock v. Watson* ([1902] A.C. 14) did not apply, and, as the beneficial trust created by cl. 3 of the settlement had failed, there was a resulting trust for the settlor's personal representatives.

Per curiam: Even if there had been an initial absolute gift to or between the settlor's daughters, so that the rule in *Lassence v. Tierney* (supra) would have applied to the shares originally given to them, the rule would not, on the true construction of the settlement, have applied a second time to the accruer clause, because that clause was not so expressed as to contain an initial absolute gift to a donee, but provided for an accruing share to accrue to the share of the other daughter not to her as a gift (see p. 235, post).

Re Litt ([1946] 1 All E.R. 314), distinguished.

AS TO THE RULE IN *Lassence v. Tierney*, see HALSBURY, Hailsham Edn., Vol. 34, p. 214, para. 270; and FOR CASES, see DIGEST, Vol. 43, pp. 643-645, Nos. 790-799, and Vol. 44, pp. 554-556, Nos. 3715-3724.

Cases referred to:

- (1) *Hancock v. Watson*, [1902] A.C. 14; 71 L.J.Ch. 149; 85 L.T. 729; 43 Digest 644, 792.
- (2) *A.-G. v. Lloyds Bank, Ltd.*, [1935] A.C. 382; 104 L.J.K.B. 523; 152 L.T. 577; Digest Supp.
- (3) *Lassence v. Tierney*, (1849), 1 Mac. & G. 551 (41 E.R. 1379); 2 H. & Tw. 115 (47 E.R. 1620); 15 L.T.O.S. 557; 43 Digest 643, 790.
- (4) *Re Litt*, [1946] 1 All E.R. 314; [1946] Ch. 154; 115 L.J.Ch. 114; 174 L.T. 184; 2nd Digest Supp.
- (5) *Re Norton*, [1949] L.J.R. 568; [1949] W.N. 23; 2nd Digest Supp.

ADJOURNED SUMMONS to determine whether on the true construction of a deed of settlement, dated Apr. 10, 1919, and made between Arthur Burton, the settlor, of the one part, and trustees, of the other part, and in the events which had happened of the death without issue of the settlor's daughters, Audrey Evelyn Burton and Ida Marion Burton (the beneficiaries named in the settlement), the trust funds subject to the settlement were now held (a) on trust in equal moieties for the respective personal representatives of the deceased beneficiaries, or (b) on trust, as to the entirety, for the personal representative of Ida Marion Burton, the later survivor of the beneficiaries, or (c) on a resulting trust for the personal representative of the settlor (who died on July 12, 1932), or (d) on and for some other and what trusts.

E. I. Goulding for the plaintiff, the trustee of the settlement.

A. J. Belsham for the first and second defendants, the personal representatives of Audrey Evelyn Burton, and for the third defendant, the personal representative of Ida Marion Burton.

Ian Campbell for the fourth defendant, the personal representative of the settlor.

ROXBURGH, J.: This difficult case is a further instalment in the chapter relating to the rule applied in *Hancock v. Watson* (1). The rule is familiar enough, and from the many places in which that rule is stated, I propose to adopt the statement by LORD TOMLIN in *A.-G. v. Lloyds Bank, Ltd.* (2), where he said ([1935] A.C. at p. 394):

"... the respondents contend, first, that the rule commonly known as the rule in *Lassence v. Tierney* (3) approved and applied by your Lordships' House in *Hancock v. Watson* (1) operates in the present case, with the result that upon the true construction of the appointment there is an absolute initial gift to the three children of the settlor in equal shares, and that the absolute initial gift of each share is only cut down if and when and

while there is in existence some person qualified to take under the trusts of such share declared in derogation of the absolute gift and to the extent necessary to give effect to the rights of such person . . . ”

The difficulty in this case, as always, is to apply the rule, or, in other words, to determine whether there is what is called “an absolute initial gift” to the beneficiaries in question. First of all, of course, what the court looks for is not something which is in fact an absolute gift, because ex hypothesi it is not, but something that is in form an absolute gift. That is made clear by LORD TOMLIN in a later passage in his speech in *A.-G. v. Lloyds Bank, Ltd.* (2). Moreover, the word “absolute” there, I think, merely means “complete” or “full”, as distinct from a limited gift, such as a gift of a life interest, or a gift *durante viduitate*. The distinctions which have been drawn in some of the cases are very fine. This much, at least, is clear in the present case, that there is not in express terms any gift to the beneficiaries in the first instance. The question, and it is a difficult question, is whether there are in the context of the settlement sufficient indications to justify the court in construing certain words which are capable of more than one meaning in the sense of an initial gift.

The settlor, having expressed his desire to make some provision for the maintenance, education and benefit of his daughters, Audrey and Ida, had transferred some investments to trustees. By cl. 2 of the settlement it was agreed that the trustees should stand possessed of those investments and the investments for the time being representing the same (thereinafter called “the trust fund”) and of the annual income thereof

“upon trust to divide the trust fund or without actual division to treat the same as divided into two equal parts and to appropriate one of such parts as the share of each of them the said two daughters of the settlor namely [Audrey and Ida] respectively.”

Then the settlement proceeds:

“3. The share of the trust fund of each of the said two daughters of the settlor shall not vest absolutely in such daughter but shall be retained . . . ”

on certain trusts. I need not read the trusts in full. There is a life interest for the daughter with a power of appointment amongst her issue, and trusts for issue in default of appointment.

Both the daughters have died without having been married. Accordingly, all the trusts failed except the trust for the daughters for life and for the surviving daughter for life. The latter arises under the accruer clause (cl. 4), which is as follows:

“If the trusts hereinbefore declared concerning the share of either such daughter shall fail then subject to the trusts powers and provisions herein declared and contained and to the power by law vested in the trustees concerning the same and to every or any exercise of such respective powers such share shall go and accrue by way of addition to the share of such other daughter and shall be held upon the trusts and subject to the powers and provisions herein declared and contained concerning her original share or as near thereto as circumstances will admit.”

Therefore, what happened was that the two daughters, Audrey and Ida, in the first instance, each had a life interest in what for the moment I will call without prejudice “their respective shares”. Then, on the death of Audrey on Aug. 31, 1927, Ida, under the operation of the accruer clause, had a life interest in the whole fund, and on Ida's death unmarried on Sept. 25, 1952, all the trusts declared by the settlement failed. The question which I have, in the first instance, to decide is whether there is a resulting trust to the settlor.

There is another question which, on any view, I could not decide today. It so happens that, as a result of wills, and so on (which I need not state), it does not

matter whether, if there is no resulting trust, the whole fund goes to the estate of Audrey or to the estate of Ida. Therefore, counsel have not been briefed separately to argue that particular question, and I do not propose to decide it, but there is no doubt that I have to think of that matter in connection with the construction of the settlement. Indeed, this is only the second case in the voluminous reported literature on this theme in which an accruer clause has been relevant. The first, and I think it is expressly stated to be the first, is *Re Litt* (4), a decision of the Court of Appeal.

In *Re Litt* (4) it was plain that there was an initial absolute gift and that the rule, commonly called the rule in *Lassence v. Tierney* (3) and stated in *Hancock v. Watson* (1) applied, and those points were not argued in the Court of Appeal, where the question was whether or not the rule applied de novo to the accruer clause so that the whole fund would be carried to the share of the survivor to the exclusion of the shares of those who were not the survivors. The court came to the conclusion that the rule in *Lassence v. Tierney* (3) did apply de novo or a second time. There was no doubt in that case about the first gift. The court did not have to consider what bearing the accruer clause might have on the construction of a doubtful initial creation of shares. That problem I must consider.

There is, to my mind, an important point at the outset of this debate. I am sure that nowhere in the reported cases is there a direction to divide the trust fund or, without actual division, to treat the same as divided. In *Re Norton* (5) LORD GREENE, M.R., said ([1949] L.J.R. at p. 572):

"A trust to divide something equally between three people appears to me to be a suitable direction for a beneficial division."

That could hardly be said, however, of a trust "to divide the trust fund into three parts or two parts, still less of a trust "to divide the trust fund or without actual division to treat the same as divided into two . . . parts." It seems to me that such a direction points inescapably to an administrative direction to trustees in contradistinction to the attempted creation of any beneficial interest; and it is in that context that the meaning of the words "to appropriate one of such parts as the share of each of them the said two daughters" is to be found. I am not unaware that there are cases in which a direction to appropriate to a person has been enough to create a beneficial interest in that person. Whether a direction "to appropriate . . . as the share of" a person has ever been held to be enough, I do not know, but I do not think that any such direction has ever been considered in the setting in which I have it here; and when it is quite plain that the first part of the direction is of an administrative character, I think it is reasonable and proper to assume that the second part of the direction is of an administrative character as well. Therefore, I think that "to appropriate one of such parts as the share of each of them the said two daughters" is merely a direction to the trustees of an administrative character and is not intended to create any beneficial interest.

The settlement proceeds:

"The share of the trust fund of each of the said two daughters of the settlor shall not vest absolutely in such daughter but shall be retained upon the following trusts."

It is quite certain that these words are not in themselves construed as negating the creation of a beneficial interest if there are other words to justify its creation. There are many cases in which these words have occurred and yet the rule in *Hancock v. Watson* (1) has been held to apply, but it does not seem to me that the words are sufficient to create a beneficial interest. Where on the true construction of a will a beneficial interest has already been created, words such as I have just read are treated as meaning that the gift shall vest but shall not vest absolutely. Here, however, there is no gift in any of the other words. I think that the words used merely mean that what the daughters are to have is

not given by anything that has hitherto appeared but is the life interest which they are given under the following trusts; in other words, that the word "absolutely" in cl. 3 of the settlement is used in contradistinction to the life interest which was expressed to be without power of anticipation during coverture. It is true, also, that in later passages in the settlement there are references to the "shares" of the daughters, but I cannot but regard that as a compendious way of referring back to that which was expressed much more fully in the initial direction in cl. 2, which I have already read.

I now come to the accruer clause. If there had been in this case a clear initial gift, as there was in *Re Litt* (4), I should have been strongly tempted to hold that the rule in *Lassence v. Tierney* (3) would have to apply over again and that, notwithstanding the strong difference unfavourable to the application of the rule which exist between the present case and *Re Litt* (4), there was a gift in the accruer clause, for this reason. The accruer clause contemplates the blending of the funds, and, therefore, there is a very strong presumption that the beneficial incidents of the whole fund are thereafter to be the same for all purposes, not merely for the application of the declared trusts, because so far they plainly are the same for all purposes, but also for the application of any principle of resulting trusts, which, of course, is a rule of law applied in the absence of a declared trust. It would be a strange thing if Ida's estate, as that of the surviving daughter, was entitled absolutely to her original share and not to the share which accrued, seeing that the two shares were blended in order to give effect to her life interest as she was the survivor of the two daughters. Yet I notice, first of all, that LORD GREENE, M.R., in *Re Litt* (4) said that he thought that, even on the words in that case, it was difficult to decide whether the rule in *Lassence v. Tierney* (3) and *Hancock v. Watson* (1) applied; and when discussing his decision, he actually said ([1946] 1 All E.R. at p. 317):

"With regard to the direction for accruer . . . the testator says: ' . . . such child's share and any additional share or shares in the trust fund or otherwise which may accrue or be added thereto by virtue of this present proviso and the income thereof shall go and accrue to such of my children as shall be living at the death of such child of mine . . . ' Pausing there for a moment, the language used appears to me to be perfectly apt to express an absolute gift. The direction is not that the accruing share is to accrue to the original share, but that it is to accrue to the then living children."

In the present case, on the contrary, the accruing share is to accrue, not "to the other daughter", but "to the share of such other daughter". In my view, it would be almost impossible to construe the accruer clause in this case as creating a *de novo* application of the rule in *Lassence v. Tierney* (3).

That, in my view, is an additional reason for thinking that the only words which could be said to create an initial absolute gift were intended, as I have already suggested, as an administrative direction and not as creating beneficial interests, because, as I have already said, it would be very strange if there had to be a re-division, by reason of different beneficial incidents, of a fund which has already been properly blended in order to give effect to the life interest of the surviving daughter. Therefore, not without hesitation, I come to the conclusion that, on the true construction of the settlement, there is no initial absolute gift to the daughters. The only gift to them is in the trusts declared in their favour, with the result that there is a resulting trust to the settlor, because the trusts have now all failed.

Order accordingly.

Solicitors: *Routh, Stacey & Castle*, agents for *Orford, Cunliffe, Grey & Co.*, Manchester (for the plaintiff); *Stileman, Neate & Topping*, agents for *Walker, Charlesworth & Jefferson*, Leeds (for the first and second defendants); *Stileman, Neate & Topping* (for the third defendant); *Gregory, Rowcliffe & Co.*, agents for *George Gatey & Son*, Windermere (for the fourth defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

JUAN YSMAEL & CO. INCORPORATED *v.* GOVERNMENT OF
THE REPUBLIC OF INDONESIA.
JUAN YSMAEL & CO. INCORPORATED *v.* GOVERNMENT OF
THE REPUBLIC OF INDONESIA AND ANOTHER.

[PRIVY COUNCIL (Earl Jowitt, Lord Porter, Lord Oaksey, Sir John Beaumont and Mr. L. M. D. de Silva), April 5, 6, 7, 8, 12, 13, May 26, October 7, 1954.]

Conflict of Laws—Impleading foreign sovereign state—Shipping—Claim by foreign sovereign state to ownership of, or interest in, ship—Evidence of interest of foreign sovereign state needed before proceedings stayed.

In 1950 the steamship *Tasikmalaja* was acquired by the appellants who, from 1951 onwards, chartered it to the respondents, the government of Indonesia, under successive charterparties the latest of which was due to expire on June 30, 1952. In November, 1950, by power of attorney, the appellants constituted S. their attorney to sell the ship, and in 1951 negotiations were opened with P., acting as agent on behalf of the government of Indonesia, for the sale of the ship. The government of Indonesia wished to deduct the charter money due under the charterparty expiring on June 30, 1952, from the purchase price of the ship, but the appellants would not agree to this, and so informed S. In spite of this, however, S. and P. entered into an agreement to sell the ship and moneys due under the charterparty were deducted from the purchase price. The sale was completed by a bill of sale dated Mar. 17, 1952. As from this date the government of Indonesia claimed to be owners of the ship and took various measures to implement their title. On Mar. 13, 1952, the ship was brought by the government of Indonesia to Hong Kong for repair. On June 27, 1952, the appellants issued a writ in rem against the ship and, by the statement of claim indorsed thereon claimed to have legal possession of the ship decreed to them. On June 30, 1952, the government of Indonesia entered appearance under protest and on July 9, 1952, gave notice of motion for an order that the writ and all subsequent proceedings be set aside on the grounds that the writ impleaded a foreign sovereign state, and that the government of Indonesia was the owner, or was in possession or control, or entitled to possession, of the ship.

HELD: where a foreign sovereign state claims, in proceedings to which it is not a party, immunity from the court's jurisdiction for its alleged interests in property which is the subject of the proceedings, the bare assertion of a claim of title to the property is not enough to entitle the foreign sovereign state to that immunity: but once the court is satisfied that there are conflicting rights which have to be decided in relation to the claim of the foreign sovereign state and that the state's claim is not for rights which are illusory the state is entitled to immunity from the court's jurisdiction: and as, on the facts, the purported sale of the ship by the appellants' agent to the government of Indonesia was without authority, as the government's purchasing agent knew, the government had not established that, at the date when they claimed immunity (July 9, 1952), they had any such interest in the ship as would show that they were impleaded, and accordingly the court had jurisdiction.

DICTUM OF SCRUTTON, L.J., in *The Jupiter* ([1924] P. at p. 244), not followed.

Appeal allowed.

EDITORIAL NOTE. The view that a declaration by a foreign sovereign as to the sovereign's ownership of personal property was conclusive in support of a claim to immunity from the court's jurisdiction was also supported by HILL, J., in *The Jupiter* (No. 3) ([1927] P. 122 at p. 138), and his decision was affirmed, though not expressly on this ground, by the Court of Appeal ([1927] P. 250).

These views are now held to be contrary to the weight of authority, including, in effect, a decision of the House of Lords (see p. 240, letter E, post), and the principle expressed in the headnote above should accordingly be taken to prevail in English law.

AS TO IMMUNITY OF FOREIGN GOVERNMENTS, see HALSBURY, Simonds Edn., Vol. 1, p. 16, para. 22; Vol. 7, p. 265, para. 569; and FOR CASES, see DIGEST, Vol. 1, pp. 48-50, Nos. 384-400.

Cases referred to:

- (1) *Compania Naviera Vascongada v. Steamship Cristina, The Cristina*, [1938] 1 All E.R. 719; [1938] A.C. 485; 107 L.J.P. 1; 159 L.T. 394; Digest Supp.
- (2) *United States of America v. Dollfus Mieg et Compagnie, S.A.*, [1952] 1 All E.R. 572; [1952] A.C. 582; 3rd Digest Supp.
- (3) *The Jupiter*, [1924] P. 236; 93 L.J.P. 156; 132 L.T. 624; Digest Supp.
- (4) *Haile Selassie v. Cable and Wireless, Ltd.*, [1938] 3 All E.R. 384; [1938] Ch. 839; 107 L.J.Ch. 380; 159 L.T. 385; Digest Supp.
- (5) *The Arantzazu Mendi*, [1938] 4 All E.R. 267; [1939] P. 37; 108 L.J.P. 2; 159 L.T. 499; *affd.* H.L., [1939] 1 All E.R. 719; [1939] A.C. 256; 160 L.T. 513; sub nom. *Spain Republic Government v. Arantzazu Mendi*, 108 L.J.P. 55; Digest Supp.

CONSOLIDATED APPEALS by owners of the s.s. Tasikmalaja from a judgment of the Appeal Court of Hong Kong, dated Dec. 13, 1952, reversing a judgment of REECE, J., in the Supreme Court of Hong Kong (Admiralty Jurisdiction), dated Sept. 15, 1952, setting aside the writs and all subsequent proceedings in the two actions. During the course of the hearing before the Board it was conceded that the second appeal could be ignored, and the judgment of the Board was, therefore, confined to the first appeal.

The facts appear in the judgment.

Viscount Hailsham, Q.C., and *R. O. Wilberforce, Q.C.*, for the appellants.
Sir Hartley Shawcross, Q.C., and *R. I. Threlfall* for the respondents.

EARL JOWITT: These are consolidated appeals from a judgment dated Dec. 13, 1952, of the Appeal Court of Hong Kong reversing a judgment of REECE, J., in the Supreme Court of Hong Kong (Admiralty Jurisdiction) dated Sept. 15, 1952, and setting aside the writs and all subsequent proceedings in two actions, namely, Action No. 6 and Action No. 8 in the Supreme Court of Hong Kong (Admiralty Jurisdiction). Action No. 6 was an action brought against the steamship Tasikmalaja by the respondent, Anthony Loh, for ship's necessities. It was conceded in argument that that action can be ignored, and their Lordships have, therefore, confined their judgment to Action No. 8.

It will be convenient to summarise in the first place the relevant steps in the action leading up to the judgment under appeal. The appellants, who are a company incorporated under the laws of the Philippine Islands, issued the writ in the action on June 27, 1952. It was a writ in rem against the steamship Tasikmalaja addressed to all parties interested in the said steamship, and by the statement of claim indorsed thereon the appellants, as the owner of the said steamship, claimed to have legal possession of the vessel decreed to them. On June 27, 1952, the said vessel was arrested by process of the court in the action and at all material times thereafter remained in the legal custody of the head bailiff of the Supreme Court. On June 30, 1952, an appearance under protest was entered by the government of Indonesia without prejudice to an application to dismiss the action. On July 9, 1952, the government of Indonesia gave notice of motion for an order that the writ and all subsequent proceedings be set aside on the grounds that the writ impleaded a foreign sovereign state and that the government of Indonesia was the owner, or was in possession or control,

or entitled to possession, of the vessel. Affidavits were sworn in support of the motion by various persons, including, in particular, Kwee Djie Hoo, described as consul general for the government of Indonesia at Hong Kong, and Paimoe Rahardjo, described as a major in the army of the republic of Indonesia. On July 25, 1952, the appellants gave notice of their intention to cross-examine these deponents, and applied for leave to do so, and on Aug. 25, REECE, J., granted such leave. Thereupon the government of Indonesia claimed diplomatic privilege for the deponents, but on Aug. 27, REECE, J., ruled that the deponents were not entitled to diplomatic privilege. Summonses were accordingly issued to the deponents to attend for cross-examination, which they failed to do, and on Sept. 15, 1952, REECE, J., ordered the affidavits of the two deponents to be removed from the file. There is no appeal before their Lordships' Board against the orders of the learned judge overruling the claim to diplomatic privilege, and directing the two affidavits to be removed from the file, and their Lordships express no opinion on the propriety of such orders.

On Sept. 15, 1952, REECE, J., gave judgment dismissing the motion of the government of Indonesia claiming immunity from being sued, and on the same day the said government gave notice of appeal from the said order to the Appeal Court. On Oct. 24, 1952, REECE, J., gave judgment in the action and decreed possession of the vessel to the appellants, subject to the claim of the Hong Kong & Whampoa Dock Co., Ltd. for the cost of work done on the said vessel. On Dec. 8, the appeal of the government of Indonesia against the order of REECE, J., of Sept. 15, 1952, refusing immunity, came before the Appeal Court. The three following submissions were made to the Appeal Court by counsel on behalf of the Indonesian government: (i) That the trial judge erred in making the orders for the cross-examination of Mr. Kwee Djie Hoo and Major Paimoe Rahardjo; (ii) That the trial judge erred in refusing to grant to these persons the diplomatic immunity claimed for them; (iii) That, even if the trial judge was correct in his decisions on points (i) and (ii), there was left on the record ample material on which the impleading motions should have been allowed.

The Appeal Court decided to hear the third point first, as a decision on that point would render it unnecessary to determine points (i) and (ii). The court came to the conclusion that, on the material before them, the impleading motions should have been allowed. They pronounced no decision on points (i) and (ii). Accordingly, the judgment of the court rescinded the judgment of REECE, J., of Sept. 15, 1952, ordered that the writ and all subsequent proceedings and orders in the said action be set aside on the ground that the said action impleaded the government of Indonesia, a foreign sovereign state, declared that the judgment of REECE, J., dated Oct. 24, 1952, was null and void for want of jurisdiction, and ordered the appellants to pay the costs of the government of Indonesia of the said appeal and the said notice of motion. The question before the Board is whether that judgment is right.

The rule according to a foreign sovereign government immunity against being sued has been considered and applied in many cases. The basis of the rule is that it is beneath the dignity of a foreign sovereign government to submit to the jurisdiction of an alien court, and that no government should be faced with the alternative of either submitting to such indignity or losing its property. The rule was stated by LORD ATKIN in *Compania Naviera Vascongada v. Steamship Cristina, The Cristina* (1), as involving two propositions. The first that the courts of a country cannot implead a foreign sovereign; and the second that they would not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. DICEY, 6th edn., p. 131, in a passage in his *CONFLICT OF LAWS* approved by LORD RADCLIFFE in *United States of America v. Dollfus Mieg et Compagnie, S.A.* (2), stated the rule in these terms:

"The court has . . . no jurisdiction to entertain an action or other proceeding against—(1) any foreign sovereign . . . An action or proceeding against the property of [a foreign sovereign] is . . . an action or proceeding against such person . . ."

In whichever way the rule is stated it is apparent that difficulty may arise in the application of the second branch of it. Where the foreign sovereign state is directly impleaded the writ will be set aside, but where the foreign sovereign state is not a party to the proceedings, but claims that it is interested in the property to which the action relates and is, therefore, indirectly impleaded, a difficult question arises as to how far the foreign sovereign government must go in establishing its right to the interest claimed. Plainly, if the foreign government is required as a condition of obtaining immunity to prove its title to the property in question, the immunity ceases to be of any practical effect. The difficulty was cogently expressed by LORD RADCLIFFE in *Dollfus Mieg* (2), where he said ([1952] 1 All E.R. at p. 588):

" . . . a stay of proceedings on the ground of immunity has normally to be granted or refused at a stage in the action when interests are claimed but not established, and, indeed, to require him [i.e., the foreign sovereign] to establish his interest before the court (which may involve the court's denial of his claim) is to do the very thing which the general principle requires that our courts should not do."

In *The Jupiter* (3), where the writ was in rem against the ship, SCRUTTON, L.J., based his judgment on the view that an assertion by a foreign sovereign that he claimed a right in property must be accepted by the court as conclusive without investigating whether the claim be good or bad. The learned lord justice concluded his judgment by saying ([1924] P. at p. 244):

" . . . I am content to rest my decision in this case on the fact that this writ requires a foreign sovereign to appear in these courts to defend what he alleges to be his property, and by the principles of international comity the courts of this kingdom do not allow such steps to be taken against foreign sovereigns."

The view that a bare assertion by a foreign government of its claim is sufficient has the advantage of being logical, and simple in application, but it may lead to a very grave injustice if the claim asserted by the foreign government is, in fact, not maintainable, and the view of SCRUTTON, L.J., has not found favour in subsequent cases.

In *The Cristina* (1), the action was commenced by a writ in rem against the ship, and the foreign government which sought to have the writ set aside claimed to be in possession of the ship. LORD WRIGHT noted that the fact of possession was proved, and he added ([1938] 1 All E.R. at p. 731):

"It is unnecessary here to consider whether the court would act conclusively on a bare assertion by the government that the vessel is in its possession. I should hesitate, as at present advised, so to hold, but the respondent here has established the necessary facts by evidence."

LORD MAUGHAM in his speech dealt with the matter at more length and expressed the view that (*ibid.*, at p. 738):

"There is, I think, neither principle nor any authority binding this House to support the view that the mere claim by a government or an ambassador, or by one of his servants, would be sufficient to bar the jurisdiction of the court, except in such cases as ships of war or other notoriously public vessels, or other public property belonging to the state."

In *Haile Selassie v. Cable and Wireless, Ltd.* (4), the plaintiff sued for a debt, and a foreign government claimed that it was entitled to the debt, and claimed to have the action stayed, but the foreign government took no part in the

proceedings and the Court of Appeal in those circumstances refused to stay the action accepting the view expressed by LORD MAUGHAM in *The Cristina* case (1) that a mere claim by the foreign government is not enough. In *The Arantzazu Mendi* (5), the writ was in rem claiming possession of the vessel. A foreign government entered appearance under protest and claimed to set aside the writ on the ground that the action impleaded a foreign sovereign state. In the Court of Appeal it was held that the foreign government was entitled neither to the ownership nor possession of the ship, but that it had proved that it had requisitioned the ship, and that the master and owners had recognised such requisition. The court held that this showed a sufficient interest in the foreign government to involve that it was impleaded by the writ, and, accordingly, the writ was set aside. GODDARD, L.J., expressed the view on the authority of *The Cristina* (1) and *Haile Selassie* (4) cases that, where a claim for immunity is made by a foreign sovereign, it is not enough that his claim should be a bare assertion of right or a mere claim and the lord justice continued ([1938] 4 All E.R. at p. 279):

"If the court can see that the question that arises is a question of competing rights, as in this case here, if it is the fact that the owner of the ship admittedly has purported to give to the foreign sovereign who is claiming immunity, rights over the ship—it may be that those rights are good or it may be they are bad, that is just what we cannot try—but, if he purports to give rights over his ship, then there is more than a mere claim, and evidence before the court on which it can be shown that the question which is to be decided in the case is one of competing rights, and it appears to me that the principle of immunity applies."

In the House of Lords, the view was taken that the foreign government had proved that it was in possession of the vessel and the case, therefore, was similar to that of *The Cristina* (1).

In the *Dollfus Mieg* case (2), the plaintiffs claimed from the Bank of England sixty-four gold bars which the bank held as bailee. Certain foreign governments sought to stay the action on the ground that they were the owners of the bars. The action was stayed as to fifty-one bars, it having been discovered after the hearing in the court of first instance that the bank had inadvertently parted with thirteen of the bars. Their Lordships think it clear that the House of Lords considered the evidence relating to the claim of the foreign governments, since most of the learned Lords expressed the view that there should have been more adequate discovery which would only have been important to enable the court to ascertain all the relevant facts.

In their Lordships' opinion, the view of SCRUTTON, L.J., that a mere assertion of a claim by a foreign government to property the subject of an action compels the court to stay the action and decline jurisdiction is against the weight of authority, and cannot be supported in principle. In their Lordships' opinion, a foreign government claiming that its interest in property will be affected by the judgment in an action to which it is not a party, is not bound as a condition of obtaining immunity to prove its title to the interest claimed, but it must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective. The court must be satisfied that conflicting rights have to be decided in relation to the foreign government's claim. When the court reaches that point it must decline to decide the rights and must stay the action, but it ought not to stay the action before that point is reached. It remains to apply this principle to the facts of the present case.

The steamship *Tasikmalaja* was registered on the Panamanian registry. It was acquired by the appellants in the year 1950, and from 1951 onwards was chartered by the appellants to the government of Indonesia under successive charterparties, the last of which was due to expire on June 30, 1952, three days after the issue of the writ. The vessel was used by the government of Indonesia

for carrying troops, so that the question raised in some of the cases whether a right of immunity can be claimed for a ship used by the foreign government solely for commercial purposes does not arise. The only charterparty produced in evidence is that of Jan. 1, 1951, which was made by Frank Starr as lawful attorney of the appellants and, under it, possession of the vessel did not pass to the government. The last charterparty due to expire on June 30, 1952, has not been produced, and there is no evidence that, under it, the government of Indonesia acquired possession of the vessel, nor, indeed, has it been so claimed in argument. The power of attorney in favour of Starr is dated Nov. 8, 1950, and constitutes Starr the attorney of the appellants to sell the steamship Tasikmalaja for any sum of money or other consideration as to him may seem most advantageous and beneficial to the appellants. The power of attorney was signed on behalf of the appellants by K. H. Hemady, as president and general manager. There is some evidence that the power was void under the law of the Philippine Islands, but this matter has not been fully investigated, and their Lordships will assume that the power was valid. On Jan. 10, 1952, Hemady wrote to Major Pamoe saying that if the government bought the Tasikmalaja there should be no deduction from \$450,000 in respect of money paid to Starr on account. In his reply of Jan. 17, 1952, Major Pamoe agreed to act as requested. At the end of January, 1952, Major Pamoe wrote to Hemady a letter in which he said:

"We have chartered the Tasik for six months more until June this year with option to buy the vessel. The purchase price of the vessel will be applied to the charter price of the six months of last year. This contract is settled down already and we agreed. We can and dared to do this because Mr. Starr has the full power of attorney from your company to charter or to purchase the vessel."

After receipt of this letter, on Feb. 6, 1952, Hemady cabled to Major Pamoe:

"We do not agree to deduct any charter money from purchase price Tasikmalaja. Starr inquired and we answered negatively."

This cable was confirmed by letter to Major Pamoe the next day, and on the same day, Feb. 7, Hemady wrote to Starr setting out a copy of the cable sent to Major Pamoe. In spite of these instructions and in complete disregard of them, Major Pamoe and Starr entered into an agreement to sell the ship, and it has not been denied that moneys due under the charterparty were deducted from the purchase money. It appears from the printed Case of the government of Indonesia that the contract for sale was entered into on Feb. 13, 1952, the contract price being United States \$70,000 and that the sale was completed by bill of sale dated Mar. 17, 1952. The bill of sale is not in evidence, but, presumably, further particulars of the transaction were contained in the evidence of the respondents which has been struck out. As from the date of the alleged sale, the government of Indonesia have claimed to be owners of the vessel, and have taken various steps to implement their title, including registering the vessel on the Indonesian register, and changing the flag from Panamanian to Indonesian. On Mar. 13, 1952, the vessel was brought by the government of Indonesia to Hong Kong and was delivered for repair to the Hong Kong & Whampoa Dock Co., Ltd., in whose dock the ship was at the time of the issue of the writ. The said government claims to have paid large sums to the dock company for work done on the vessel. The ship, however, has always remained in the legal possession of the appellants through the acting captain, Jose Silos. On June 30, 1952, the consul general for the government of Indonesia at Hong Kong by letter purported to dismiss Silos, but Silos, in his answer of the same day, refused to accept such dismissal. Their Lordships are satisfied that Silos, as acting captain of the Tasikmalaja, has always remained, as he claims in his affidavit, the servant of the appellants, and that legal possession of the vessel never passed to the

government of Indonesia. This, indeed, was not disputed in the argument before their Lordships' Board.

The result appears to be this. The charterparty under which the government of Indonesia had control of the vessel, expired on June 30, 1952, at the latest, even if it had not been previously repudiated. At the date when immunity was claimed by the government of Indonesia, namely, July 9, 1952, which is the date on which the validity of the claim first fell to be considered, the government of Indonesia had no interest whatever in the vessel except such as arose under the alleged purchase of Feb. 13, 1952. The negotiations for the sale and purchase of the ship were conducted between Starr and Major Pamoe. Starr was purporting to act as agent of the appellants as sellers, and Major Pamoe as agent for the government of Indonesia as purchasers. In fact, Starr had no authority to sell the ship on the terms specified in the agreement of sale, and Major Pamoe was fully aware that he had no such authority. However wide the powers originally given to Starr may have been, it is clear that they could be withdrawn or modified by the appellants. The cable and letters of Feb. 6 and Feb. 7, 1952, from Hemady to Starr and Major Pamoe make it clear that the vessel could only be sold on certain conditions, and Starr and Major Pamoe subsequently purported to agree to a sale of the ship in complete disregard of these conditions. The evidence in the record of their title to the ship set up by the government of Indonesia appears, therefore, to their Lordships to be manifestly defective, since, even if Major Pamoe did not disclose the position to his employers, the government of Indonesia, yet he was the agent of that government in carrying out the purchase, and his knowledge must be attributed to the government. For these reasons, their Lordships think that the government of Indonesia have not established that they possess such an interest in the steamship Tasikmalaja as would show that they were impleaded. Accordingly, there is no ground for setting the writ aside.

Their Lordships will, therefore, humbly advise Her Majesty that this appeal be allowed, that the judgment of the Appeal Court in Hong Kong dated Dec. 13, 1952, be set aside, including the declaration that the judgment of REECE, J., dated Oct. 24, 1952, was null and void for want of jurisdiction, and that the matter be remitted to the Appeal Court to consider the other questions raised in the appeal. All costs incurred in the courts in Hong Kong shall be dealt with by the Appeal Court. The respondents must pay the costs of the appeal to their Lordships' Board.

Appeal allowed; Case remitted.

Solicitors: *Reid Shurman & Co.* (for the appellants); *Markby, Stewart & Wadesons* (for the respondents).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

SEVERNE (INSPECTOR OF TAXES) v. DADSWELL.
INLAND REVENUE COMMISSIONERS v. DADSWELL.

[CHANCERY DIVISION (Roxburgh, J.), July 21, 22, 30, 1954.]

Income Tax—Profits—Computation of profits—Discontinuance of trade—Payments for trading not finally settled—Subsequent gratuitous payments received—Re-opening of trading accounts—Income Tax Act, 1918 (c. 40), sched. D.

Excess Profits Tax—Computation of profits—Discontinuance of trade—Payments for trading not finally settled—Subsequent gratuitous payments received—Re-opening of trading accounts.

The taxpayer milled flour from 1941 to 1945 under a licence from the Ministry of Food, and, as part of a scheme to compensate for the uneconomic price of wheat, received rebates on flour he milled in the form of deductions from invoiced prices of imported wheat sold to him by the Ministry and periodic cash payments by the Ministry in respect of home-grown wheat purchased by him. These rebates were taken into account in the computation of the taxpayer's profits for tax purposes. Not having been a miller at the outbreak of war, the taxpayer was not eligible for membership of the British Millers Mutual Pool, Ltd., and was not entitled to the benefit of an agreement made by that company with the Ministry, under which its members were to receive compensation for losses in addition to the rebates. In 1942 the taxpayer received documents from the Ministry with a covering letter referring to "remuneration" to which he might become entitled as a flour miller and later in that year the Ministry told his accountant to keep his accounts on lines similar to those for the remuneration agreement form used by members of the company. On various occasions the Ministry stated that the general basis on which non-members of the company should be "remunerated" was being considered. Four years after the taxpayer had ceased to trade, the Ministry paid him £3,289 as "remuneration".

HELD: if, at the discontinuance of a trade, payment for work already done has not been finally settled, and subsequently a payment is made gratuitously and not under any legal claim, the trading account can be re-opened so as to let in this payment at the figure actually received, it being analogous to a trade debt; on the facts the payments to the taxpayer had not been finally settled when he ceased to trade and the further payment, therefore, was made in respect of the trade and was required to be taken into account in the computation of profits for income tax and excess profits tax purposes.

Isaac Holden & Sons, Ltd. v. Inland Revenue Comrs. (1924) (12 Tax Cas. 768), applied.

AS TO RE-OPENING ACCOUNTS IN RESPECT OF LATER TRADE RECEIPTS, see HALSBURY, Hailsham Edn., Vol. 17, p. 120, para. 226; and FOR CASES, as regards EXCESS PROFITS TAX, see DIGEST Supps., Vol. 39, title Revenue, Part XI.

Cases referred to:

- (1) *Isaac Holden & Sons, Ltd. v. Inland Revenue Comrs.*, (1924), 12 Tax Cas. 768; Digest Supp.
- (2) *Inland Revenue Comrs. v. Northern Aluminium Co., Ltd.*, [1946] 1 All E.R. 546; 175 L.T. 237; *affd.* H.L., [1947] 1 All E.R. 608; [1947] L.J.R. 685; 176 L.T. 486; 2nd Digest Supp.
- (3) *Gardner, Mountain & d'Ambrumenil, Ltd. v. Inland Revenue Comrs.*, [1947] 1 All E.R. 650; 177 L.T. 16; 29 Tax Cas. 69; 2nd Digest Supp.
- (4) *Spencer & Co. v. Inland Revenue*, 1950 S.C. 345; 32 Tax Cas. 111; 2nd Digest Supp.

- (5) *Newcastle Breweries, Ltd. v. Inland Revenue Comrs.*, (1926), 95 L.J.K.B. 336; 135 L.T. 618; *affd.* H.L., (1927), 96 L.J.K.B. 735; 137 L.T. 426; 12 Tax Cas. 927; Digest Supp.
- (6) *Try, Ltd. v. Johnson*, [1946] 1 All E.R. 532; 174 L.T. 399; 27 Tax Cas. 167; 2nd Digest Supp.
- (7) *British Mexican Petroleum Co., Ltd. v. Jackson, British Mexican Petroleum Co., Ltd. v. Inland Revenue Comrs.*, (1932), 16 Tax Cas. 570; Digest Supp.

CASES STATED by the Special Commissioners of Income Tax.

The respondent taxpayer appealed against (i) additional assessments to income tax under sched. D to the Income Tax Act, 1918, for 1944-45 (£3,289) and 1945-46 (£404); and (ii) assessments to excess profits tax in the following accounting periods: the years ending on Dec. 31, 1942 (£655), 1943 (£733) and 1944 (£1,059) and the nine months ending on Sept. 30, 1945 (£86), when he had ceased to trade as a flour miller. He contended that certain sums paid to him by the Ministry of Food in 1949 in respect of his flour milling activities, approximately four years after he had discontinued his trade of flour milling, were not profits of that trade and were not properly to be included in the computation of his liability to income tax or excess profits tax on the ground: (i) that they were not receipts of the trade or of any trade but were *ex gratia* payments; (ii) that, even if they were receipts of a trade, they could not be assessed on the taxpayer because they were received four years after he ceased to trade on Sept. 30, 1945, and if there was a debt arising to the trade at the date of cessation its value at that date was nil. The Crown contended: (i) that rebates received by the taxpayer from the Ministry during the period of trading were interim payments, that there was an understanding that there would be a final accounting and that the final settlement had been left until after the emergency; (ii) that the sums in question were received in respect of the taxpayer's trade or business as flour miller being by way of a final payment in respect of milling costs; and (iii) that, though not ascertained and paid until 1949, they were a receipt arising from the trade or business referable to the period when the taxpayer was trading. The commissioners found that the taxpayer had no right to receive any payment other than the rebates to which he was entitled as a licensed miller, and that the sums were *ex gratia* payments and not trading receipts in his hands. They therefore allowed the appeals and discharged the assessments. The Crown appealed.

Heyworth Talbot, Q.C., and Sir Reginald Hills for the Crown.

R. E. Borneman, Q.C., and C. N. Beattie for the taxpayer.

Cur. adv. vult.

July 30. **ROXBURGH, J.**, read the following judgment: The taxpayer had been trained as a flour miller, but had ceased to mill flour in 1929. In 1941 he wished to start milling flour again and, as the whole flour milling industry had come under the control of the Ministry of Food at the outbreak of war, he applied to the Ministry for a licence to mill flour, and the Ministry granted him a licence on Oct. 8, 1941. As a licensed miller, he was entitled to receive rebates based on the flour he milled, and these rebates provided him with a profit. The rebates took the form of a deduction from the invoiced prices of imported wheat sold to him by the Ministry, and periodic cash payments to him by the Ministry in respect of home-grown wheat purchased by him. The purpose of the rebates was to compensate the miller for the price he was required to pay for his wheat, such price being uneconomic in relation to the control price at which the miller was required to sell flour.

At the beginning of the war the Ministry had granted licences to all millers who were at that time engaged in milling flour. All these millers (the "pool millers") combined to form a company called the British Millers Mutual Pool, Ltd., to enable terms of remuneration to be agreed between themselves and the

Ministry. On Nov. 10, 1941, this company made an agreement (the "remuneration agreement") with the Minister of Food, whereby any pool miller who suffered a loss under the system of rebates was given a right to receive compensation. As the taxpayer had not been a miller at the outbreak of war, he was not a member of this company, nor could he become a pool miller so as to be entitled to benefit under the remuneration agreement. There were a few other millers in a similar position, and they were known as non-pool millers. There was no statutory enactment or agreement with the Ministry whereby non-pool millers were to receive anything more than the rebates.

In 1942 the taxpayer, who knew nothing about the way in which pool millers were remunerated, received a number of forms and documents from the Ministry relating to the payments for flour milling. The covering letter, sent with the forms, dated Mar. 3, 1942, made use of the expression "any remuneration to which you may become entitled as a flour miller." He sent these forms to his accountant, Mr. Quaife, a partner in the firm of Messrs. A. E. Quaife and Son, of Tunbridge Wells. On Oct. 19, 1942, Mr. Quaife wrote to the Ministry to find out what information would be required by the Ministry so as to enable him to keep the appropriate records on behalf of the taxpayer. On Oct. 27, 1942, Mr. Quaife was told by the Ministry that, although the taxpayer was not entitled to become a party to the pool millers' remuneration agreement, the accounts which he would in all probability be required to furnish should be prepared on lines similar to the remuneration agreement forms used by the pool millers. On Dec. 16, 1943, Mr. Quaife wrote to the Ministry to find out when the taxpayer was likely to be asked to submit accounts and from what date should they be prepared. He also asked whether the taxpayer would have to comply with any other formalities. On Dec. 28, 1943, Mr. Quaife was informed by the Ministry that the general basis on which millers who had commenced milling during the period of control would be "remunerated" was at that time under consideration and that the taxpayer would be advised when a decision was reached and would be instructed in regard to the accounts which he might be called on to furnish. On Oct. 27, 1944, and May 11, 1945, Mr. Quaife received from the Ministry, in answer to his inquiries, information that no decision had been reached but that the matter was still under consideration.

The taxpayer ceased to trade on Sept. 30, 1945, when his business was taken over by James Hodson (Millers), Ltd. At that time neither he nor Mr. Quaife expected that any payment would be made beyond the rebates. There was never any entry in the taxpayer's balance sheets in anticipation of any such payment. On Sept. 6, 1946, Mr. Quaife was requested by the Ministry to submit accounts in respect of the taxpayer's flour milling activities, because the "remuneration" to be allotted to millers who had commenced milling since the beginning of the control period was under consideration. Between then and May, 1948, there was intermittent correspondence.

By May, 1948, the taxpayer, although he still had no real expectation of receiving any further "remuneration" (and Mr. Quaife was sceptical on the matter) realised that neither of them was sufficiently experienced to deal with the Ministry's forms without some assistance, and consulted Mr. Roberts, a partner in the firm of Messrs. Brown, Peet and Tilly, chartered accountants, who specialised in accounts connected with the flour milling industry. Mr. Roberts proceeded to get out figures in respect of the taxpayer's flour milling activities on the same basis as if he had been a pool miller. He did this because, although he did not regard him as having any right whatever to receive any remuneration, he knew from his previous dealings with the finance department of the Ministry that the Treasury had consented in 1947 to entertain claims for additional payments to non-pool millers. When the Ministry received the forms and accounts in 1949 showing the losses on trading and allowances for salary and remuneration sustained by the taxpayer and the company which succeeded him in respect of

his flour milling activities, the Ministry made two payments, the first on May 26, 1949, of £2,000, and the second on Dec. 13, 1949, of £3,546, representing a total sum of £5,546, of which (on apportionment) the taxpayer received the sum of £3,289. On July 16, 1953, the Special Commissioners held that the taxpayer had no right to receive any payment other than the rebates to which he was entitled as a licensed miller, and that the aforesaid sums of money which he received in 1949 were ex gratia payments and not trading receipts in his hands. Hence this appeal.

It is common ground that when the taxpayer ceased to trade on Sept. 30, 1945, he had no legal or equitable right to any further payment from the Ministry, and that he had no asset which could then have been properly entered in a final account as a book debt. At first I was disposed to think that a man who had made out a final account including all items properly then to be described as book debts was not liable to have his account re-opened after retirement from business so as to let in a gratuitous payment received long afterwards. A study of the cases under the able guidance of counsel has convinced me, however, that the relevant question is not whether at the date of retirement there was any outstanding book debt or any contingent or deferred legal or equitable right, but whether any work had been done in the course of trade in respect of which the reward had not been finally settled, or, in other words, anything outstanding in the nature of, or analogous to, a book debt.

The first case to which I was referred was *Isaac Holden & Sons, Ltd. v. Inland Revenue Comrs.* (1). In that case the headnote is as follows (12 Tax Cas. at p. 768):

"The appellant company was a member of the Wool Combing Employers Federation who were engaged in combing wool on commission for the government, during the period of control of the wool trade, on the basis of a tariff fixed in 1917. In July, 1918, following negotiations between the federation and the government, a provisional increase of ten per cent. on the tariff, to operate as from Jan. 1, 1918, and to be subject to adjustment either up or down on completion of the examination of accounts to Dec. 31, 1918, was agreed, and in July, 1919, a total increase of twenty per cent., to include the first increase, was awarded as a final settlement. In its accounts for the year ended June 30, 1918, the company charged the full costs for work done in the period, but it included for that work only the amount of commission which had been received under the tariff as increased by the agreement of July, 1918. Held, that the total amount of commission received for the year ended June 30, 1918, under the terms of the final settlement arose from the company's trade in that year, and must be included in arriving at the profits of that period for the purpose of computing the company's liability to excess profits duty."

This case is not entirely satisfactory because ROWLATT, J., appears to have overlooked the fact that neither the first nor the second percentage increase was legally exigible at the close of the accounting period, and, as the company had given credit in the accounts for the first, there seemed to be no reason why it should not give credit for the second as well. Though there may have been some misapprehension, however, the ratio decidendi is clear and proceeds on another basis (*ibid.*, at p. 772):

"These woolcombers had done a certain amount of work by June, 1918, and they were paid the 1917 tariff plus ten per cent. up to June, 1918. It was uncertain whether they ever would receive more at that time: they certainly had no right to demand more. It was uncertain that they ever would receive more, and it might be that they would receive less the next half year. That is quite clear, but in the result what happened? They were paid twenty per cent., that is to say ten per cent. more, in respect of the whole of 1918; pound for pound of their work they earned another ten

per cent. beyond what had been paid them in June, 1918; if they did more work they got more; if they did less work they got less. It was paid to them, as the Solicitor-General says, in respect of work in 1918, including the half year. Looking at it merely on those facts, what have I to say? Did not that arise from the work that they did in their trade in the first half of 1918? If not, what did it arise from? Could it be said that it arose at all from the charity of the government? I cannot see what it arose from, unless it arose from the trade in the first half year . . . I cannot see any sensible way of looking at the facts other than that which leads me to say that these profits arose from the business in the accounting period, and, therefore, that the decision of the commissioners was right. As the fact which shows that the books were wrong has occurred after they have been closed, I do not see any difficulty in re-opening them and putting them right."

This decision, and the reasoning on which it was based, have been accepted and explained in a number of later cases of high authority. Thus, in *Inland Revenue Comrs. v. Northern Aluminium Co., Ltd.* (2), LORD GREENE, M.R., in the Court of Appeal said ([1946] 1 All E.R. at p. 549):

"There are well-known cases under the legislation in the last war which dealt with the question of the period to which amounts received at a later date should be attributed. The cases were cases in which, for example, some time after the expiration of an accounting period increases of price were granted, sometimes voluntarily, in respect of goods sold, or services rendered during the accounting period. The *Woolcombers'* case (1) is a well-known example. Broadly speaking, it was held in those cases that the subsequent receipt of an addition to the price was referable to the transaction under which the goods were sold. The price for which the goods were sold in the accounting period was so much, and that price later on was increased by virtue of some understanding, or something which might fall short of a contractual obligation. There the increased price was held to be referable to the original transaction, and, therefore, the accounts must be re-opened in order to bring that increase into the profits of the company in the accounting period."

In *Gardner, Mountain & d'Ambrumenil, Ltd. v. Inland Revenue Comrs.* (3) VISCOUNT SIMON referred to *Isaac Holden & Sons, Ltd. v. Inland Revenue Comrs.* (1) and explained it in the following words ([1947] 1 All E.R. at p. 654):

"In other words, the taxpayer was treated as earning, by his work in that year, all the profits arising from the business of the year, even though there was no legal right to part of them until the agreement was afterwards made. It will be observed that the Crown's contention in the present case does not go so far as the contention which prevailed in the *Woolcombers'* case (1), for in the latter there was no legal right, at the time when the work was done, to receive the amount which was ultimately paid. Here the appellant company had a legal right to be paid in futuro."

Counsel for the taxpayer relied on the summary of the case of *Isaac Holden* (1) given by the Lord President (LORD COOPER) in the Scottish case of *Spencer & Co. v. Inland Revenue* (4), where he said (32 Tax Cas. at p. 116):

"In the case of credit items, such cases as *Newcastle Breweries* (5) and *Isaac Holden & Sons* (1) indicate that, if the title to the sum arose in one accounting period, the fact that the precise amount of the credit was not fixed until later will not prevent the eventual receipt being credited in the earlier year."

If by "title" the Lord President meant "legal title" (and I certainly doubt it), then it is not an accurate summary of the effect of *Isaac Holden's* case (1). I much prefer that given by LORD GREENE, M.R., in *Try, Ltd. v. Johnson* (6) ([1946] 1 All E.R. at p. 542):

"That was a case where money was payable under a contract. The

actual amount payable for the work done under the contract in respect of a particular year was only finally settled some time after that year had expired. But there again it was something which was quite clearly referable to a trading contract. All that had happened was that the original amount was not left untouched, but was subsequently increased by agreement. It seems to me that this again is a case which can fairly be regarded as analogous to a trade debt. The circumstance that the amount of remuneration was only fixed at a later date does not alter the fact that the remuneration was in respect of trading operations of the earlier year."

Or the explanation given by LORD THANKERTON in *British Mexican Petroleum Co., Ltd. v. Inland Revenue Comrs.* (7) (16 Tax Cas. at p. 591):

"The remaining four cases related to the final adjustment of the amount at which receipts or liabilities had been entered in the earlier trading account, when the amount had not been finally ascertained or admitted between the trader and his debtor or creditor. In *Isaac Holden & Sons, Ltd.* (1), the amount of the payment for woolcombing, originally entered for excess profits duty purposes, was only a provisional settlement with the government, the final settlement not being made until a year later."

Leading counsel for the taxpayer was constrained by pressure of authority to admit that sometimes a receipt might be related back to the year in which it was earned, although not then received or finalised and although not then receivable under any contract or other legal or equitable title. This could only be done, in his submission, "when the amount actually received or agreed (or the formula agreed for quantification) before the discontinuance of the trade is not the final amount (or final formula for quantification of the amount) referable to the item concerned but is only provisional and may fall to be increased by a further amount to which a legal right may subsequently be established." There is no authority to support this proposition and the relevance of the subsequent establishment of a legal right I find it hard to discover. Once circumstances arise which allow the re-opening of a final account, it seems to me immaterial whether the further payment is gratuitous or not, provided that it relates to work done before the discontinuance of the trade.

Junior counsel for the taxpayer did not lend his aid to counsel's proposition. He submitted another to the effect that the final account could only be re-opened "where at the end of the accounting period there is in existence a contract under which some further payment may fall to be made on the doing of an act or the occurrence of an event." This would appear to involve the necessity of a contingent right (I distrust the phrase "inchoate right") and so to limit the power of re-opening an account would be to defy the whole trend of authority. Authority in my view establishes the proposition that, if it can be said at the moment of discontinuance that the payment for some work already done has not been finally settled, even though there is no legal claim for any more, then, if a further payment is made afterwards, even though it is wholly gratuitous, the account can be re-opened so as to let in what is analogous to a trade debt at the figure actually received. If, on the other hand, the item is not analogous to a trade debt, or if there has been a final settlement, the account has been finally closed.

This must be a question of fact. No doubt in the present case the taxpayer and Mr. Quaife were pessimists. Mr. Roberts (whose special knowledge was greater) was less pessimistic. No doubt too, as is usual in matters such as this, the wheels of government grind slowly and the payment was long deferred. On Dec. 28, 1943, Mr. Quaife was informed by the Ministry that the remuneration of millers who had begun to mill during the period of control was under consideration and on Oct. 27, 1944, and again on May 11, 1945, that it was still under consideration and that no decision had been reached. In those circumstances I have no hesitation in holding that, for the work in question, payment had not been finally settled on Sept. 30, 1945, when the taxpayer ceased to trade.

Accordingly, I allow the appeal with costs. The £3,289 must be brought into the re-opened accounts.

[The second appeal relating to excess profits tax, which, it was conceded, was required to be determined on income tax principles, was also allowed with costs.]

Appeals allowed.

Solicitors: *Solicitor of Inland Revenue; Bridgman & Co.* (for the taxpayer).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

B SHAVE v. J. W. LEES (BREWERS), LTD., AND ANOTHER.

[COURT OF APPEAL (Lord Goddard, C.J., Jenkins and Morris, L.JJ.), October 7, 1954.]

County Court—Appeal—Damages—Personal injuries—Excessive damages—No right of appeal in absence of error of law.

In the absence of some error of law or some matter wrongly taken into account in their assessment, damages for personal injuries, pain and suffering awarded by a county court are a question of fact and cannot be altered on appeal merely because they are extravagant.

Henderson v. Clifford Watmough & Co. (1939) (161 L.T. 233), applied.

Appeal dismissed.

EDITORIAL NOTE. It is interesting to compare this decision with that in *Bocock v. Enfield Rolling Mills* ([1954] 3 All E.R. 94). There the Court of Appeal held that where the amount of damages had been determined by a jury an appellate court would not interfere unless the verdict was out of all proportion to the facts. A verdict of a jury is a finding of fact. In the present case, where the appeal is from a county court, the award of damages by that court is regarded as a question of fact; but the view taken by the Court of Appeal is that the appellate court may not intervene even though the award is inadequate or extravagant, and the question what the position might be if the award were by a jury and out of all proportion to the facts is not raised; in general an appeal from a county court, however, lies only on a point of law.

AS TO APPEALS FROM COUNTY COURTS LYING ONLY ON POINTS OF LAW, see HALSBURY, Simonds Edn., Vol. 9, p. 323, para. 784; and FOR CASES, see DIGEST, Vol. 13, pp. 527-532, Nos. 787-835.

Case referred to:

(1) *Henderson v. Watmough (Clifford) & Co.*, (1939), 161 L.T. 233; Digest Supp.

APPEAL by the first defendants against an order dated June 11, 1954, made by His Honour JUDGE EMLYN-JONES in Warrington County Court in an action for damages for negligence and nuisance commenced in the High Court and remitted to the county court.

The plaintiff was a pillion passenger on a motor cycle owned and driven by the second defendant which at 10.15 p.m. on July 31, 1952, came into collision with the rear of a lorry and trailer managed and controlled by the servants of the first defendants on the Shotwick-Helsby arterial road in Cheshire. She suffered from concussion, from a laceration of the back of the scalp and from two fractures of the lower jaw (she had to have her teeth wired) as a result of which she was unable to open her mouth more than ninety per cent. She was in hospital for three weeks. The county court judge found that at the time of the accident there was no rear light on the trailer of the lorry owing to the negligence of the servants of the first defendants and that the accident was attributable to that negligence

without contributory negligence by the second defendant. He gave judgment for the plaintiff and for the second defendant against the first defendants and awarded the plaintiff £750 damages. The first defendants appealed.

F. W. Beney, Q.C., and G. Heilpern for the first defendants.

G. N. England for the plaintiff.

A. A. Edmondson for the second defendant.

LORD GODDARD, C.J.: This is an appeal from an order of His Honour JUDGE EMLYN-JONES, who, sitting at the Warrington County Court, tried this action as a remitted action. Where a case is remitted to the county court it becomes for all purposes a county court action, and, although the parties may save something in costs, the grounds on which they can appeal are limited. I can understand why the defendants are not altogether satisfied with the result of this case, but there have been findings of fact by the learned judge which cannot be challenged in this court. [His LORDSHIP held that the county court judge was justified in finding the driver of the lorry and trailer guilty of negligence and in absolving the second defendant, the driver of the motor cycle, from negligence, these being findings of fact which could not be disturbed, and continued:] The last point is one on which—although we have not heard the other side—it seems to me that there would be a good deal to be said but for a certain decision. The learned judge awarded £750 damages. According to the medical evidence the plaintiff was in hospital three weeks, suffering from some concussion. The only other damage she suffered was an injury to her jaw, which results in her being able to open her mouth not more than ninety per cent. The agreed medical report states that she suffers no difficulties from that or anything of that sort. It seems to me that the sum of £750 was a wholly excessive amount. I think it is a pity that the learned judge, probably because he had sympathy with an apparently good-looking young woman, should give such excessive damages as that. In my opinion, if this case had been tried in the High Court, the judge would probably have given £100, or £150 at the outside, and I think that would have been ample. I do not think counsel could have persuaded me, on these very clear medical reports, that there was any ground for suggesting that this was a serious case, or that this girl would not have been well compensated by the sum I have mentioned. Unfortunately, in *Henderson v. Clifford Watmough & Co.* (1) this court decided that, in these cases of excessive or inadequate damages, unless it can be shown that the judge has gone wrong on a point of law, the question of what somebody should receive as compensation for injuries, pain and suffering is purely a question of fact. Counsel for the first defendants called the attention of the court to this case, which he admitted put a difficulty in his way. He could not get over that difficulty. In *Henderson v. Clifford Watmough & Co.* (1) I think the court would have got over the difficulty if it could, because it is obvious from the report that the court took the view that the damages which had been awarded to the injured plaintiff in that action were inadequate. In this case it is the other way round. The damages awarded to the plaintiff are extravagant, but as the court has said it cannot interfere in the case of inadequate damages because that is a mere question of fact, it follows that we cannot interfere because the damages are extravagant. If it could have been shown that the judge took into account something by mistake or some matter which he ought not to have taken into account, or of which there was no evidence, that would be another matter, but here he says—

“The medical reports speak for themselves . . . I regard it as a very serious accident. I order damages of £750.”

However much we regret it, we cannot interfere. Therefore, this judgment must stand and the appeal must be dismissed with costs.

JENKINS, L.J.: I agree.

MORRIS, L.J.: I agree.

Appeal dismissed.

Solicitors: *Gibson & Weldon*, agents for *John Whittle, Robinson & Bailey*, Manchester (for the first defendants); *Robert Davies & Co.*, Warrington (for the plaintiff); *Broune, Sturgess & Wheeler*, Warrington (for the second defendant).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

R. v. NUNEATON JUSTICES, *Ex parte* PARKER.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Parker, JJ.), October 13, 1954.]

Mandamus—Justices—To issue summons for careless driving—Discretion of prosecutor over offence to be charged—Road Traffic Act, 1930 (c. 43), s. 11, s. 12.

Criminal Law—Offence—Discretion of prosecutor over offence to be charged.

On an application by an inspector of the Warwickshire Constabulary to the Nuneaton justices for the issue of a summons against a respondent for careless driving under the Road Traffic Act, 1930, s. 12, the chairman of the justices informed the applicant that he would not issue a summons for careless driving and that an information for dangerous driving, under s. 11, would have to be laid. On a motion for mandamus,

HELD: the discretion as to what charge should be preferred in a particular case must be left to the prosecutor and, consequently, an order of mandamus should issue.

Dicta of DEVLIN, J., in *Re Beresford* (1952) (36 Cr. App. Rep. 1), explained.

FOR THE ROAD TRAFFIC ACT, 1930, s. 11, s. 12, see HALSBURY'S STATUTES, Second Edn., Vol. 24, pp. 586, 588.

Case referred to:

(1) *Re Beresford*, (1952), 36 Cr. App. Rep. 1; 3rd Digest Supp.

MOTION for an order of mandamus to compel the Nuneaton justices to issue a summons for careless driving. On Apr. 24, 1954, the applicant, Edward Parker, an inspector of police of the Warwickshire Constabulary made an application in writing to the Nuneaton justices for the issue of a summons for careless driving contrary to the Road Traffic Act, 1930, s. 12, against a certain Frank Bostock. On Apr. 26, the applicant having gone into the justices' retiring room for his application to be heard, the chairman of the magistrates stated that he would not grant a summons for careless driving but that the applicant was to lay an information for dangerous driving under s. 11. The applicant alleged, by his affidavit in support, that the chairman did not know the circumstances of the case nor inquire about them nor allow the applicant to relate them. The chairman deposed in his affidavit in reply that he awaited an explanation why the summons was for an offence under s. 12 of the Road Traffic Act, 1930, and that the applicant said that it was most unlikely that a conviction would be obtained for an offence against s. 11 but did not explain the facts; the chairman further deposed that he said that as a matter of principle no summons would be issued under s. 12 unless he was satisfied that there could not possibly be a conviction for an offence under s. 11 and that he purported to follow certain dicta of DEVLIN, J., in *Re Beresford* (1).

Paul Wrightson for the applicant.

The respondents did not appear.

LORD GODDARD, C.J.: In this case counsel for the applicant moves for an order of mandamus directed to the Warwick justices sitting at Nuneaton requiring them to issue a summons under their hand and seal against a certain defendant for careless driving, contrary to s. 12 of the Road Traffic Act, 1930. The justices refused because they said that they had a settled practice under which the charge in the first instance, unless apparently there were some other circumstances, should be a dangerous driving charge (under s. 11). It is said that it should be left to the justices to decide under s. 35 of the Road Traffic Act, 1934, when they had heard the case, whether it would be proper to order a summons for careless driving instead of dangerous driving. The chairman of the justices, who has made a very proper affidavit and has been very frank about the matter, has referred to certain remarks made by **DEVLIN, J.**, in the case of *Re Beresford* (1). **DEVLIN, J.**, was there dealing with the question whether it was desirable to charge a defendant with manslaughter where death had taken place, and did express the opinion that, *prima facie*, he ought to be charged with manslaughter. He also said—and on this part of the case he consulted me—that it was not desirable, if no charge of murder or manslaughter had been preferred, to take proceedings until the inquest was finished. Then he said that there was another matter which called for comment. I desire to point out that the learned judge was not giving directions. What he was doing was making a recommendation to the police as to the charges which the police should make. That is one thing, but it is a different thing for the justices to say “We are not going to issue a summons for the lesser offence; you must take out a summons for the more serious offence”. In some cases it is for the Director of Public Prosecutions to decide and in other cases it is for the police to say what charges they will prefer. If it were found that the police were being unduly lenient in not preferring a charge of dangerous driving in cases where the evidence showed that there was dangerous driving, the justices would be quite right to call the attention of the chief constable of the county and, if necessary, the Home Office to it, but I do not think that the justices can have a right to say when a prosecutor comes before them and asks for leave to prefer a charge—“You must prefer the more serious charge”, because that is to a certain extent pre-judging a case.

For these reasons, we think that an order of mandamus must go and that the justices must issue the summons for which the police ask.

LYNSKEY, J.: I agree. I should just like to add that **DEVLIN, J.**, when he made his remarks on the application for leave to enter a *nolle prosequi*, was dealing with the particular case before him, and my experience on circuit has been that those remarks have been to some degree misconstrued and misunderstood. I am quite sure that **DEVLIN, J.**, was not laying down, as I have found it has been thought that he was laying down, that in every case where death occurs as the result of the driving of a motor vehicle, there should be a charge of manslaughter; nor was he laying down that in every case where some driving takes place to which objection can be made the charge must be a charge of dangerous driving. The position, as I understand it, is that it must be left to the prosecution in the first instance to decide what, on the evidence before them, the charge should be. It would certainly, in my view, lead to a grave miscarriage of justice if a man were to be charged with an offence which the evidence before the police would not support. Take the cases of careless driving and dangerous driving. Careless driving is one thing; it is generally dealt with by the justices, and very often, if it is really ordinary careless driving, is admitted by the defendant. If, on the same facts, he is charged with dangerous driving, one has the possibility and, very often, the probability of a trial by quarter sessions and a jury with heavy expense all on evidence which cannot support the charge laid by the prosecution. It must not be thought that it is laid down that in every case where death occurs the charge should be manslaughter, or in

every case where there is some complaint as to driving the charge should be dangerous driving; it is a matter for the prosecution. On the other hand, the offence of dangerous driving or reckless driving is a very serious one, and the police ought always, in my view, where the facts support it, to bring the more serious charge rather than the lighter charge of careless driving; but they are not bound to bring the more serious charge where the evidence will not support that charge. I only add that I am not differing from DEVLIN, J., but attempting to explain what I think he meant by his recommendations.

PARKER, J.: I agree.

Order of mandamus to issue.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *R. M. Willis*, Warwick (for the applicant).

[*Reported by* MICHAEL MALONEY, Esq., *Barrister-at-Law.*]

JONATHAN CAPE, LTD. v. CONSOLIDATED PRESS, LTD.

[QUEEN'S BENCH DIVISION (Danckwerts, J., sitting as a judge of the Division), October 6, 1954.]

Copyright—Assignment—Partial assignment—Author agreeing to grant to plaintiffs exclusive right to print and publish an original work in volume form—Publication by defendants of same work in weekly magazine—Infringement—Right of plaintiffs to sue alone—Copyright Act, 1911 (c. 46), s. 5 (2), (3).

By an agreement in writing, dated Apr. 16, 1951, and made between an author, of the one part, and the plaintiffs of the other part, the author agreed to grant to the plaintiffs, their successors and assigns "the exclusive right to print and publish an original work, or any part or abridgment thereof, provisionally entitled 'A Mouse is Born' in volume form", during the legal term of unrestricted copyright throughout a specified area which included Australia. The defendants, without the plaintiffs' consent, published substantially the same work in the issue of "The Australian Women's Weekly" dated July 2, 1952. The publication consisted of a number of sheets of paper fastened together in a paper cover on which the name of the work appeared. In an action for damages for breach of copyright,

HELD: (i) the publication of the work by the defendants was "in volume form" within the meaning of the agreement of Apr. 16, 1951, and was an infringement of the rights conferred on the plaintiffs by the agreement.

(ii) the plaintiffs were entitled, under the Copyright Act, 1911, s. 5 (3), to bring the action without joining the author, because, on the true construction of the agreement, there was a partial assignment of the copyright by the author to the plaintiffs under s. 5 (2) of the Act; and, accordingly, the plaintiffs were entitled to damages.

EDITORIAL NOTE. The word "copyright" is defined in the Copyright Act, 1911, s. 1 (2). 4 HALSBURY'S STATUTES (2nd edn.) 779, and s. 5 (2) of the Act speaks of assigning the copyright. Commonly, therefore, an assignment of copyright expressly assigns "the copyright"; see, e.g., 6 ENCY. FORMS AND PRECEDENTS (3rd edn.) 134, Form 21. Partial assignments of copyright, however, have often been expressed as assigning sole and exclusive rights of printing and publishing works, particularly when limited to particular territories; see, e.g., 6 ENCY. FORMS AND PRECEDENTS (3rd edn.) 135, Form No. 22, which also expressly provides for securing "the copyright" within the territory, which, in that instance, is the U.S.A. "Licences", however, e.g. in relation to serial rights, have included forms of grant of exclusive rights to print and publish, not dissimilar (except as regards 'volume' form) from that considered in this case, where the grant is held to be an effective partial assignment of copyright.

AS TO PARTIAL ASSIGNMENTS OF COPYRIGHT, see HALSBURY, Simonds Edn., Vol. 8, pp. 413-415, paras. 756-758; and FOR CASES, see DIGEST, Vol. 13, p. 195, Nos. 293-298.

Case referred to:

- (1) *British Actors Film Co. v. Glover*, [1918] 1 K.B. 299; 87 L.J.K.B. 689; 118 L.T. 626; 13 Digest 195, 294.

ACTION for infringement of copyright.

The plaintiffs, Jonathan Cape, Ltd., claimed, inter alia, (i) a declaration that the defendants, Consolidated Press, Ltd., had infringed the plaintiffs' copyright in a work entitled "A Mouse is Born" by the publication of the work in the issue dated July 2, 1952, of a periodical entitled "The Australian Women's Weekly", and (ii) damages for infringement of copyright.

K. E. Shelley, Q.C., and D. Lloyd for the plaintiffs.

L. G. Scarman for the defendants.

DANCKWERTS, J.: I propose to read first a few sections of the Copyright Act, 1911, which provides the basis of any rights in works with which this case is concerned. Section 1 (2) of the Act provides:

"For the purposes of this Act, 'copyright' means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof . . ."

Section 2 (1) provides:

"Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright . . ."

Then there are certain statutory exceptions.

Section 5 of the Act seems to me to be the important one for the purposes of this case. Section 5 (1) first provides that the author of the work shall be the first owner of the copyright. I am, however, concerned more particularly with the provisions which enable other persons to acquire the rights of the owner. Section 5 (2) provides:

"The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations to the United Kingdom or any self-governing dominion or other part of His Majesty's dominions to which this Act extends, and either for the whole term of the copyright or for any part thereof, and may grant any interest in the right by licence, but no such assignment or grant shall be valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by his duly authorised agent."

There then follows a proviso which I need not read, but s. 5 (3) is of importance:

"Where, under any partial assignment of copyright, the assignee becomes entitled to any right comprised in copyright, the assignee as respects the right so assigned, and the assignor as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of the copyright, and the provisions of this Act shall have effect accordingly."

There is no dispute about the facts in the present case, and the matter depends on the result of an agreement dated Apr. 16, 1951, by which Miss Anita Loes, the author of a work entitled "A Mouse is Born", parted with some of her rights to the plaintiffs, Jonathan Cape, Ltd. The question is whether a publication by the defendants of the same work in substance in a weekly paper called "The Australian Women's Weekly", the issue being dated July 2, 1952, infringed the

rights of the plaintiffs under that agreement with Miss Anita Loos. The agreement is made between Miss Anita Loos, who is described as "the author", of the one part, and Jonathan Cape, Ltd., who are described as "the publishers", of the other part. Clause 1 provides:

"The author hereby agrees to grant to the publishers, their successors and assigns, the exclusive right to print and publish an original work, or any part or abridgment thereof, provisionally entitled 'A Mouse is Born' in volume form during the legal term of unrestricted copyright in the English language throughout the British Commonwealth and Empire as constituted at Jan. 1, 1947, and all territories at that date under mandate, also Egypt, but excluding the Dominion of Canada, the rest of the world other than the United States of America, its Dependencies, the Philippine Islands and Canada to be an open market."

Clause 2 provides a warranty in regard to the nature of the work, but I need not concern myself with that. There are provisions for royalties and provisions about the issue of cheaper editions. Then by cl. 12:

"Within the territories covered by this agreement the publishers shall act as the author's agents for the sale of the first serial rights (i.e., publication of instalments in several issues of a newspaper, magazine or periodical prior to publication in volume form) in the said work. If they shall obtain any offer for the sale of such rights they shall forthwith submit the same to the author for approval and in the event of the author accepting any such offer and entering into an agreement in writing for the sale or licence of any such rights the publisher shall be entitled to a commission . . . on the sums received by the author under such agreement."

Clause 13 is also concerned with serial rights:

"Within the territories covered by this agreement, all rights of serialization subsequent to publication in volume form, all broadcasting, television or microphotographic reproduction rights, the right to license publication of extracts or abridgments in other books or in periodicals and the right to perform the said work or any substantial portion thereof by any gramophone record or similar contrivance shall be controlled jointly by the author and the publishers."

Therefore, those clauses are concerned with serial rights in regard to the work, and they indicate that the transfer of rights effected by the agreement is not to include in the terms contained in cl. 1 the rights as regards the publication of the work in serial form.

By cl. 15:

"The publishers shall have entire control of the publication; and all details of the production including choice of materials, design of jacket and other embellishments shall be at their sole discretion."

Clause 17 reads:

"The publishers undertake that the name of the author shall appear in its customary form with due prominence on the title page and on the binding of every copy of the said work issued by the publishers or their agents."

I will read cl. 19 because a different word appears in that clause:

"If, in the opinion of the publishers, any extra editorial work is necessary before the book is ready to be set up in type, and if the author is unable to undertake this work or arrange for it to be done, then the publishers shall be at liberty to employ a competent editor to do the work. Any fee payable to such an editor shall be paid by the author provided always that the author shall approve the choice of such editor and the amount of the fee in question."

In cl. 21 there again appears a word which is not found elsewhere:

"Should the publishers at any time by themselves or anyone acting on their behalf wilfully fail to fulfil or comply with any of the conditions accepted by them in this agreement or should they go into liquidation, other than voluntary liquidation or a members' winding-up, this agreement shall thereupon determine and the author be free to license any other person to print and publish the said work, notwithstanding anything to the contrary contained or implied in any part of this agreement."

The first question is whether the publication by the defendants in their paper or periodical is publication of the work "in volume form". I agree with the contention of counsel for the defendants, that this refers to the material form of the work, which is referred to in s. 1 (2) of the Copyright Act, 1911, "any substantial part thereof in any material form", but I do not think that that carries the matter very much further. In the SHORTER OXFORD ENGLISH DICTIONARY, under the word "volume", the material part of the definition is, I think, that under "I. 2":

"A collection of written or printed sheets bound together so as to form a book . . ."

In the same dictionary, under the word "book" I find:

"A collection of sheets of paper or other substance, blank, written, or printed, fastened together so as to form a material whole . . ."

It seems to me that, whether or not those definitions are to be regarded as really of the highest materiality, the defendants' publication does meet both the definition which I have read of a "volume" and that of a "book". It is a number of sheets which are fastened together so that they form one volume. Except for certain abridgments, it is the whole work which is published in this way, and it seems to me to be immaterial that it is not published in the form of an object with thick cardboard sides and back, but merely has a paper cover. The paper cover contains the title, a fancy picture on the outside, on which is the name of the book or volume, "A Mouse is Born", and a description, "As a complete novel beginning overleaf", and the whole work is there in substance. The real point, in my opinion, is that, in the agreement of Apr. 16, 1951, the distinction is made between the publication of the work as a whole, which is meant, in my view, by the word "volume", and the publication of the work by instalments, which is publication in a serial form and is dealt with by the agreement in a separate way. Therefore, on that point of construction, I feel no doubt whatever that the defendants' publication is a publication of Miss Anita Loos' work in the form of a volume. It is, I think, difficult to differentiate the publication merely by the fact that it is in rather a flimsy material form and of a size which makes it inconvenient to put on a book-shelf. In my judgment, therefore, this publication is within the rights which were given by the description "in volume form" in the agreement of Apr. 16, 1951, and is, therefore, an infringement of the rights conferred on the plaintiffs.

The other point on which it is necessary to reach a conclusion is whether the rights which are given to the plaintiffs by the agreement amount to a partial assignment of the copyright or some other transfer of rights which enables the plaintiffs to sue alone without joining the author of the work. Several possibilities have been put forward, and this depends, in essence, on the provisions of the Copyright Act, 1911, s. 5 (2) and s. 5 (3). Referring to s. 5 (2), which was a new provision of the Act altering the former copyright law, it is plain that the owner of the copyright in any work may assign his rights either wholly or partially, and, of course, subject to territorial limitations. The sub-section, however, also introduced another conception which was apparently of a new kind: the owner of the copyright may grant any interest in the right by licence. It is argued on

behalf of the plaintiffs that, if either of those two things are the result of the agreement to which I have referred, that is sufficient to enable the plaintiffs to bring an action in their own right against the defendants. It is argued, on the other hand, on behalf of the defendants that the agreement of Apr. 16, 1951, does no more than create a licence, which may be a defence to an action for infringement but does not give any right to the owner or grantee of the licence to sue an infringer of the rights of copyright in the work on his own motion.

Here again, I do not feel any real doubt as to the proper construction of the agreement. I have been referred to certain authorities in which the matter is to some extent discussed, but I do not get a great deal of assistance in reaching the proper construction of this agreement from those authorities. Reading the agreement in its ordinary and natural way, however, it is, I think, quite plain that there is transferred and assigned to the plaintiffs by the words "the exclusive right to print and publish an original work, or any part or abridgment thereof, provisionally entitled 'A Mouse is Born' in volume form" what amounts to a partial assignment of the copyright conferred on the author by the Copyright Act, 1911, s. 5 (1), and, therefore, it is plain that the plaintiffs are entitled to bring this action. As regards the other point, whether the creation of a grant of any interest in the right by licence is sufficient to confer such a right, it is unnecessary, as it seems to me, to go into that matter, and I propose to leave it where it was left by LUSH, J. ([1918] 1 K.B. at p. 309), in *British Actors Film Co. v. Glover* (1). I conceive that somewhat difficult questions are raised by the provision in s. 5 (2), and I do not think it is desirable that I should make observations which, in view of the conclusions which I have reached, would in this case be merely obiter dicta. Accordingly, in my view, the plaintiffs' action succeeds.

Judgment for the plaintiffs.

Solicitors: *Rubinstein, Nash & Co.* (for the plaintiffs); *Slaughter & May* (for the defendants).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

Re LEWIS (deceased). PUBLIC TRUSTEE v. ALLEN AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), October 13, 1954.]

Charity—Benefit to community—Impotent person—Gifts to each of ten blind children—Charitable Uses Act, 1601 (43 Eliz. 1 c. 4), preamble.

By his will a testator provided: "I leave to ten blind girls Tottenham residents if possible the sum of £100 each". The testator also made a like bequest to ten blind boys.

HELD: although the will did not require that the legatees should be poor as well as blind, the gifts were charitable, because the words "aged, impotent and poor" in the statute 43 Eliz. 1 c. 4, ought to be read disjunctively so far as the word "impotent" was concerned and, therefore, a condition of their being poor was not essential to enable a gift to blind girls or boys to be charitable.

Re Fraser (1883) (22 Ch.D. 827), followed.

Re Lucas ([1922] 2 Ch. 52), discussed.

Re Glyn's Will Trusts ([1950] 2 All E.R. 1150n.) and *Re Robinson* ([1950] 2 All E.R. 1148), considered.

AS TO RELIEF OF AGED, IMPOTENT AND POOR, see HALSBURY, Simonds Edn., Vol. 4, pp. 213-218, paras. 492-495; and FOR CASES, see DIGEST, Vol. 8, pp. 242-245, Nos. 7-39.

Cases referred to:

- (1) *Re Lucas*, [1922] 2 Ch. 52; 91 L.J.Ch. 480; 127 L.T. 272; Digest Supp.
- (2) *Re Olgin's Will Trusts*, [1950] 2 All E.R. 1150n.; [1950] W.N. 373; 66 (Pt. 2.) T.L.R. 510; 2nd Digest Supp.
- (3) *Re Robinson*, [1950] 2 All E.R. 1148; [1951] Ch. 198; 2nd Digest Supp.
- (4) *Re Fraser*, (1883), 22 Ch.D. 827; 52 L.J.Ch. 469; 48 L.T. 187; 8 Digest 407, 2421.
- (5) *Re Elliott*, (1910), 102 L.T. 528; 8 Digest 243, 23.
- (6) *Re Dudgeon*, (1896), 74 L.T. 613; 8 Digest 243, 22.

ADJOURNED SUMMONS to determine among other questions whether on the true construction of the will of the testator the two gifts therein of £100 each to ten blind girls and to ten blind boys constituted valid charitable gifts and, if the gifts were valid, for a scheme for carrying them into effect.

By a home-made will dated Jan. 9, 1946, Mark Albert Lewis bequeathed legacies of varying amounts and proceeded:

"I leave to ten blind girls Tottenham residents if possible the sum of £100 each. I leave to each of ten blind boys Tottenham residents if possible the sum of £100 each."

On Nov. 24, 1948, the testator died and on Aug. 19, 1949, probate was granted to the Public Trustee.

H. A. Rose for the plaintiff, the Public Trustee.

The first defendant, a specific legatee, appeared in person.

Denys B. Buckley for the second defendant, the Attorney-General.

Michael Bowles for the third defendant, a blind girl.

J. L. Arnold for the fourth defendant, a blind boy.

J. A. Gibson for the fifth defendant, the Treasury Solicitor.

ROXBURGH, J. : Mark Albert Lewis, after making pecuniary bequests to private individuals, made a number of charitable bequests and then made the following testamentary disposition:

"I leave to ten blind girls Tottenham residents if possible the sum of £100 each. I leave to each of ten blind boys Tottenham residents if possible the sum of £100 each. I leave to the Salvation Army for their welfare work in England the sum of £500."

Then he gives directions about death duties.

I have read the bequest to the Salvation Army to indicate that the bequest on which I have to adjudicate, viz., the bequest to ten blind girls and each of ten blind boys, appears among a series of charitable gifts, but I do not propose to base my judgment on any such adventitious circumstance. I propose to grasp the nettle and to decide rightly or wrongly whether a gift for the benefit of blind persons as a class—not as individuals, of course—is a charitable gift. I wish to say at once that I find nothing in the will which imports any element of poverty in connection with these two bequests.

To my mind my problem is a simple one, and I should not have had to refer to what is the much more difficult problem recently grappled with by *DANCKWERTS, J.*, and *VAISEY, J.*, but for the able argument which has been presented to me and with which, therefore, I wish to deal carefully.

It is undoubtedly true that *RUSSELL, J.*, in *Re Lucas* (1) indicated plainly that he would hesitate to hold that a gift for the benefit of "aged persons" was charitable per se. I can well understand his reluctance. It appears to me that so to hold opens the doors of charity very wide. None the less, it is plain that he did not hesitate so to hold because he put any unusual construction on the words of the Statute of Elizabeth (43 Eliz. 1 c. 4), but because of a line of cases to which he referred. In the end, as has happened in so many other cases, by finding a context satisfactory to him to import poverty, he escaped from the

necessity of reaching a decision which he undoubtedly would have found difficult. Counsel for the Treasury Solicitor was inclined to say that RUSSELL, J., indicated that he could not have decided that a gift for "aged persons" per se was charitable. I do not think that RUSSELL, J., went as far as that, but he undoubtedly indicated a great disinclination to do so, and counsel suggests that he reached his state of disinclination because of the manner in which he construed the statute. That, I think, is not so. He reached his disinclination possibly to some extent on practical grounds, but mainly, I think, in the light of certain authorities about aged persons. Counsel's argument ran in this way:—prima facie when the statute speaks of "aged, impotent and poor", it must envisage three classes: (i) aged, (ii) impotent and (iii) poor; but, having regard to the hesitation of RUSSELL, J., and his predecessors to hold that it was enough to be aged, it is necessary not to read the words disjunctively, but to say that to be "poor" is an essential ingredient in each class. The illogicality of that appears to be that on that view poor persons would not qualify unless they were either aged or impotent. That is quite contrary to authority and, indeed, to the good sense of the matter. I think that the answer to counsel must be that the statute logically bears the prima facie meaning that it would appear to have, i.e., there are three classes, and that the hesitation which RUSSELL, J., felt (founded, as I say, mainly on earlier decisions, but partly, I think, on the obvious practical disadvantages of holding that to be "aged" per se was enough) was not the result of construing the statute illogically.

I would have hesitated to speak so strongly about a judgment of RUSSELL, J., were it not for the fact that first of all DANCKWERTS, J., and then VAISEY, J., have cut the painter in no uncertain terms. I refer to the judgment of DANCKWERTS, J., in *Re Glyn's Will Trusts* (2). I think the report must be substantially accurate because it seems there are three reports of this case, one in the WEEKLY NOTES, one in the TIMES LAW REPORTS, and one (though only in the form of a note) in the ALL ENGLAND LAW REPORTS, and though they are very short they all seem to be to the same effect. DANCKWERTS, J., is reported as saying ([1950] W.N. at p. 374):

"The preamble to the Poor Relief Act, 1601, referred to the relief of aged, impotent and poor people. The words 'aged, impotent and poor' should be read disjunctively. It had never been suggested that poor people must also be aged to be objects of charity, and there was no reason for holding that aged people must also be poor to come within the meaning of the preamble."

Pausing there, if (as I suspect) DANCKWERTS, J., meant "no logical reason", I heartily agree with that observation, though I must confess that I should have thought that so far as "aged" is concerned, the earlier cases did create some difficulty, perhaps more difficulty than DANCKWERTS, J., felt. DANCKWERTS, J., referred to *Re Lucas* (1) in which many of the earlier cases are carefully summarised, and he said (ibid.):

"... that a trust for the relief of aged persons would be charitable unless qualified in some way which would clearly render it not charitable."

VAISEY, J., in *Re Robinson* (3) took the same line. He also said that the statute must be read disjunctively. Then he said that he held that "the old people over sixty-five years" in a particular parish were a class of persons who were proper objects of charity (in the legal sense) merely because they were over sixty-five years of age and, therefore, aged.

I am not in any way differing from the decisions of DANCKWERTS, J., and VAISEY, J. If I may say so, I warmly approve of them, but I must confess that they have shown perhaps greater boldness in this matter than I might have shown if I had been concerned with the word "aged" per se. Fortunately for me my path is very much easier.

There is no case which suggests that in the case of impotent persons, the statute should not be read disjunctively, so as to constitute impotent persons a class per se. On the contrary, there is a case of venerable antiquity in which it was done, viz., *Re Fraser* (4). Unfortunately, the case is not reported on that point, and accordingly it is not possible to know for certain whether there was any argument or whether the judge gave reasons for his judgment, but there is no reason whatever to suppose that it was not argued or that the judge did not give reasons. It is not usual for the court to make a declaration in a case which is not argued. The words in *Re Fraser* (4) were "to be invested for the benefit of the blind in Inverness-shire". Nobody, I think, would suggest that there was anything there to import poverty. The court declared (22 Ch.D. at p. 828):

"that the residue was effectually given to the testator's executors and two or more trustees to be appointed by them, in trust for the benefit of the blind in Inverness-shire. And the court directed a reference to the Court of Session in Scotland to settle a scheme for the administration of the charity."

So there is quite a clear decision.

It is true that PARKER, J., in 1910, in *Re Elliott* (5) was clearly under the influence of what I think I might properly call the *Re Lucas* (1) standpoint, because in dealing with the matter apart from authority he thought it desirable to consider whether in the gift which he had to construe there was an element of poverty, and he arrived at the conclusion that there was. It is, I think, fairly to be said, as counsel for the Treasury Solicitor said, that PARKER, J., thought that in principle it was necessary to find an element of poverty in order to be sure that it was a charitable gift. PARKER, J., does not tell us how that could be consistent with a proper construction of the statute, but he does further say (102 L.T. 530):

"At the same time [which, I think, in this context really means "however that may be"] I think that I could not, without in effect overruling several decisions, hold that this is not a good charitable gift."

Then he refers to *Re Fraser* (4) and *Re Dudley* (6). From that I infer that if PARKER, J., had failed to find any element of poverty, though he might have doubted whether to hold it was charity was in accordance with principle, he would have felt bound so to hold by authority.

It is that which makes my task today easier—much easier than that of PARKER, J.—because I am happy to be bound by the authority of *Re Fraser* (4), which appears to me to be the inevitable result of the only interpretation of the statute which does not lead to an absurd conclusion. In that respect, I am completely at one with DANCKWERTS, J., and VAISEY, J.

Accordingly, I declare that the gifts of £100 each to "ten blind girls Tottenham residents if possible" and of £100 each to "each of ten blind boys Tottenham residents if possible" constitute valid charitable gifts; and the Public Trustee is authorised by way of scheme (i) to pay to or apply for the benefit of ten blind girls, the sum of £100 each, such blind girls to be resident in Tottenham if any suitable objects of the charity are there resident and, if not, resident anywhere in the world and (ii) similarly in the case of the ten blind boys.

Order accordingly.

Solicitors: *Pearce & Nicholls* (for all parties except the first, second and fifth defendants); *Treasury Solicitor* (for the second and fifth defendants).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

SURTEES v. BENEWITH.

QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Parker, J.J.),
October 11, 1954.]

*Insurance—Motor insurance—Disqualification—"Special reasons" for re-
fraining from disqualification—No "special reasons" found—Conditional
discharge not applicable—Road Traffic Act, 1930 (c. 43), s. 35 (1), (2)—
Criminal Justice Act, 1948 (c. 58), s. 7(1).*

The respondent pleaded Guilty to using a motor vehicle without there being in force in relation to the user of the vehicle a policy of insurance in respect of third-party risks contrary to the Road Traffic Act, 1930, s. 35 (1). He established no special reason why he should not be disqualified pursuant to s. 35 (2) of the Act, but the magistrates, in view of the fact that he had made several attempts to obtain such a policy, that he was not very conversant with insurance practice and that they were satisfied he had not deliberately or intentionally tried to evade the law, granted him a conditional discharge under the Criminal Justice Act, 1948, s. 7 (1).

HELD: by the Road Traffic Act, 1930, s. 35 (2), a person committing an offence under that section must be disqualified for holding or obtaining a licence unless there are special reasons; in the present case there were no special reasons and, therefore, the magistrates had no discretion to grant the respondent a conditional discharge, and, accordingly, the case must be remitted to the magistrates with a direction to impose disqualification.

Appeal allowed.

AS TO COMPULSORY INSURANCE OF MOTOR VEHICLES, see HALSBURY, Hailsham Edn., Vol. 18, pp. 560-563, paras. 907-912; and FOR CASES, see DIGEST Supps.

FOR THE ROAD TRAFFIC ACT, 1930, s. 35 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 602.

Cases referred to:

(1) *Whittall v. Kirby*, [1946] 2 All E.R. 552; [1947] K.B. 194; [1947] L.J.R. 234; 175 L.T. 449; 111 J.P. 1; 2nd Digest Supp.

(2) *Dennis v. Tame*, (1954), 118 J.P. 358.

(3) *Taylor v. Saycell*, [1950] 2 All E.R. 887; 114 J.P. 574; 2nd Digest Supp.

CASE STATED by Surrey justices.

On Feb. 20, 1954, the appellant, Richard Surtees, a police sergeant, preferred an information against the respondent, Robert Benewith, charging that he, on Jan. 25, 1954, used a motor vehicle on Manor Road, Wallington, without there being in force in relation to the user of the vehicle a policy of insurance or such a security in respect of third-party risks as complies with the requirements of the Road Traffic Act, 1930, contrary to s. 35 (1) of that Act.

At the hearing of the information on Mar. 10, 1954, the respondent pleaded Guilty. The following facts were found. The respondent had been a cab driver and had recently decided to change over to private hire. On Jan. 14, 1954, he sold his previous car, and on Jan. 15, 1954, took over the car in question, which he started working on Jan. 18, 1954. He discovered that his own insurance company did not insure for private hire and approached a colleague who told him the name of the agent of another office. Before he started work on Jan. 18, the respondent attempted, but failed, to get the agent on the telephone, and on Jan. 19 and Jan. 20 he again tried but again failed. On Jan. 22, 1954, he approached his colleague who tried to find the agent both on that day and on the morning of Jan. 25, 1954. The agent was eventually found on the afternoon

of Jan. 25, having in the meantime tried to find the respondent on Jan. 22 and Jan. 23 and failed to do so. At 11.25 a.m. on Jan. 25, 1954, the respondent arrived at Wallington station driving a passenger in the car in question, which was being used for private hire. At the appellant's request, the respondent was unable to produce a certificate of insurance covering the use of the car, and a search at his home only revealed a certificate relating to a car which he had previously sold and, in any case, did not cover private hire work. Later the same day the respondent produced a cover note, issued at 5 p.m. on that day, covering the car for private hire. When the agent issued this cover note, he was unaware that the respondent had been stopped by the police earlier in the day.

The respondent submitted special reasons why he should not be disqualified for holding or obtaining a licence for twelve months pursuant to the Road Traffic Act, 1930, s. 35 (2), and, alternatively, he asked for an absolute or conditional discharge under the Criminal Justice Act, 1948, s. 7 (1). He gave evidence and called witnesses in support of his submission which was not challenged by the appellant.

The justices were not satisfied that the respondent had established special reasons why he should not be disqualified pursuant to the Road Traffic Act, 1930, s. 35 (2), since the reasons shown by him were not special to his offence, as laid down in *Whittall v. Kirby* (1), and other cases. Nevertheless, they appreciated (i) that the respondent (being confronted with the fact that his previous insurance company did not cover private hire risk) had made several attempts to get in touch with the insurance agent of a new company, (ii) that men of the respondent's class were not very conversant with insurance practice and were used to doing their business with local agents, and (iii) that there was no question raised against the respondent's character. Furthermore, they were satisfied that he did not deliberately or intentionally attempt to evade the law. Accordingly, they discharged him conditionally for twelve months pursuant to the Criminal Justice Act, 1948, s. 7 (1), and the appellant now appealed.

Paul Wrightson for the appellant.

The respondent did not appear.

LORD GODDARD, C.J., stated the facts and continued: Counsel for the appellant has called our attention to *Dennis v. Tame* (2), in which this court said, after having *Taylor v. Saycell* (3) cited to them, and having considered that case, that justices could only use the machinery of conditional discharge to avoid a disqualification if there were circumstances in the case which would amount to special reasons. If there are circumstances in the case which would amount to special reasons, the court can give a conditional discharge, which avoids the necessity of imposing any penalty and will not require the licence to be indorsed. Looking at the reasons we gave in *Dennis v. Tame* (2), I see that we said that Parliament has laid it down that, if a motorist commits certain offences under the Road Traffic Act, 1930, s. 35, he is to be disqualified unless there are special reasons. Conditional discharge deals with a matter of punishment and, therefore, it is quite open to the court to say in a particular case: "We think it inexpedient to give any punishment", and, if there are special reasons, they need not give any punishment, and they can give a conditional discharge. They cannot, however, get out of the necessity of disqualifying by giving a conditional discharge unless there are special reasons which justify them in so doing. In the present case there were no special reasons found by the justices, and the case must go back to them, but I call attention to the fact that the disqualification will have to date back to the conviction and, as that was on Mar. 10, 1954, more than six months have gone by and the disqualification, by what I think is an unfortunate oversight in the Act, cannot take effect except from the date of the conviction. We can only say that this case must go back to the justices with a direction that

they must disqualify, and I have no doubt they would have done so if *Dennis v. Tame* (2) had been called to their attention.

LYNSKEY, J.: I agree.

PARKER, J.: I agree.

Appeal allowed.

Solicitor: *Solicitor, Metropolitan Police* (for the appellant).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

BAMBOSE v. DANIEL AND OTHERS.

[PRIVY COUNCIL (Lord Morton of Henryton, Lord Cohen and Lord Keith of Avonholm), July 14, 15, October 12, 1954.]

Privy Council—Nigeria—Legitimacy—Children of polygamous marriage legitimate according to law of domicile—Succession to intestate's estate—Whether English laws of succession apply only to children of monogamous marriage—Marriage Ordinance of the Colony of Lagos (No. 14 of 1884), s. 41.

By the Marriage Ordinance of 1884 of the Colony of Lagos, s. 41: "Where any person who is subject to native law or custom contracts a marriage in accordance with the provisions of this or of any other ordinance relating to marriage . . . And . . . where any person who is issue of any such marriage as aforesaid died intestate subsequently to the commencement of this ordinance, the personal property of the intestate and also any real property of which the said intestate might have disposed by will shall be distributed in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates, any native law or custom to the contrary notwithstanding . . ."

D., who died intestate in 1948, at Lagos, was the only son born of a marriage contracted under the Marriage Ordinance of 1884. His parents had another son who was born out of wedlock, but who became legitimated per subsequens matrimonium by virtue of the Legitimacy Ordinance of Nigeria of 1929, and the only child of his marriage, which was a Christian marriage, was the appellant. The respondent children were issue of polygamous marriages entered into by D. in accordance with native law and custom. The appellant claimed to succeed to the whole of D.'s estate, contending that the Statute of Distribution, 1670 (which was the relevant law in England in 1884), could not be applied to polygamous unions.

HELD: the Statute of Distribution was not limited so as to apply only to monogamous unions; in the present case the respondent children, subject to establishing that they were legitimate children of the deceased under the law of their domicile, which recognised polygamous unions, were entitled to succeed to the deceased's estate under that statute.

Per curiam: under what are now well accepted principles, recognised by the English courts, no grounds exist, in circumstances such as these, for excluding children of polygamous unions from taking their rights of succession if they are legitimate children of the intestate according to the law of their domicile (see at p. 267, letter C, post).

Appeal dismissed.

EDITORIAL NOTE. The Marriage Ordinance of 1884 of the Colony of Lagos (No. 14 of 1884), s. 41, has been re-enacted in the Marriage Ordinance of

1914 of Nigeria (Laws of Nigeria, 1948, c. 128). The Statute of Distribution, 1670, 9 HALSBURY'S STATUTES (2nd edn.) 658, was repealed, except as to deaths before 1926, by the Administration of Estates Act, 1925, s. 56 and sched. II, Part I; see now s. 46 of that Act, 9 HALSBURY'S STATUTES (2nd edn.) 751.

Cases referred to:

- (1) *Re Sarah I. Adadevoh*, (Nov. 3, 1951) Unreported.
- (2) *Re Adeline Subulade Williams*, (1941), 7 W.A.C.A. 156. A
- (3) *Cole v. Cole*, [1898] 1 N.L.R. 15.
- (4) *Re Don's Estate*, (1857), 4 Drew. 194; 27 L.J.Ch. 98; 30 L.T.O.S. 190; 21 J.P. 694; 62 E.R. 75; 3 Digest 374, 145.
- (5) *Sinha (Peerage) Case*, (1939), 171 Lords Journals, 350; see also [1946] 1 All E.R. 348.
- (6) *Baindail (otherwise Lawson) v. Baindail*, [1946] 1 All E.R. 342; [1946] B P. 122; 115 L.J.P. 65; 174 L.T. 320; 2nd Digest Supp.
- (7) *Cheang Thye Phin v. Tan Ah Loy*, [1920] A.C. 369; 89 L.J.P.C. 44; 122 L.T. 593; Digest Supp.
- (8) *Khoo Hooi Leong v. Khoo Huan Kwee*, [1926] A.C. 529; 95 L.J.P.C. 94; 135 L.T. 170; Digest Supp.
- (9) *Khoo Hooi Leong v. Khoo Chong Yeok*, [1930] A.C. 346; 99 L.J.P.C. 129; C 143 L.T. 25; Digest Supp.
- (10) *Re Goodman's Trusts*, (1881), 17 Ch.D. 266; 50 L.J.Ch. 425; 44 L.T. 527; 3 Digest 372, 135.
- (11) *Seedats Executors v. The Master (Natal)*, [1917] S.A.L.R. 302.
- (12) *Re Bischoffsheim*, [1947] 2 All E.R. 830; [1948] Ch. 79; [1948] L.J.R. 213; 2nd Digest Supp. D

APPEAL by the intestate's nephew from an order of the West African Court of Appeal dated June 2, 1952, on an issue of law in the administration of the estate of an intestate who died domiciled in Nigeria. The respondents were twelve children of the deceased intestate by polygamous marriages, and the Administrator-General of Nigeria, who was appointed administrator of the estate. The facts are summarised in the headnote and fully stated in the judgment. E

H. E. Salt, Q.C., and *A. J. Belsham* for the appellant.

R. L. Edwards, Q.C., *K. B. Campbell* and *F. R. H. Williams* for the respondent children.

The Administrator-General of Nigeria was not represented.

July 15. Their Lordships dismissed the appeal. F

Oct. 12. **LORD KEITH OF AVONHOLM:** This is an appeal from a judgment of the West African Court of Appeal in a matter relating to the distribution of the estate of John St. Matthew Daniel (hereafter referred to as the deceased) who died at Lagos on Apr. 25, 1948, intestate. The Administrator-General of Nigeria was appointed administrator of the estate by order of the Supreme Court of Nigeria made on Feb. 1, 1949. G

The history of the matter is as follows: The deceased was the son, born posthumously, of Matthew Joaquim Daniel and Theresa Maria who were married in a Wesleyan Methodist Church in Lagos on Sept. 28, 1890. This was a marriage under the Marriage Ordinance, 1884, of the Colony of Lagos, which applied to any person subject to native law and custom who contracted a marriage in accordance with the provisions of the ordinance. The deceased was the only child born of the marriage. The deceased's parents had another son, Pedro, who was born, out of wedlock, in 1884. Pedro appears to have entered into a Christian form of marriage at Lagos in 1909. It is claimed by the appellant that Pedro became legitimated in 1929 by virtue of the Legitimacy Ordinance of Nigeria of 1929 which introduced the principle of legitimation per subsequens matrimonium and applied it to marriages contracted both before and after the date of the ordinance. Pedro died in 1936. The appellant claims to be the only H

child of Pedro's marriage. The deceased is said to have entered into nine polygamous marriages in accordance with native law and custom, and the respondents (other than the Administrator-General) claim, as issue of these polygamous marriages, to be legitimate children of the deceased under Nigerian law. It would appear, and was assumed at the hearing, that all the persons mentioned were, at all material times, domiciled in Nigeria. The contest in this appeal lies between the appellant, who claims as lawful nephew of the deceased to succeed to the whole of the estate, and respondents who claim, as children of the deceased procreated by polygamous marriages, to exclude him.

In the Supreme Court of Nigeria at Lagos, ROBINSON, J., on May 17, 1951, made orders for distribution of the estate among the deceased's children. On appeal by the present appellant, the West African Court of Appeal, on June 2, 1952, allowed the appeal on the ground that there was insufficient evidence before the trial judge to justify his assumption that the twelve children concerned were issue of marriages with the deceased, and remitted the respondents' motions for distribution of the estate to the court below for hearing *de novo*. The Court of Appeal further directed that the court below should require the respondents to adduce evidence sufficient to satisfy it on the following matters:— (i) Whether the mothers of the twelve respondents were married to the intestate John St. Matthew Daniel, in accordance with the native law and custom applicable in each case; (ii) Whether the respondents, or any of them, are the issue of such marriages; and if so, of which such marriages; and (iii) Whether by the native law and custom applicable in each case the respondents, or any of them, have the status of legitimate children. The appellant was allowed to be joined as opposer to the respondents' motions. In so doing, it is clear from the judgment of the Court of Appeal that they rejected a claim by the appellant to oust the respondents from any share in the estate even if they were legitimate issue of polygamous marriages by the deceased. The appellant, accordingly, applied for leave to appeal against the judgment of the Court of Appeal to Her Majesty in Council, which leave was granted by the Court of Appeal on Oct. 6, 1952.

The question at issue arises under the Marriage Ordinance of the Colony of Lagos of 1884. In the West African Court of Appeal it was assumed that the succession was governed by the Marriage Ordinance of Nigeria of 1914. It is now agreed between the parties that it is the ordinance of 1884 that falls to be considered, and it appears to their Lordships that this must be so as the marriage of the deceased's parents was contracted under that ordinance. There is no material difference in the language of the two ordinances on any point affecting this appeal. It was at one time indicated by an amendment made by the respondents to their pleadings and allowed by their Lordships that the respondents intended to argue, as an alternative to their main submission, that the relevant section of the Marriage Ordinance did not apply to the deceased. In the end, counsel for the respondents did not see his way to submit any argument in support of this amendment. Their Lordships, accordingly, proceed on the view which has been accepted throughout this case that the succession to the deceased's estate turns on an interpretation of the relevant provisions of the Marriage Ordinance.

Section 41 of the Marriage Ordinance of 1884 is as follows:

"Where any person who is subject to native law or custom contracts a marriage in accordance with the provisions of this or of any other ordinance relating to marriage, or has contracted a marriage prior to the passing of this ordinance, which marriage is validated hereby and such person dies intestate, subsequently to the commencement of this ordinance, leaving a widow or husband or any issue of such marriage, And also where any person who is issue of any such marriage as aforesaid dies intestate subsequently to the commencement of this ordinance, The personal property of such intestate and also any real property of which the said intestate might have disposed by will shall be distributed in accordance with the provisions of the law of England

relating to the distribution of the personal estates of intestates, any native law or custom to the contrary notwithstanding. Provided always, that where by the law of England, any portion of the estate of such intestate would become a portion of the casual hereditary revenues of the Crown such portion shall be distributed in accordance with the provisions of native law and custom and shall not become a portion of the said casual hereditary revenues. Provided also that real property, the succession to which cannot by native law or custom be affected by testamentary disposition shall descend in accordance with the provisions of such native law or custom anything herein to the contrary notwithstanding. Before the registrar of marriages issues his certificate in the case of an intended marriage, either party to which is a person subject to native law or custom, he shall explain to both parties the effect of these provisions as to the succession to property as affected by marriage."

From what has been said at the outset of this judgment it follows that the deceased falls within the second category of intestate, being a person who was the child of a marriage contracted under the ordinance. The short question is, what is the effect of the direction that his disposable estate shall be distributed in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates, any native law or custom to the contrary notwithstanding?

The relevant law of England in 1884 is to be found in the Statute of Distribution, 1670 (22 & 23 Car. 2 c. 10) and the Administration of Intestates Estates Act, 1685 (1 Jac. 2 c. 17). For purposes of this appeal their Lordships are concerned only with the direction in the Statute of Distribution dealing with the succession of children of an intestate. The appellant's contention is that this law precludes the succession on intestacy of children or others who cannot claim kinship with the deceased through monogamous marriage; that the respondent claimants being the offspring of polygamous marriages fall to be regarded as illegitimate under the English Statute of Distribution and that he, the appellant, being the only person who can claim kinship with the deceased through monogamous marriage, is entitled to the whole estate. This ignores one factor, that the appellant's father, the brother of the deceased, was the issue of an illicit union and was only legitimated in 1929 by a statute of the Nigerian Colony, so that the appellant would have to rely on the law of his father's domicile for the purpose of bringing himself within the class of legitimate heirs. This point was not, however, adumbrated in the courts below and, owing to the course the hearing took before their Lordships, was not developed in argument before their Lordships' Board. On the view on which this judgment proceeds their Lordships have found it unnecessary to deal with this point, to which special considerations may apply. Accordingly, they do not refer further to this matter.

The contention for the respondent children is that, by the law of their domicile of origin, they are legitimate children of the deceased and, accordingly, come within the class of persons entitled to succeed under the English Statute of Distribution. This view has been upheld by the West African Court of Appeal subject to the respondents establishing their status of legitimacy. This question has been the matter of some conflict of decision in the Nigerian courts. It was very fully and clearly considered in *Re Sarah I. Adaderoh* (1) by the West African Court of Appeal in a judgment delivered on Nov. 23, 1951, by SIR JOHN VERITY, C.J., and concurred in by the two other members of the court, which decided in favour of children of polygamous unions. In the present case, SIR STAFFORD FOSTER SUTTON, P., who delivered the judgment of the court, followed this decision, adding that he found himself

"in entire agreement with that portion of the Chief Justice's judgment which touches the issue with which we are concerned on this appeal."

These judgments overruled a previous decision in a contrary sense in *Re*

Adeline Subulade Williams (2). Reference was also made by counsel for the appellant to a number of decisions in the Nigerian courts, commencing with the case of *Cole v. Cole* (3), where in the case of marriages contracted under the rites of a Christian church, to which for one reason or another the provisions of a marriage ordinance did not apply, the courts held that the parties must be taken to have intended their succession on intestacy to be regulated by English law, not by native law and custom. Their Lordships have carefully considered these cases but cannot extract from them any principle that would affect the present case. They find it unnecessary to decide whether the courts were right in applying the English law of succession or whether, if English law was applicable, it was rightly applied in the circumstances of the particular cases.

Their Lordships would observe that no question can arise as to the capacity of the deceased to enter into polygamous marriage by his local law. He himself was the child of a monogamous marriage, but that was no impediment to his contracting a marriage by native law and custom. Even a person who has himself contracted a monogamous marriage under the ordinance is, by s. 37 of the ordinance, prohibited from contracting a valid marriage under any native law or custom only during the continuance of the monogamous marriage. If, then, the respondent children are found to have been from birth legitimate children of the deceased the only question with which their Lordships are concerned is whether they are entitled to share in the succession of the deceased under the Statute of Distribution.

Their Lordships entertain little doubt that, under what are now well accepted principles recognised by the English courts, no ground exists, in circumstances like the present, for excluding the respondents from taking their rights of succession if they are legitimate children of the deceased under the law of their domicile. In *Re Don's Estate* (4), SIR RICHARD KINDERSLEY, V.-C., dealing with the status of a child born in Scotland of a father domiciled there and legitimated by the subsequent marriage of his parents, said (4 Drew. at p. 197):

"It appears to me that, on the authorities applicable to this question, the principle is this: that the legitimacy or illegitimacy of any individual is to be determined by the law of that country which is the country of his origin. If he is legitimate in his own country, then all other civilized countries, at least all Christian countries, recognise him as legitimate everywhere. Questions may arise, and have arisen, whether the law which is to determine the legitimacy or illegitimacy is the law of the country where the individual was born, or the law of the country where the parents intermarried, or the law of the country of the domicile of the parents? and if the domicile of the parents was different, whether the law of the father's or of the mother's domicile governs? If it were necessary for me to determine these questions I should hold that the law of the father's domicile governed."

None of the special questions referred to in this passage arise here for, as their Lordships apprehend, all the circumstances concur to fix Nigeria as the domicile of the parents, the place of their marriages, and the place of the birth of the children. This, and similar expressions of opinion in earlier cases, were no doubt given in cases dealing with the institution of monogamous marriage. But more recent authority shows that the principle cannot be confined within so narrow a field: see the opinion of LORD MAUGHAM, L.C., in the *Sinha (Peerage) Case* (5) ([1946] 1 All E.R. at p. 348) and the opinion of LORD GREENE, M.R., in *Baindail (otherwise Lawson) v. Baindail* (6) (ibid., at p. 346). Their Lordships' Board have also on various occasions had regard to, and acted on, the application of the Statute of Distribution to Chinese successions in the Straits Settlements, arising from polygamous unions: see *Cheang Thye Phin v. Tan Ah Loy* (7); *Khoo Hooi Leong v. Khoo Hean Kwee* (8); *Khoo Hooi Leong v. Khoo Chong Yeok* (9).

In their Lordships' opinion the West African Court of Appeal has reached a right conclusion on the law applicable in this case. *Re Goodman's Trusts* (10), on

which that court in the case of *Re Sarah I. Adadevoh* (1) largely proceeded, was a case under the Statute of Distribution in which it was held by a majority of the Court of Appeal that a child born in Holland, where her parents were at the time domiciled, who had been legitimated under Dutch law by the subsequent marriage of the parents there, was entitled to share as a "brother's child" under the Statute of Distribution. As already indicated, their Lordships cannot hold that the principle of this decision is restricted to the case of monogamous marriage. COTTON, L.J., said in that case (17 Ch.D. at p. 292):

" . . . I am of opinion that if a child is legitimate by the law of the country where at the time of its birth its parents were domiciled, the law of England, except in the case of succession to real estate in England, recognises and acts on the status thus declared by the law of the domicile."

And JAMES, L.J., said (*ibid.*, at p. 300):

" It must be borne in mind that the Statute of Distribution is not a statute for Englishmen only, but for all persons, whether English or not, dying intestate and domiciled in England, and not for any Englishman dying domiciled abroad . . . And, as the law applies universally to persons of all countries, races, and religions whatsoever, the proper law to be applied in determining kindred is the universal law, the international law, adopted by the comity of states. The child of a man would be his child so ascertained and so determined . . ."

The decision and reasoning of the majority in that case has not, so far as their Lordships are aware, been questioned in any subsequent case. It proceeds in their opinion on sound principle and gives a meaning and effect to the Statute of Distribution wider than it would have under the purely domestic law of England.

In the present case, the Statute of Distribution is a statute applying to a limited class of persons domiciled in Nigeria. As a matter of construction and on the authorities referred to, it cannot, in their Lordships' opinion, be limited in its local application to children who are the issue of monogamous unions. The effect of the application of the statute in the cases to which it applies is to fix the order of succession according to a table different from that prevailing under native law and custom, leaving it to the courts to determine, in accordance with the principles indicated, who are the particular individuals who fall within any particular class in the succession table.

It was contended for the appellant that the Statute of Distribution could not be applied to polygamous unions because of the difficulty of applying its provisions to a plurality of wives. The West African Court of Appeal observed that no claim had been put forward in this case by any person as a widow of the deceased, and their Lordships propose to say nothing as to what rights, if any, widows would have in the event of a claim being made. They cannot, however, agree with the appellant's submission. Whatever difficulties may arise in the case of the mothers of the children the claims of the children as lawful children of the deceased must, in their Lordships' opinion, be considered independently. This may be so in some cases even in questions of status. In a judgment of the Board in *Khoo Hooi Leong v. Khoo Hean Kwee* (8), where the claim of a child to be legitimate by the law of a community in which polygamy was recognised and practised was considered, LORD PHILLIMORE, who delivered the judgment of the Board, said ([1926] A.C. at p. 543):

" In deciding upon a case where the customs and the laws are so different from British ideas a court may do well to recollect that it is a possible jural conception that a child may be legitimate, though its parents were not and could not be legitimately married. This principle was admitted by the canon law which governed western continental Europe till about a century ago and governed still later, if it does not govern still, the countries of Spanish America . . ."

Two other cases may be mentioned. In *Scodats Executors v. The Master (Natal)* (11), the Supreme Court of South Africa held, in a learned judgment by SIR JAMES ROSE-INNES, C.J., that they could not recognise as valid in Natal a polygamous marriage of the deceased entered into in India before he became domiciled in Natal, but that the children of this marriage who were all born in India while their parents were domiciled there were entitled to be treated as legitimate children. Accordingly, while the widow was not entitled to exemption in the matter of succession duty, but, on the contrary, was liable to the rate appropriate to a stranger in blood, the rate of duty attributable to the children's share of the succession was held to be that borne by lawful children of a testator. Again in *Re Bischoffsheim* (12) ROMER, J., had to consider the question of the legitimacy for the purposes of succession under the will of an English testator of a child born in New York of English parents who were domiciled in New York at the time of the child's birth. A question might have been raised as to the validity of the parents' marriage under English law, but in holding that the child was legitimate by the law of New York at the time of his birth and, therefore, entitled to be treated as a lawful child of his mother under the will, ROMER, J., adopted the view ([1947] 2 All E.R. at p. 836):

" . . . that, where succession to personal property depends on the legitimacy of the claimant, the status of legitimacy conferred on him by his domicile of origin (i.e., the domicile of his parents at his birth) will be recognised by our courts, and that, if that legitimacy be established, the validity of his parents' marriage should not be entertained as a relevant subject for investigation."

It would be a strange result that, in the converse case where a marriage of the parents was recognised as valid, the children should be deprived of their rights of succession because of a difficulty in working out the rights of the wife.

In their Lordships' view, the West African Court of Appeal reached a right conclusion. They have, accordingly, humbly advised Her Majesty to dismiss the appeal. The appellant must pay the costs of the respondents other than the Administrator-General who was not represented before the Board.

Appeal dismissed.

Solicitors: *Rexworthy, Bonser & Wadkin* (for the appellant); *Hatchett Jones & Co.* (for the respondent children).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

R. v. CITY OF LONDON LICENSING JUSTICES. *Ex parte*
STEWART AND ANOTHER.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Parker, J.J.),
October 15, 1954.]

*Licensing—Licence—Planning removal—Conditional confirmation of proposal by
planning authority—Condition complied with—Duty to grant removal—
Licensing Act, 1953 (c. 46), s. 58 (2).*

The applicants were holders of a justices' on-licence in respect of certain premises in the City of London. In 1943 the premises were damaged by enemy action and remained closed thereafter. The licence was suspended in accordance with the provisions of the Finance Act, 1942, s. 10 (3). On Apr. 12, 1954, the applicants applied to the City of London licensing planning sub-committee under s. 65 (2) of the Licensing Act, 1953, to formulate proposals under s. 57 (1) for the removal of the licence to other premises in the City of London. The sub-committee submitted a proposal to the County of London licensing planning committee under s. 65 (2) of the Act of 1953 and that committee confirmed the proposal, but imposed on the applicants a condition that they should "forthwith [give] an effective written undertaking to the licensing justices . . . (i) to sell no intoxicating liquor under the licence for consumption off the premises, and (ii) to provide only one bar for use by the general public". The applicants duly gave the written undertaking. On July 14, 1954, the applicants applied under s. 58 (2) of the Act of 1953 for the grant of a planning removal of the licence. The licensing justices refused to grant the removal on the ground that the conditions, being of a permanent nature, were incapable of being complied with prior to the hearing of the application for the removal. The applicants applied for an order for mandamus.

HELD: it was necessary to distinguish between the condition imposed by the planning committee that the applicants should give an undertaking, and the undertakings themselves; the power of the licensing justices under s. 58 (2) (c) of the Licensing Act, 1953, was limited to an inquiry whether the condition imposed had been complied with and did not extend to inquiring whether the condition was good or bad; in the circumstances the justices had no option but to grant the removal of the licence and, therefore, the order for mandamus must issue.

FOR THE LICENSING ACT, 1953, s. 58 (2), s. 65, see HALSBURY'S STATUTES, Second Edn., Vol. 33, pp. 200, 205.

MOTION for an order of mandamus directing the licensing justices of the City of London to hear and determine an application by Hugh Dugan Stewart and Herbert William Chapman for a planning removal pursuant to the Licensing Act, 1953, s. 58 (1) and (2) of the justices' licence held by them in respect of premises known as the Swan and Horseshoe situate in the City of London, from those premises to other premises known as Dunster House Restaurant also situate in the City of London.

The applicants were respectively a director and the general manager of Mecca, Ltd., the lessees of extensive restaurant premises known as Dunster House Restaurant in the City of London. The company also owned fully licensed premises known as the Swan and Horseshoe in the City of London, the licence being held by the applicants on behalf of the company. In January, 1943, the Swan and Horseshoe premises were damaged by enemy action and had thereafter remained closed, the licence being suspended in accordance with the Finance Act, 1942, s. 10 (3). The company authorised the applicants to apply for the removal of the justices' licence from the Swan and Horseshoe to Dunster House Restaurant. On Apr. 12, 1954, application was made to the City of London licensing planning sub-committee which formulated a proposal under

s. 57 (1) and s. 65 of the Act. On June 14, 1954, the licensing planning committee of the County of London confirmed the proposal, such confirmation to be conditional on the applicants'

"forthwith giving an effective written undertaking to the licensing justices (i) to sell no intoxicating liquor under the licence for consumption off the premises, and (ii) to provide only one bar for use by the general public and to close the same during the evening permitted licensing hours except during such times as the restaurant is used for the purpose of organised functions to which admission should be by special arrangement."

On July 6, 1954, the applicants gave the required undertaking in writing to the justices. On July 14, 1954, the applicants applied to the licensing justices for the removal of the licence to Dunster House Restaurant. At an early stage of the hearing the justices intimated that they had formed the opinion that they had no jurisdiction to grant the removal as the conditions imposed by the planning committee involved an undertaking of a permanent nature, and were, therefore, such as could not be and had not been complied with before the application for the grant of the removal. They adjourned the application in order to consult with the planning committee on that point. On Sept. 15, 1954, at the resumed hearing the justices intimated that the planning committee were of the opinion that they could impose the conditions, but that they, the justices, were not prepared to alter their decision and refused the removal. The applicants submitted that the justices not only had jurisdiction but also were obliged by the terms of the Licensing Act, 1953, s. 58 (2) to make the removal order.

Viscount Hailsham, Q.C., and S. H. Lamb for the applicants.
Christmas Humphreys for the licensing justices.

LORD GODDARD, C.J.: Part II of the Licensing Act, 1953, deals with various matters in "war damaged areas". Legislation* passed during the war of 1939 to 1945 kept alive licences of premises which were destroyed by enemy action, and subsequently further legislation* was passed to provide for what was to happen to those licences, when or before re-building took place, so as to enable the licences to be removed. In London the matter has to go before two bodies [see s. 64 and s. 65 of the Act of 1953]. First of all it goes before a sub-committee of the licensing planning committee [see s. 65 (2)], and if they recommend that one of these old licences can be removed to other premises, they submit the proposal to the licensing planning committee for confirmation [s. 57 (1) and s. 65 (2) of the Act of 1953].

[His LORDSHIP stated the facts and continued:] The justices, to whom the applicants gave the undertaking required by the licensing planning committee when the applicants were about to apply for planning removal of the licence, thought, and were advised, that the licensing planning committee had no power† to make the confirmation conditional. Accordingly the justices said that they would not proceed with the hearing of the application because in their opinion these undertakings which the applicants were required to give were ultra vires, that they had no power to grant the licence subject to that undertaking, and that

* The suspension of licences was effected by the Finance Act, 1942, s. 10 (3), repealed and replaced by the Licensing Act, 1953, s. 168 and s. 83 (2); 33 HALSBURY'S STATUTES, (2nd edn.) 290, 219. Planning removal of licences was provided for by the Licensing Planning (Temporary Provisions) Act, 1945, s. 5; 13 HALSBURY'S STATUTES (2nd edn.) 331; repealed by the Licensing Act, 1953, s. 168, and replaced by s. 57 of that Act; 33 HALSBURY'S STATUTES (2nd edn.) 198.

† The power to confirm proposals is contained in s. 57 (4) of the Licensing Act, 1953, as modified for London by s. 65 (3) of that Act, and is in the following terms so far as is material (see 33 HALSBURY'S STATUTES (2nd edn.) 205, 206): "(4) If no objection to the proposals is made to the licensing planning committee within the time and in the manner stated in the notice, or if all objections so made are withdrawn, the licensing planning committee may confirm the proposals with or without modification; . . ."

it was an old licence which was free of any conditions or undertakings in the past.

The Licensing Act, 1953, s. 58 (2) provides:

"Where proposals of a licensing planning committee that have been confirmed by the Minister provide for a planning removal, then, if the holder of the justices' licence applies to the licensing justices for the licensing district in which the premises to which it is intended to make the removal are situated, the justices shall grant a planning removal of the licence to those premises if they are satisfied that—(a) the premises are fit and convenient for the purpose, (b) the applicant is not disqualified by this or any other Act for holding a justices' licence and is in all other respects a fit and proper person to hold a justices' licence, and (c) any conditions specified in the proposals as confirmed have been complied with."

It may be that the justices or their advisers have not distinguished between the condition imposed by the licensing committee, that the applicants should give a written undertaking, and the undertakings themselves. The justices have thought there was a difficulty about the particular undertakings. If there is, that must be dealt with when there is a breach of the undertakings, but it seems to me that the applicants have complied with the condition which was imposed, viz., "You, the applicants, shall give a written undertaking to the justices that you will not do this that or the other". It seems to me with all respect to the justices, who obviously had a new, and not altogether easy, point before them, that the applicants have complied with the condition imposed on them and, therefore, that under s. 58 (2) the justices are bound to grant the licence. For these reasons I think the order must go.

LYNSKEY, J.: I agree. I would only like to add that under the Licensing Act, 1953, s. 58 (2) the powers of the licensing justices on an application for planning removal are limited. The effect of the sub-section is to give the justices jurisdiction to inquire, first, whether the premises are fit and convenient for the purposes of a licence, secondly, whether (summarising the effect of the sub-section) the applicant is a fit person and not disqualified, and, thirdly, whether the conditions specified in the proposals have been complied with. As to this third inquiry it seems to me that all that they have power to do is to look at the conditions imposed by either the Minister or the planning committee. If those conditions have in fact been complied with, the licensing justices have no power or discretion to refuse the grant of the planning removal and, in those circumstances, it seems to me that they are not entitled to investigate the question whether the conditions imposed by the planning committee are good or bad. That will possibly be a matter for other persons at other times, but I would add that the powers given to the planning committee to make modifications and proposals are extremely wide and no limitation is applied to them. In those circumstances, it seems to me that in the present case the licensing justices had no option but to grant the planning removal, and they must now do so.

PARKER, J.: I agree.

Mandamus granted.

Solicitors: *H. H. Wells & Sons* (for the applicant); *Comptroller & City Solicitor* (for the justices).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

JAMES & SON, LTD. v. SMEE.
GREEN v. BURNETT AND ANOTHER.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels, Lynskey, Slade and Parker, JJ.), October 12, 13, 22, 1954.]

A Street Traffic—Motor vehicle—"Person uses or causes or permits to be used"—
Limited company—"Permits to be used"—Trailer used with defective
brake—No evidence of permitting—Motor Vehicles (Construction and
Use) Regulations, 1951 (S.I., 1951, No. 2101), reg. 75, reg. 101.

B The appellants, a limited company, owned a motor lorry and trailer. In
order that the braking system should be in proper order when the lorry was
drawing the trailer a brake cable on the lorry had to be connected to a
brake cable on the trailer. On Nov. 10, 1953, the lorry and trailer left the
appellants' premises with the connection properly made and the braking
system in good order. The lorry driver and his assistant were employees of
the appellants. The lorry was driven to other premises for the purpose of
loading goods for which it was necessary to uncouple the trailer. When
C the loading was completed, the driver left it to his assistant to couple the
trailer to the lorry. The assistant failed to connect the brake cable.
The appellants were charged that they did "permit to be used", contrary
to the Motor Vehicles (Construction and Use) Regulations, 1951, reg. 101,
on a road a trailer the braking system of which was not "maintained in
good and efficient working order and . . . properly adjusted" as required
by reg. 75. The appellants were convicted. On appeal,

D HELD: (i) (SLADE, J., dissenting) the appellants could not be guilty
of "permitting" a user in contravention of the regulation (i.e., the offence
charged) unless it were proved that some person, for whose criminal act
they were responsible, "permitted", as opposed to "committed", the user
in contravention of the regulation; that, as there was no evidence that the
E appellants had knowledge of any facts constituting user in contravention of
the regulation, they did not permit such user, and accordingly the con-
viction should be quashed.

F Per PARKER, J. (delivering the judgment of the majority of the court,
LORD GODDARD, C.J., CASSELS, LYNSEY and PARKER, JJ.): knowledge,
in this connection, includes the state of mind of a man who shuts his eyes to
the obvious or allows his servant to do something in circumstances where
a contravention is likely not caring whether a contravention takes place or
not (see p. 278, letter G, post; *Goldsmith v. Deakin* (1933) (150 L.T. 157),
Prosser v. Richings ([1936] 2 All E.R. 1627), *Churchill v. Norris* (1938)
(158 L.T. 255), considered); and no different considerations regarding the
inferring of knowledge are imported whether the person charged is an
G individual or a limited company (see p. 279, letter A, post; statements of
VISCOUNT READING, C.J., and ATKIN, J., in *Mousell Bros. v. L. & N.W. Ry.*
([1917] 2 K.B. at pp. 845, 846), approved).

H (ii) the prohibition on user of a motor vehicle imposed by regs. 101 and
75 of the Motor Vehicles (Construction and Use) Regulations, 1951, is
absolute in the sense that no mens rea need be proved in addition to the
user to constitute the offence (test stated by ATKIN, J. in *Mousell Bros. v.*
L. & N.W. Ry. ([1917] 2 K.B. at p. 845), applied); and thus (per
PARKER, J. delivering the judgment of the majority of the court) if the
appellants had been charged with contravening the regulations by their
use of the vehicle and trailer, as distinct from permitting a contravention by
their servant, they would have had no defence, for a master, whether he
be an individual or a limited company "uses" his vehicle if it is used by
his servant on the master's business (see pp. 277, letter H, 279, letter G, post).

Per PARKER, J. (delivering the judgment of the majority of the court): where legislation throws a wide net it is important that only those should be charged who either deserve punishment or in whose case it can be said that punishment would tend to induce them to keep themselves and their organisation up to the mark: dictum of DEVLIN, J., in *Reynolds v. G. H. Austin & Sons, Ltd.* ([1951] 1 All E.R. at p. 612), applied (see p. 279, letter H, post).

Appeal allowed.

A

Street Traffic—Motor vehicle—“Person uses or causes or permits to be used”—Limited company—“Uses”—Motor van driven with defective brake—Absolute offence—Motor Vehicles (Construction and Use) Regulations, 1951 (S.I., 1951, No. 2101), reg. 75, reg. 101.

The respondent B. was driving a Fordson motor van, owned by his employers, the respondent company, when it collided with a stationary lorry. The motor van was equipped with a vacuum-assisted hydraulic brake, part of which had been broken for some time before the collision. Two days before the accident a firm of automobile engineers had examined the van but not the braking system, and B. had not complained to them regarding the condition of the brake. The justices dismissed informations against both respondents that they used on a road a motor vehicle part of whose braking system was not maintained in good working order contrary to the Motor Vehicles (Construction and Use) Regulations, 1951, reg. 101, reg. 75. On appeal,

B

HELD: regulation 101 laid down an absolute prohibition against user in contravention of reg. 75, and, accordingly, the offence against both respondents was proved.

C

D

Provincial Motor Cab Co., Ltd. v. Dunning ([1909] 2 K.B. 599), applied.

Appeal allowed.

AS TO THE CRIMINAL RESPONSIBILITY OF A MASTER FOR THE ACTS OF A SERVANT, see HALSBURY, *Hailsham Edn.*, Vol. 9, p. 12, para. 4; and FOR CASES, see DIGEST, Vol. 14, p. 76, No. 438 et seq.

E

FOR THE ROAD TRAFFIC ACT, 1930, s. 30 (1) (g), see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 600.

FOR THE MOTOR VEHICLES (CONSTRUCTION AND USE) REGULATIONS, 1951, reg. 75, reg. 101, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 22, pp. 199, 203.

F

Cases referred to:

- (1) *Mousell Bros. v. L. & N.W. Ry.*, [1917] 2 K.B. 836; 87 L.J.K.B. 82; 118 L.T. 25; 81 J.P. 305; 13 Digest 409, 1288.
- (2) *Reynolds v. G. H. Austin & Sons, Ltd.*, [1951] 1 All E.R. 606; [1951] 2 K.B. 135; 115 J.P. 192; 2nd Digest Supp.
- (3) *Somerset v. Wade*, [1894] 1 Q.B. 574; 63 L.J.M.C. 126; 70 L.T. 452; 58 J.P. 231; 14 Digest 38, 79.
- (4) *Ferguson v. Weaving*, [1951] 1 All E.R. 412; [1951] 1 K.B. 814; 115 J.P. 142; 2nd Digest Supp.
- (5) *Goldsmith v. Deakin*, (1933), 150 L.T. 157; 98 J.P. 4; Digest Supp.
- (6) *Prosser v. Richings*, [1936] 2 All E.R. 1627; 155 L.T. 284; 100 J.P. 390; Digest Supp.
- (7) *Churchill v. Norris*, (1938), 158 L.T. 255; 82 Sol. Jo. 114; Digest Supp.
- (8) *Browning v. Watson (J. W. H.) (Rochester), Ltd.*, [1953] 2 All E.R. 775; 117 J.P. 479; 3rd Digest Supp.
- (9) *Provincial Motor Cab Co., Ltd. v. Dunning*, [1909] 2 K.B. 599; 78 L.J.K.B. 822; 101 L.T. 231; 73 J.P. 387; 13 Digest 409, 1293.

G

H

- (10) *Barker v. Levinson*, [1950] 2 All E.R. 825; [1951] 1 K.B. 342; 114 J.P. 545; 2nd Digest Supp.
- (11) *Griffiths v. Studebakers, Ltd.*, [1924] 1 K.B. 102; 93 L.J.K.B. 50; 130 L.T. 215; 87 J.P. 199; 34 Digest 153, 1202.
- (12) *Evans v. Dell*, [1937] 1 All E.R. 349; 156 L.T. 240; 101 J.P. 149; Digest Supp.
- (13) *Gifford v. Whittaker*, [1942] 1 All E.R. 604; [1942] 1 K.B. 501; 111 L.J.K.B. 461; 166 L.T. 324; 106 J.P. 128; 2nd Digest Supp.
- (14) *Houston v. Buchanan*, [1940] 2 All E.R. 179; 1940 S.C. (H.L.) 17; 2nd Digest Supp.

JAMES & SON, LTD. v. SMEE

CASE STATED by Kent justices.

On Dec. 18, 1953, at a court of summary jurisdiction sitting at Bromley, an information was preferred by the respondent Charles Smeë, against the appellants James & Son, Ltd., that they on Nov. 10, 1953 at High Street, Bromley, did permit to be used on a road a trailer the braking system of which had not been maintained in good and efficient working order and properly adjusted, contrary to the Motor Vehicles (Construction and Use) Regulations, 1951, reg. 75 and reg. 101.

The information was heard on Jan. 11, 1954, and the facts found by the justices are set out in the judgment of PARKER, J. It was contended by the appellants that they had taken all proper steps to prevent the offence by their driver, Cheeseman, of using the trailer when the brakes were not properly adjusted; that the driver was solely responsible for the vehicle after it had left their premises; that the brake cable of the trailer had been properly adjusted and was not defective when it left their depot and was in order when it returned later the same day; that they could not have known and could not be responsible for the lack of adjustment which occurred after the trailer had left their premises; that while agreeing that both the driver and the trailer boy were servants of the appellants and that a corporation could only act by its servants or agents, the acts of the driver and/or of the trailer boy after they left the depot were not the acts of the appellants and these two men were not their servants or agents for the purpose of criminal responsibility in relation to permitting this offence. The respondent did not reply. The justices were of the opinion that the regulations imposed an absolute prohibition on the use on a road of a trailer with a faulty braking system; the respondent having proved that the appellants were the owners of the trailer the brakes of which were not in order, it fell to the appellants to prove they had not permitted the use of the trailer with the brakes in that condition. The appellants being a corporation could only act by an agent; the act or omission of any responsible servant of a corporation in contravention of the regulations, if done in the course of his employment, must be deemed to be the act or omission of the corporation; the driver was a responsible servant of the appellants, and he allowed a junior servant of the appellants to attend to the brake connections without taking steps to verify that they had been properly connected and adjusted, and that was a failure by the appellants to take all proper steps to prevent the use of the trailer as alleged in the information. Accordingly, the justices convicted the appellants.

N. J. Skelhorn, Q.C., and *C. D. Brandreth* for the appellants.
Paul Wrightson for the respondent.

GREEN v. BURNETT

CASE STATED by West Riding justices.

On Jan. 13, 1954, at a court of summary jurisdiction sitting at Wakefield, two informations were preferred by the appellant, a superintendent of police, one

against the respondent Charles Thomas Burnett, and one against the respondent company Chippeck Bedding Co., Ltd., that each of them on Nov. 30, 1953, at Wrenthorpe unlawfully did use on a certain road a motor van on which a certain part of the braking system fitted thereto was not maintained in good and efficient working order and properly adjusted, contrary to the Motor Vehicles (Construction and Use) Regulations, 1951, reg. 75 and reg. 101.

The informations were heard on Mar. 1, 1954, and the justices found the following facts: The respondent Burnett was engaged in the course of his employment by the respondent company on Nov. 30, 1953, in driving a Fordson motor van on a road when it collided with a stationary motor lorry as a result of its brakes failing to operate when the respondent Burnett attempted to apply them. The motor van was equipped with a vacuum-assisted hydraulic brake. The braking system of the motor van was undamaged by the collision. Thereafter the foot pedal could be depressed to its maximum extent without any braking effort being exerted by any of the brake shoes. The braking system was dismantled by a motor engineer who discovered that a certain part had been broken for some time before the collision, as a result of which no effective pressure could be exerted on the system. The motor van had the appearance of having been well maintained in a roadworthy condition up to the time of its examination by the motor engineer. The respondent Burnett, who was employed as a driver and had no responsibility as a motor mechanic, had a general instruction from the respondent company to hand over the motor van to the care of a certain firm of automobile engineers whenever he felt the vehicle needed their attention for maintenance purposes or whenever any manifest defect in any of its parts indicated that it required examination and or repair. The respondent Burnett had handed over the motor van to this firm on several occasions, the last being on Nov. 28, 1953. This firm did not examine the braking system on Nov. 28, 1953, nor did Burnett complain to them about the system. The firm had no record of having examined or repaired the braking system at any time. The broken part could have been discovered only by dismantling the master cylinder. On one occasion on the day before the collision (i.e., on Nov. 29, 1953) the action of the brake foot pedal, when the respondent Burnett was driving the motor van, indicated some deterioration in the braking system.

It was contended on behalf of the respondents, *inter alia*, that they had done everything within their power to keep the motor van well maintained in a roadworthy condition and that they had, therefore, complied with reg. 75; that they could have had no knowledge of a defect contained within the casting of the master cylinder, nor should such knowledge be imputed to them merely because the driver of the vehicle had on one occasion on the day prior to the collision found the brake foot pedal not fully effective. It was contended on behalf of the appellant, *inter alia*, that if the court were satisfied that the braking system of the motor van, at the material time, was not in good and efficient working order (and this was admitted by the respondents), they ought to convict the respondents of an offence under reg. 75. The justices were of the opinion, *inter alia*, that (i) it was no part of the driver's duty to be concerned with the maintenance or to make any detailed examination of the vehicle but to report to his employers any defect which arose when steps would be taken by them to have the defect remedied; (ii) the failure of the brakes was not due to "failure to maintain", but was due to the mechanical failure in part of the brake mechanism; (iii) there was no evidence to suggest that the owners of the vehicle had failed to maintain it. They had made complete arrangements with a firm of motor engineers and evidence was produced of regular maintenance of the vehicle in question; (iv) the user of the vehicle by the owners and the driver with the brake in a defective condition arose from circumstances over which they

had no control and had not, therefore, contravened the provisions of reg. 75. Accordingly, the justices dismissed the informations.

F. P. Neill for the appellant.

The respondents did not appear.

Cur. adv. vult.

A Oct. 22. PARKER, J., read the majority judgment of the court (LORD GODDARD, C.J., CASSELS, LYNSKEY and PARKER, J.J.) in *James & Son, Ltd. v. Smees*.

B PARKER, J.: The short facts as found by the justices are as follows. The appellants owned a motor lorry and a trailer. In order that the braking system should be in proper order when the lorry was drawing the trailer a brake cable on the lorry had to be connected to a brake cable on the trailer. When the connection was made the trailer's brakes could be operated by a lever in the cabin of the lorry. On Nov. 10, 1953, the police stopped the lorry and trailer and found that the two cables were not connected. Apparently the lorry and trailer had left the appellants' premises that morning with the connection properly made and the braking system in good order. The driver was one Cheeseman, and he had with him a boy to act as his assistant, both being servants of the appellants. They C took the vehicles to premises of Whitbread's Brewery to load up and for that purpose it was necessary to uncouple the trailer. When the loading was completed the driver left it to the boy to couple the trailer to the lorry. He coupled on the trailer, but failed to connect the cables properly, and the driver took no steps to check the connections. The court was told that the driver had been charged with "using" the trailer contrary to the said regulations and had D been convicted.

As this case raises matters of some importance it is necessary to look closely at the relevant legislation. By s. 30 (1) of the Road Traffic Act, 1930, the Minister of Transport may make regulations with respect, inter alia, to the following matter:

E " (g) . . . for securing that brakes . . . shall be efficient and kept in proper working order . . . "

Pursuant to that power the Minister made regs. 75 and 101 of the Motor Vehicles (Construction and Use) Regulations, 1951. Regulation 75, so far as it is material, provides:

F " . . . every part of every braking system and of the means of operation thereof fitted to a motor vehicle or trailer . . . shall at all times, while the motor vehicle or trailer is used on a road, be maintained in good and efficient working order and shall be properly adjusted."

Regulation 101 provides:

G " If any person uses or causes or permits to be used on any road a motor vehicle or trailer in contravention of or fails to comply with any of the preceding regulations contained in Part III of these regulations [which includes reg. 75] he shall for each offence be liable to a fine not exceeding £20."

H It seems clear that while the driver of a vehicle on the road "uses" that vehicle within the meaning of reg. 101, so also, if he be a servant, does his master whether that master be a private individual or a limited company provided always that the servant is driving on his master's business. It cannot be said that only the servant uses and that the master merely causes or permits such use. In common parlance a master is using his vehicle if it is being used by his servant on his business and there is still room for the application of the words "causes or permits" since he may request or permit a friend to use the vehicle.

Further, applying the well-known test laid down by ATKIN, J., in *Mousell Bros. v. L. & N.W. Ry.* (1) ([1917] 2 K.B. at p. 845), it seems clear that the prohibition against user in contravention of reg. 75 is absolute in the sense that no mens rea apart from user need be shown to constitute the offence. It is true that in *Reynolds v. G. H. Austin & Sons, Ltd.* (2) this court held that the similar words in s. 72 (10) of the Road Traffic Act, 1930—

“ If any person uses a vehicle or causes or permits it to be used in contravention of this section . . . he shall be guilty of an offence ”

did not constitute an absolute prohibition, but that was because certain conditions which had to be complied with to avoid contravention necessarily depended on the action of persons over whom the user of the vehicle could have no control. As was said by LORD GODDARD, C.J. ([1951] 1 All E.R. at p. 610):

“ A consideration of the conditions, specified in s. 25 (1) of the Road Traffic Act, 1934, which have to be satisfied to make the journey a special occasion show that some impose a prohibition or some duty on the user, who for this purpose is equivalent to the owner. Such are those in paras. (a), (d), (f) and (g) of the sub-section. Clearly no question of knowledge arises in regard to them. It seems to me that quite different considerations apply to conditions (b), (c) and (e). The owner must be no party to a breach of them, but they appear to me to apply not only to acts of the owner but to those of others whom he could not control.”

DEVLIN, J., having dealt with the justification of punishing a man for something he knows nothing about, said (*ibid.*, at p. 612):

“ If a man is punished because of an act done by another, whom he cannot reasonably be expected to influence or control, the law is engaged, not in punishing thoughtlessness or inefficiency and thereby promoting the welfare of the community, but in pouncing on the most convenient victim. Without the authority of express words, I am not willing to conclude that Parliament can intend what would seem to the ordinary man (as plainly it seemed to the justices in this case) to be the useless and unjust infliction of a penalty.”

In the present case, however, the maintenance of the braking system is wholly under the control of the master's servants and agents and the prohibition is in our view absolute. Indeed, it is to be observed where in Part III of the regulations exercise of proper care and absence of knowledge is to be a defence, it is so stated: cf. regs. 73 and 80.

The appellants were, however, charged with permitting the use in contravention of reg. 75 which, in our opinion, at once imports a state of mind. The difference in this respect was pointed out as long ago as 1894 by COLLINS, J., in *Somerset v. Wade* (3), where he distinguished an absolute prohibition against a licensee selling to a drunken person and a prohibition against permitting drunkenness. In the latter case he must be shown to have known that the customer was drunk before he can be convicted: cf. also *Ferguson v. Weaving* (4). Knowledge, moreover, in this connection includes the state of mind of a man who shuts his eyes to the obvious or allows his servant to do something in the circumstances where a contravention is likely not caring whether a contravention takes place or not: cf. *Goldsmith v. Deakin* (5); *Prosser v. Richings* (6); and *Churchill v. Norris* (7). In the present case there is no evidence that the appellants by any responsible officer permitted in any such sense the user by the driver in contravention of the regulation. It is urged, however, that the fact that the appellants are a limited company imports different considerations, and that, whereas a private person could not be convicted unless there was evidence of knowledge on his part in the sense indicated above, yet in the case

of a limited company that knowledge can be inferred. We are unable to see how different considerations can apply in the two cases. A person in this context must include a company and "permitting" in the regulation must have the same meaning whether the "person" charged is a private individual or a company. Indeed in *Mousell Bros. v. L. & N.W. Ry.* (1), the court emphasised that a limited company was not to be distinguished from any other principal: see VISCOUNT READING, C.J. ([1917] 2 K.B. at p. 845) and ATKIN, J. (ibid., at p. 846). It is, of course, true that the appellants permitted the driver to use the vehicles, and indeed, as the Case finds, he was their responsible servant in charge of the vehicles whose job was to verify the condition of the brakes, but a permission to use is not, unless more is proved, a permission to use in contravention.

Finally, it was contended that the driver had permitted the use in contravention and that the appellants had accordingly permitted such use. In other words, it is said that in committing the offence of the user in contravention he at the same time made his master guilty of the offence of permitting such user. In our opinion this contention is highly artificial and divorced from reality. We prefer the view that before a company can be held guilty of permitting a user in contravention of the regulation it must be proved that some person for whose criminal act the company is responsible, permitted as opposed to committed the offence. There was no such evidence in the present case. It was, however, suggested that this view was in conflict with the decision of this court in *Browning v. J. W. H. Watson (Rochester), Ltd.* (8). In that case the respondents were charged with permitting a motor coach to be used as an express carriage without a road service licence albeit unknown to them two members of the public had journeyed in the coach which, apart from them, was carrying members of a football club as a private party. The court held that, notwithstanding that absence of knowledge, the respondents had permitted such user, and it was said in the present case that could only be on the basis that the respondents' driver had failed to see that only members of the club went in the coach. It is to be observed, however, that LORD GODDARD, C.J., said ([1953] 2 All E.R. at p. 778):

"We cannot say here that, if a coach proprietor lets a coach to a club for the conveyance of the members of the club and allows people who are not members of the club to get into the coach, he is not liable. Of course, this was not a wilful violation, but it is clear that the respondents should have taken some precaution. They should have told the football club: 'We will only do this if either you issue tickets to the members so that we can see that the people who get on the coach are members, or one of your servants, or the secretary of the club, or some other person, stands at the starting place to see that only members of the party get on to the coach.'"

In other words, it was the failure of the respondents' responsible officer to take any precautions that constituted the permission.

In our view, therefore, this appeal should be allowed albeit the appellants would have had no answer if charged with using the vehicles in contravention of the regulations. Normally, we should be very loath to allow the appeal on the ground that the appellants had been wrongly charged, but we have no such feelings in the present case since in our view on the facts it cannot be suggested that they were in any way to blame, nor is it a case where it could be said that a conviction and fine would make them more alert to see that the law was observed. Where legislation, as here, throws a wide net it is important that only those should be charged who either deserve punishment or in whose case it can be said that punishment would tend to induce them to keep themselves and their organisation up to the mark: cf. DEVLIN, J., in *Reynolds v. G. H. Austin & Sons, Ltd.* (2) ([1951] 1 All E.R. at p. 612). The appeal is accordingly allowed with costs and the conviction quashed.

SLADE, J. read the following judgment: The Motor Vehicles (Construction and Use) Regulations, 1951, reg. 101, provides:

"If any person uses or causes or permits to be used on any road a motor vehicle or trailer in contravention of or fails to comply with any of the preceding regulations contained in Part III of these regulations he shall for each offence be liable to a fine not exceeding £20."

Regulation 75 is one of the preceding regulations in Part III. Regulation 3 (5) applies the Interpretation Act, 1889, to the interpretation of these regulations. The Interpretation Act, 1889, s. 2 (1) enacts:

"In the construction of every enactment relating to an offence punishable on indictment or on summary conviction, . . . the expression 'person' shall, unless the contrary intention appears, include a body corporate."

In each of the two appeals before the court a servant of a limited company acting in the course and within the scope of his employment by the company drove on a road a motor vehicle (the property of the company) which contravened the provisions of reg. 75. In each case the company was also prosecuted in respect of the offence so committed by its servant. In one appeal the information took the form of charging the company with having permitted the use of the vehicle in breach of the statutory prohibition. In the other appeal the information charged the company with having used the vehicle in breach of the statutory prohibition. It is now well settled that if a servant, acting within the general scope of his employment, does an act which the law absolutely prohibits, the master (whether an individual or a company) is criminally responsible for that act even though he has expressly forbidden his servant to commit it: see, e.g., *Mousell Bros. v. L. & N.W. Ry.* (1), per VISCOUNT READING, C.J. ([1917] 2 K.B. at pp. 843, 844), ATKIN, J. (ibid., at p. 845); *Barker v. Levinson* (10), per LORD GODDARD, C.J. ([1950] 2 All E.R. at p. 827); *Griffiths v. Studebakers, Ltd.* (11).

The law is equally well settled that liability for contravention of an absolute prohibition depends on the fact of contravention and not on the intention to contravene. Neither mens rea in its true sense of importing a blameworthy mind nor so called mens rea, i.e., negligence in the form of a failure to take reasonable steps to prevent the offence, is a relevant matter for consideration, except on the question of punishment. My brethren take the view that reg. 101 on its true construction creates an absolute prohibition against using, but not against permitting to be used. I agree with them in thinking that reg. 101 creates an absolute prohibition against using, but I am unable to agree with them in thinking that a distinction can be drawn between "using" and "permitting to be used" where the "person" charged is a company and the liability sought to be imposed is the vicarious liability of the company for the breach of an absolute prohibition by its servant whilst acting within the general scope of his employment. I am not dealing with, and I reserve for further consideration when the question arises, the position where no question of vicarious liability arises at all; for example, where a company permits its managing director to use one of its motor vehicles for his own private purposes. There may be some authority for the distinction between using and permitting where the master and servant are both individuals: *Evans v. Dell* (12). I say "may be" because I am by no means clear on precisely what footing that case was decided and in particular whether the court held that the prohibition there was absolute. I am, however, unable to persuade myself that the legislature intended to draw any such distinction where the master is (to use the words of the Interpretation Act, 1889, s. 2 (1)) a body corporate, and I know of no authority which requires me so to hold. A master, who is an individual, can either commit an offence himself or he may cause or permit another to commit it. A company can only commit an offence by its servant.

An individual uses a motor vehicle when he is driving it himself, or perhaps when, although not actually driving it, he is nevertheless in charge of it: *Gifford v. Whittaker* (13). "Causing or permitting" a motor vehicle to be used is, in the case of an individual, apt only to describe the position when some other person is driving it or is in charge of it. Compare the language of s. 35 (1) of the Road Traffic Act, 1930:

A "... it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be . . . [the requisite policy of insurance against third-party risks]."

B The words "any other person" in this context would, I apprehend, include a chauffeur driving his employer's car in the course of his employment. A company, on the other hand, can only use a motor vehicle in the sense of permitting or causing another to use it. If, when a company's motor vehicle is being driven by its servant in the course of his employment, there is any distinction to be drawn between the company using that vehicle and permitting it to be used, I ask myself in what possible circumstances the company can be said to be using the vehicle and not permitting it to be used, or can be said to be permitting its use and not to be using it. I can think of none.

C If, in reg. 101, the legislature intended to create a distinction between an absolute, and what I may call a qualified, prohibition in relation to the user of a motor vehicle on a road by a company I should have thought that that distinction was to be found in the words "causes to be used" as opposed to the words "uses" or "permits to be used". In this connection I refer to the well-known passage from the opinion of LORD WRIGHT in *Houston v. Buchanan* (14) where he says ([1940] 2 All E.R. at p. 187):

D "To 'cause' the user involves some express or positive mandate from the person 'causing' to the other person, or some authority from the former to the latter, arising in the circumstances of the case. To 'permit' is a looser and vaguer term. It may denote an express permission, general or particular, as distinguished from a mandate. The other person is not told to use the vehicle in the particular way, but he is told that he may do so if he desires. However, the word also includes cases in which permission is merely inferred. If the other person is given the control of the vehicle, permission may be inferred if the vehicle is left at the other person's disposal in such circumstances as to carry with it a reasonable implication of a discretion or liberty to use it in the manner in which it was used. In order to prove permission, it is not necessary to show knowledge of similar user in the past, or actual notice that the vehicle might be, or was likely to be, so used, or that the accused was guilty of a reckless disregard of the probabilities of the case, or a wilful closing of his eyes. He may not have thought at all of his duties under the section."

E F G In the case of a company a distinction between "causing" and "permitting" seems to me to be far more appropriate to the requirement of some positive act or indeed negligent omission on the part of, for example, a managing director of the company, as opposed to the mere act of a servant of the company in driving the vehicle in the course of his employment, than the drawing of an essentially artificial distinction between a company using and permitting the use of one of its vehicles. In the course of the argument in *Reynolds v. G. H. Austin & Sons, Ltd.* (2), LORD GODDARD, C.J., asked whether it was true to say that a limited company can "use" a vehicle as opposed to causing or permitting it to be used.

H Had the matter been res integra it might well have been argued that a company could not "use" a vehicle, but could only cause or permit it to be used. The contention would have been that in relation to the words "If any person

uses " in reg. 101 a contrary intention within the meaning of s. 2 (1) of the Interpretation Act, 1889, did appear. I am, however, precluded from considering that possible construction of the regulation by the fact that this court has convicted limited companies of "using" a motor vehicle on a road when the vehicle has been driven by their servant in the course of his employment. I am, nevertheless, of the opinion that the word "uses" means in the case of a body corporate "permits to be used"; that the two expressions in reg. 101 as interpreted by s. 2 (1) of the Interpretation Act, 1889, are in the case of a company tautologous, and, accordingly, that if the word "uses" creates an absolute prohibition (as I think it does) so also does the expression "permits to be used". In the result I am, therefore, of opinion that in each of these appeals the company should be convicted. As my brethren take the contrary view the company which had the good fortune to be charged with "permitting" will escape whilst the company charged with "using" will be convicted. I am relieved to think that such an anomalous result will be unlikely to arise again in the future, since I imagine that those entrusted with the drafting of informations will know which expression to select in the future.

LORD GODDARD, C.J., reading the judgment of the court in *Green v. Burnett*: Having regard to the full judgment just delivered in *James & Son, Ltd. v. Smeed* it is unnecessary for the court to say more than that the Motor Vehicles (Construction and Use) Regulations, 1951, reg. 101 and reg. 75 lay down an absolute prohibition against user in contravention thereof and that, accordingly, the offence against both respondents was clearly proved. We may observe on what may perhaps be described as the merits that the present is not a case, as *James & Son, Ltd. v. Smeed* was, of the vehicle being sent out from the owners' premises in perfect condition. From the facts found by the justices it is evident that a defect in the braking had existed for some time though the respondents may not have known of it. In these circumstances the present case is indistinguishable from *Provincial Motor Cab Co., Ltd. v. Dunning* (9), which, so far as we are aware, has never been questioned. The case must go back with a direction to convict.

Appeals allowed.

Solicitors: *James & Son, Ltd. v. Smeed*: *Hugh-Jones & Co.* (for the appellants); *Solicitor, Metropolitan Police.*

Green v. Burnett: *Cummings, Marchant & Ashton*, agents for *R. C. Linney*, Wakefield (for the appellant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

DAVIES, TURNER & CO., LTD. v. BRODIE.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Ormerod, J.J.),
October 21, 1954.]

*Carriage of Goods—Carriage for hire—Failure to comply with conditions of
A licence—Aiding and abetting—Hirer making reasonable inquiries—Road
and Rail Traffic Act, 1933 (c. 53), s. 9 (1).*

A The appellants carried on the business of forwarding agents. On Oct. 29, 1953, the driver of a goods vehicle belonging to a Leicester firm, obtained from the appellants an order to carry a load of steel from Newport, Monmouthshire, on his return journey to Nottingham. The owner of the lorry held an A licence but did not hold a permit for this lorry to carry goods for hire or reward more than twenty-five miles from its operating centre, as required by the Transport Act, 1947, s. 52 (1). The driver was B unaware of the fact that a permit was required for the carriage of goods in question. Prior to giving the order the appellants' manager had inquired from the driver if he had a permit to carry the load, and, on receiving an affirmative answer, required the driver to sign an assurance that his employers held the necessary documents, and would produce them, if C required to do so. The appellants were convicted of aiding and abetting the commission of an offence by the lorry owner against the Road and Rail Traffic Act, 1933, s. 9 (1). On appeal,

HELD: as the appellants, acting in good faith and taking reasonable precautions, did not know the essential matters which would constitute the offence, they had not aided and abetted the commission of the offence.

D *Carter v. Mace* ([1949] 2 All E.R. 714), distinguished.

Appeal allowed.

E **EDITORIAL NOTE.** Section 52 (1) of the Transport Act, 1947, makes it a condition of every A licence that goods shall not be carried for hire or reward in an authorised vehicle, except under a permit granted by the British Transport Commission, if the vehicle is more than twenty-five miles from its operating centre at any time while the goods are carried. Failure to comply with this condition is an offence under s. 9 of the Road and Rail Traffic Act, 1933. Section 52 of the Transport Act, 1947, is prospectively repealed from the end of the year 1954 by s. 8 of the Transport Act, 1953, 33 HALSBURY'S STATUTES (2nd edn.) 815.

F FOR THE ROAD AND RAIL TRAFFIC ACT, 1933, s. 9 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 687.

FOR THE TRANSPORT ACT, 1947, s. 52, see *ibid.*, p. 768.

Cases referred to:

(1) *Carter v. Mace*, [1949] 2 All E.R. 714; 113 J.P. 527; 2nd Digest Supp.

(2) *Johnson v. Youden*, [1950] 1 All E.R. 300; [1950] 1 K.B. 544; 114 J.P. 136; 2nd Digest Supp.

G CASE STATED by Newport justices.

H At a court of summary jurisdiction sitting at Newport on June 2, 1954, the respondent, James Arthur Brodie, on behalf of the licensing authority for goods vehicles (South Wales traffic area) preferred an information against the appellants, Davies, Turner & Co., Ltd., charging that they did aid, abet, counsel and procure one Arthur Vincent Hill, a partner in the firm of Hills Transport, in the commission of an offence, viz., that he, on or about Oct. 29, 1953, between Newport in the county of Monmouth and Newark in the county of Nottingham did use a goods vehicle authorised in a public A carriers' licence granted under the Road and Rail Traffic Act, 1933, Part I, on a road for the carriage of steel for hire or reward outside the permitted radius of twenty-five miles from its operating centre other than under a permit granted in accordance with the provisions of s. 52 of the Transport Act, 1947, contrary to s. 9 (1) of the Road and Rail Traffic Act, 1933. It was proved or admitted that on Oct. 29, 1953,

a goods vehicle owned and operated by Hills Transport (a firm) and driven by their employee, one Durrance (herein called "the driver"), was being used on a return journey from Newport in the county of Monmouth to Newark for the carriage of steel, that the carriage of steel required a permit but that no permit had been granted, that for some months up to a few days before Oct. 29, 1953, the driver had been driving one of three vehicles owned and operated by Hills Transport for which it was not necessary to have permits for the carriage of goods, that he had previously obtained orders from the appellants for the carriage of goods on return journeys, that he had carried such goods on this last-mentioned vehicle, that he was unaware of the fact that he required a permit for the carriage of steel on Oct. 29, 1953, and that as far as he personally was aware there was no difference between the carriage of steel on Oct. 29, 1953, and the previous instances of carriage; that on Oct. 29, 1953, the driver applied to and obtained from the appellants who were forwarding agents carrying on business at a number of places including Cardiff, an order for the carriage of the steel; that prior to giving the order the appellants' manager at Cardiff, one Evans (herein called "the appellants' manager"), inquired of the driver if he had a permit to carry the load and, on the driver replying in the affirmative but failing to produce any permit or other authorisation, the appellants' manager required the driver to sign on behalf of Hills Transport an assurance in the appellants' usual form that Hills Transport held the necessary documents and would produce them if required and that they were legally entitled to collect and deliver the goods; that the driver did not in fact know much about permits and the appellants' manager was aware of this fact; that the appellants' manager realised that it was his duty to see that vehicles engaged by him could legally carry the loads for which he engaged them and knew that a driver was required to carry any necessary permit with him; that in giving the assurance the driver misinformed the appellants' manager but acted in ignorance in so doing; that the appellants' manager in accepting the assurance likewise acted in ignorance of the fact that no permit or authority covering the carriage had been granted and in accordance with the appellants' usual practice.

The document which the appellants' manager required the driver to sign read as follows:

"Goods are handed to you on your express assurance that you hold the necessary documents and will produce them if required to and on the express condition that you are legally able to collect and effect delivery to the destination."

It was contended on behalf of the appellants that for them to be found guilty it was necessary to prove either that they knew that the vehicle was being used without a permit, when a permit was required, or that they suspected it was being so used and connived at the offence, and that there was no evidence of knowledge or connivance in this case. It was contended on behalf of the respondent that the appellants were under a duty to see that a permit had actually been granted, that that duty was not and could not be discharged merely by obtaining a written assurance from the driver and that by failing to make further inquiries after he had failed to produce his permit the appellants closed their eyes to a contravention of the Act. The justices were of the opinion that the appellants were guilty of the offence alleged because they gave the order for the carriage of the goods without requiring the production to them of the permit or authorisation for such carriage and without making proper or sufficient inquiry as to the necessity for or existence of such permit or authorisation. Accordingly, they fined the appellants £10 and £3 3s. costs.

G. C. Dare for the appellants.

J. P. Ashworth for the respondent.

ORMEROD, J., stated the facts and continued: The justices clearly were of the opinion not only that it was the duty of the driver to carry a permit for the carriage of these particular goods, as indeed it was, but that it was also the duty of the appellants' manager to require from the driver the production of that permit, which is a matter for which there is no authority at all, and I think that, clearly, is not the position. [HIS LORDSHIP referred to the justices' conclusion and continued:] The questions which the justices submit in this Case for the opinion of this court are:

"Whether (i) in law the appellants were under a duty to require production of the permit itself, and (ii) there was any evidence on which we could find the appellants guilty of the alleged offence."

It appears to be clear from the opinion expressed by the justices and from the questions on which they ask the opinion of this court that in coming to the conclusion that the appellants' manager had not made sufficient or proper inquiry as to either the necessity or the existence of a permit in this particular case, that they were dominated by the view that not only was it the duty of the driver to carry this permit, but it was also the duty of the appellants' manager to demand production of it, and if he had demanded production of it and it had not been forthcoming, presumably the situation might have been different. It is contended for the appellants that there is no evidence here of aiding and abetting on the part of the appellants because before they allowed this load to be put on to this lorry they did in fact obtain from the driver an assurance that the licence was in order and would be produced at any time if necessary. That appears, on the face of it, to be a contention to which there is no answer. Counsel for the respondent referred to *Carter v. Mace* (1). In that case the appellant carried on a business similar to that carried on by the appellants in the present case—the business of a transport clearing house—and he appears to have hired for the transport of copper cathodes a lorry which could not carry that particular load. The evidence in that case was that the appellant made no inquiry of any kind whether the owner of the lorry was licensed or permitted to carry this particular load, and LORD GODDARD, C.J., in his judgment used these words ([1949] 2 All E.R. at p. 715):

"The appellant carries on a business which is described as a clearing house for transport. That means that he executes orders from people who want goods transported. He does not transport the goods himself, but he gets other people to do so. He engages the lorry owners to do the work and pays them rather less than he receives. If the appellant undertakes this class of business, he must see that contracts are carried out in a legal manner, and that the people whom he employs can lawfully carry out the contracts which he has made . . . In these circumstances, it seems to me perfectly clear that the appellant was aiding and abetting the commission of the offence by [the owner of the lorry.]"

On the strength of that judgment counsel for the respondent argued that it was the duty of the appellants' manager to make inquiries, that the inquiries made by the appellants' manager were not sufficient, as the justices have found, and that as that is a question of fact clearly the justices were entitled to convict. I think it is proper to say that *Carter v. Mace* (1) was decided on its particular facts—the failure of a man engaged in this sort of business to make any inquiries as to the existence or otherwise of licences. The present case is entirely different; inquiry was made and an assurance given by the driver that there was a permit in existence, and the additional precaution was taken by the appellants' manager to obtain an undertaking in writing that the permit was in existence and would be produced if required at any future time. It seems impossible to say that the appellants, having taken this perfectly reasonable precaution, although it may have been they could have done other things, and having inquired about the

existence of a permit and received an assurance both orally and in writing, were aiding and abetting this offence. In those circumstances, I think this appeal must be allowed.

LORD GODDARD, C.J.: I agree. I only repeat what I said, with the assent of the other members of the court, in *Johnson v. Youden* (2) ([1950] 1 All E.R. at p. 302) that

“ a person cannot be convicted of aiding and abetting the commission of an offence if he does not know of the essential matters which would constitute the offence.”

If a person shuts his eyes to the obvious or, perhaps, refrains from making any inquiry where a reasonably sensible man would make inquiry, I think the court can find that he was aiding and abetting.

Carter v. Mace (1), on which so much reliance has been placed, laid down no principle of law. It was decided entirely on the particular facts, which were striking. The appellant in that case made no inquiry but was taking any lorry that came along and using it, and the court said that he could not be heard to say he was not aiding and abetting. In the present case, I do not say that the appellants took every precaution or made every inquiry; I do not think that is necessary. Once it is shown, however, that they were acting in good faith, as the justices found that they were, and that they got this assurance which was given and taken in good faith, I do not see how it can be said that they aided and abetted an offence when they had no reason to suppose that the facts were present which would constitute an offence. That is the point: they did not know “ the essential matters which would constitute the offence ”. For these reasons, I think the appeal should be allowed.

LYNSKEY, J.: I agree.

Counsel for the appellants: My Lord, I ask for the costs of this appeal here and in the court below.

LORD GODDARD, C.J.: I think you must apply to the justices for the costs below. You can say that you have been encouraged by the Divisional Court to do that. “ Liberty to apply to the justices ” can be included in the order.

Solicitors: *Coward, Chance & Co.* (for the appellants); *Treasury Solicitor* (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

CORDING v. HALSE.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Ormerod, J.J.),
October 20, 1954.]

Street Traffic—Motor vehicle—Unladen weight—Wooden container attached to base of lorry—Whether "alternative body"—Road Traffic Act, 1930 (c. 43), s. 26—Motor Vehicles (Construction and Use) Regulations, 1951 (S.I., 1951, No. 2101), reg. 61, reg. 63 (2), reg. 101.

A
B
C
D
A motor lorry, which had a flat wooden platform extending behind the driver's cab, had a large wooden box-like container affixed to the platform by means of six adjustable wing nuts and bolts for the purpose of carrying cattle, which could not otherwise be carried on the lorry. The container was useless for carrying cattle or anything else unless it was placed on some existing base or platform. When the lorry was carrying cattle or animals the container would be necessary to, or ordinarily used with, the lorry but, when the lorry was carrying goods suitable to be transported on the flat platform, the container was not used. The unladen weight of the lorry without the container was under three tons but in excess of two and a half tons, but with the container it was in excess of three tons. By the Road Traffic Act, 1930, s. 26, the unladen weight of a lorry is inclusive of the body, and, if alternative bodies are used, the heavier body is taken for this purpose if it is necessary to or ordinarily used with the vehicle when working on a road. The owner of the lorry was convicted of contravening the regulations cited above, of which there would have been no contravention unless the lorry was a heavy motor car, i.e., weighed unladen more than three tons. On appeal by Case Stated raising in effect the question whether the weight of the container should be included in computing the weight of the lorry on the ground that with it in position the lorry had an alternative body,

E
HELD: in order to constitute an alternative body of a vehicle for the purposes of the Road Traffic Act, 1930, s. 26, it is not enough that something, e.g., a container, should merely be added to the body of the vehicle; accordingly the weight of the container ought not to be included in the computation of the weight of the lorry, which thus was not a heavy motor car, and the appeal must be allowed.

M'Cowan v. Stewart (1936 S.C. (J.) 36), followed.

Per curiam: in drafting informations in such cases the vehicle should be alleged to be a heavy motor car (see p. 291, letter D, post).

F
Appeal allowed.

G
EDITORIAL NOTE. The criterion of weight of a vehicle for the purposes of this case is three tons. The criterion of weight stated in the definition of heavy motor car in s. 2 (1) (d) of the Road Traffic Act, 1930, is two and a half tons. The fact that three tons is the relevant weight follows from the provisions of the Motor Vehicles (Definition of Motor Cars) Regulations, 1941 (S.R. & O., 1941, No. 291); 22 HALSBURY'S STATUTORY INSTRUMENTS 139, which created further sub-divisions of the classes of motor vehicles defined in s. 2 (1) of the Act of 1930.

AS TO THE WEIGHTS UNLADEN OF MOTOR VEHICLES, see HALSBURY, Hailsham Edn., Vol. 31, p. 773, para. 1206, and Supplement.

H
FOR THE ROAD TRAFFIC ACT, 1930, s. 26, see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 597.

FOR THE MOTOR VEHICLES (CONSTRUCTION AND USE) REGULATIONS, 1951, reg. 61, reg. 63 and reg. 101, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 22, pp. 195 and 203.

Cases referred to:

(1) *Lowe v. Stone*, [1948] 2 All E.R. 1076; [1949] L.J.R. 797; 113 J.P. 59; 2nd Digest Supp.

(2) *M'Cowan v. Stewart*, 1936 S.C. (J.) 36.

(3) *Hodge v. Haydon* (Nov. 13, 1924). Unreported.

(4) *Mackie v. Waugh*, 1940 S.C. (J.) 49; 2nd Digest Supp.

CASE STATED by Somerset justices.

On Dec. 22, 1953, the respondent, Charles Westbrook Halse, an inspector of police, preferred two informations against the appellant, Reginald Sampson Cording, charging that (i) he failed to have prescribed markings on a motor lorry contrary to the Motor Vehicles (Construction and Use) Regulations, 1951 (S.I., 1951, No. 2101), reg. 61 and reg. 101, in that, on Nov. 17, 1953, he, being the owner of a motor lorry being used on the main Bristol Road at Puriton, failed to cause the unladen weight of the vehicle and the maximum speed at which it might be driven when not drawing a trailer to be painted or otherwise plainly marked on some conspicuous place on the left or near-side of the vehicle, (ii) he permitted the use of a motor vehicle not displaying a speed limit disc contrary to the Motor Vehicles (Construction and Use) Regulations, 1951, reg. 63 and reg. 101, in that, on Nov. 17, 1953, he permitted the use of a motor lorry to which the regulations applied, on the main Bristol Road at Puriton, on which there was not exhibited in a conspicuous position at the rear thereof a disc of not less than eight inches in diameter displaying thereon the number "20", which complied in all respects with the requirements of reg. 63. The informations were heard on Apr. 30, 1954, at a court of summary jurisdiction sitting at Bridgwater and the following facts were found. The appellant was the owner of a Commer motor lorry, constructed or adapted for use only for the conveyance of goods or burden, which, on Nov. 17, 1953, was being used with his authority and permission on the main Bristol Road at Puriton. There was no trailer. All the wheels were fitted with pneumatic tyres. At the time of such user there was not painted or otherwise marked anywhere on the lorry the unladen weight thereof or the maximum speed at which it might be driven when not drawing a trailer, nor was there exhibited anywhere on the lorry a disc displaying the number "20". Attached to the base of the lorry was a container. The unladen weight of the lorry without the container was under three tons, but in excess of two and a half tons, while the unladen weight with the container was in excess of three tons. The lorry without the container consisted of the usual cab for the driver and his mate, and a base including a large flat wooden platform extended behind the cab. At the cab end of the platform there was a board about one foot nine inches high extending the width of the platform, which would partially prevent goods on the platform from coming into contact with the back of the cab, and also could be used to secure sideboards to the platform when the lorry was used as a drop-side vehicle. On the edges of the platform there were cleats or other facilities for fastening ropes, and for attaching such sideboards. This platform, without the container or sideboards, was suitable for conveying bulky solid loads, such as bags of cement, lime or trusses of hay or straw. With the sideboards and tailboard attached to the platform, the lorry could be used for the conveyance of loose materials, such as sand, gravel or coal. The container was a large wooden box-like article with two sides, two ends, a roof or covering, and a floor or base. At the material time it was rested on the platform and affixed or attached thereto by means of six wing nuts and bolts, three on each side of the lorry. When so placed on the platform, the container occupied very nearly the whole of the space thereon, the superficial area of its floor or base being only slightly less than the superficial area of the platform. The presence of the container enabled the lorry to be used for carrying cattle, which could not otherwise be carried. The only structural connection between the container and the platform was the six adjustable wing nuts and bolts. The container would be useless for the carriage of cattle or anything else, unless placed on some existing base or platform. If and when the lorry was being used, or about to be used, or had recently been used, for the conveyance of cattle or animals of

any description, the container would be necessary to, or ordinarily used with, the lorry. Conversely, when the lorry was being used for purposes requiring a flat base or low-sided body, the presence of the container would not be necessary, or ordinarily used. The lorry's road fund licence showed its unladen weight to be under three tons.

It was contended on behalf of the appellant that offences were only committed if, at the time of the user, the lorry was a heavy motor car, and that, at the material time, the lorry was not a heavy motor car. The container was something necessary to, or ordinarily used with, the lorry when working on a road. The real issue was whether or not the container was an "alternative body". In itself, the container was not a "body" at all, and it was an "alternative body" since it was merely something placed on, and made fast to, the existing body of the lorry, and merely superimposed on such existing body. It was contended on behalf of the respondent that, at the time of the user, the lorry was a "heavy motor car". The container was a part of the lorry and, as such, fell within the term "all parts" used in the Road Traffic Act, 1930, s. 26. In connection with the use of the lorry for the conveyance of cattle, the use of the container would be ordinary, or necessary, when working on a road, and the question would arise why it was there, if it were not necessary. The container could not be regarded as loose equipment within the meaning of the Road Traffic Act, 1930, s. 26, having regard to the ruling in *Low v. Stone* (1). If the container were not part of the lorry, then, in the circumstances, it comprised the body of the lorry, or was an alternative body. One purpose of the Road Traffic Act, 1930, and of the regulations in question was to ensure that vehicles travelled at such a speed that would, having regard to their own weight and the weight of the load they carried, ensure reasonable safety, by adequate braking power or otherwise, for other road users, vehicular or pedestrian, and that the road surface was left reasonably undamaged. That factor should be borne in mind when construing their provisions.

The justices were of opinion that the container was an alternative body to the lorry and that, when used for carrying cattle or livestock, the container, as such alternative body, was necessary to, or ordinarily used with, the lorry within the meaning of the Road Traffic Act, 1930, s. 26. Therefore, the weight of the container must be included in the computation of the weight of the lorry, and, as the combined weight exceeded three tons, the lorry was a "heavy motor car". Accordingly, the justices convicted the appellant who now appealed.

M. A. B. King-Hamilton, Q.C., and *J. C. D. Harington* for the appellant.
R. Hughes for the respondent.

LORD GODDARD, C.J. : This is a Case stated by justices for the petty sessional division of Bridgwater in Somerset, before whom the appellant was summoned for failing to have prescribed markings on a motor lorry contrary to certain regulations. The markings which the regulations require, if it is a motor lorry to which the regulations apply, are the markings of the unladen weight and the speed at which it might be driven. The appellant was also summoned for permitting the use of a motor vehicle which did not display by means of a disc a speed limit contrary to certain regulations. I will say a word at the end of my judgment about the informations in this case, which, in substance, turned entirely on whether the motor lorry was a heavy motor car because, unless it was a heavy motor car, it did not have to bear the markings or the disc, and if it was, it was bound to carry those markings and display the disc.

The case turns almost entirely on s. 26 of the Road Traffic Act, 1930, which provides:

"For the purposes of this Part of this Act, and of any other enactment relating to the use of motor vehicles on roads, the weight unladen of any vehicle shall be taken to be the weight of the vehicle inclusive of the body

and all parts (the heavier being taken where alternative bodies or parts are used) which are necessary to or ordinarily used with the vehicle when working on a road, but exclusive of the weight of water, fuel or accumulators used for the purpose of the supply of power for the propulsion of the vehicle, and of loose tools and loose equipment."

The justices convicted. I can very well understand the view the justices took, and, if I did not think it was my duty in this case to follow some cases in the Court of Justiciary in Scotland, for reasons which I will also explain, I should have found as the justices found. [HIS LORDSHIP stated the facts and continued:] The whole question which the justices had to decide was whether or not they should, on those facts, find that they must take into account in weighing the vehicle the heavier weight where alternative bodies are used, and they held that the container was an alternative body.

When the Case was first read, I confess that my mind went exactly with the views of the justices. I thought that if a lorry is at one time used simply as a flat open lorry, and on other occasions used to carry cattle and, in order to make the lorry fit to carry cattle a container must be put on to the lorry, altering its whole appearance, then anybody might consider that that was just the sort of thing the Act was dealing with when it talked about alternative bodies. And I thought that this might be so especially in view of the object of this provision in the Road Traffic Act, 1930, which is for the protection of the roads. The difficulty, however, is this. In 1936, this very point came before the Court of Justiciary in Scotland. I do not need to read the facts of *McCowan v. Stewart* (2), but that case is indistinguishable in any material respect from the present case. The only difference there was that the receptacle was fixed to the lorry by means of ropes, and in this case it was fixed by means of nuts. In that case, which was heard before a full Bench—seven Lords of Justiciary were sitting—the court, by a majority of six to one, put a very strict construction on the word "alternative", and held that a body was not an alternative body merely because something was added to the body, and, therefore, that there was no breach of the section when the lorry was used with the receptacle on it. There does seem to have been a case in England which is unreported, which was referred to by the Lord Justice-General (LORD NORMAND) in his judgment, *Hodge v. Haydon* (3), which was heard in this court in November, 1924. He distinguished *Hodge v. Haydon* (3) from *McCowan v. Stewart* (2) by saying that *Hodge v. Haydon* (3) was decided as a pure question of fact, but it is very difficult to say that this case differs in any material respect from *McCowan v. Stewart* (2). It is true that, in 1940, another case raising the same point, *Mackie v. Waugh* (4), came before the other Division of the Court of Justiciary, presided over by the Lord Justice-Clerk (LORD ARTHURSON) and that court held that they were bound by the previous decision, although the three Lords of Justiciary who heard the subsequent case indicated pretty clearly that they did not agree with the decision but felt bound by it.

Meanwhile, Parliament may be said to have taken a hand in this matter because, in 1937, the year after *McCowan v. Stewart* (2) was decided, they passed a section in the Finance Act, 1937 (s. 7), which amended sched. II to the Finance Act, 1920, and they used these words:

"For the purpose of para. 5 of sched. II to the Finance Act, 1920, the unladen weight of a goods vehicle shall be taken to include the weight of any receptacle, being an additional body, placed on the vehicle for the purpose of the carriage of goods or burden of any description, if any goods or burden are loaded into, carried in and unloaded from the receptacle without the receptacle being removed from the vehicle . . ."

It seems to me that Parliament must have regarded *McCowan v. Stewart* (2) as rightly decided, or at any rate that it was a decision with which Parliament was not prepared to interfere, and that they then passed s. 7 of the Finance Act,

1937, to make it clear that, if those circumstances occurred and a vehicle of that nature was used with a receptacle, it was to bear a higher rate of duty. That is only an excise provision, however, and only deals with duty and does not deal with the question whether an offence has been committed under s. 26 of the Road Traffic Act, 1930.

It is very desirable that, with statutes of this nature, the same interpretation should be given on either side of the Border. It would be very unfortunate to have, on a similar set of facts, a conviction in England and no conviction in Scotland, or vice versa, and, in this class of case dealing with this class of subject-matter, this court always tries to follow the decisions of the Court of Session if they can, and I think the Court of Session always pays the same respect to decisions in this country, so that one may get uniformity, which is certainly very desirable. If this case had come before me in 1936 before the case in the Court of Justiciary was decided, I should have been very much inclined to take the view which the justices took here. Since, however, the Court of Justiciary decided as they did, and Parliament has obviously, as it seems to me, accepted that decision, but for finance purposes has cleared up the matter by using the word "additional" instead of "alternative", I think that we must hold that the facts disclosed in this case do not amount to an offence against s. 26, and, for those reasons, with some reluctance, I feel that this appeal must be allowed. It is a matter for the Minister of Transport to consider whether an alteration of the law is desirable, and, if so, to ask Parliament for it.

I only want to say one other word, and that is that, in any future case of this nature, I hope that more thought and care will be taken with the drafting of the informations. At first, it looked as if we should have to refuse to hear this case on the ground that the informations disclosed no case. The main information simply said:

"Failing to have prescribed markings on a motor lorry contrary to reg. 61 and reg. 101 of the Motor Vehicles (Construction and Use) Regulations."

There was no allegation that it was a heavy motor car, which, of course, ought to have been alleged, because it is only a heavy motor car which requires such markings. The court allowed the case to proceed because no point was taken below, and because we thought that the reference to the regulations just saved the position; but it is not the way to draft informations because, if the case goes to appeal, the information has to be carefully reproduced in the conviction so that it discloses an offence on the face of it.

For the reasons I have given, I think that this appeal must be allowed.

LYNSKEY, J. : I agree, and have nothing to add.

ORMEROD, J. : I agree.

Appeal allowed.

Solicitors: *Baileys, Shaw & Gillett*, agents for *Tozers*, Dawlish (for the appellant); *Rashleigh & Co.*, agents for *Alms & Young*, Taunton (for the respondent).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

R. v. NATIONAL INSURANCE COMMISSIONER.

Ex parte TIMMIS.R. v. SAME, *Ex parte* COX. R. v. SAME, *Ex parte* JAMES.[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Ormerod, JJ.),
October 19, 1954.]

National Insurance—Benefits—Entitlement—Convicted persons detained as of unsound mind and as mental defectives—“Detention in legal custody”—National Insurance Act, 1946 (c. 67), s. 29 (1) (b)—Criminal Justice Act, 1948 (c. 58), s. 66.

Where a person having been charged with a criminal offence is found to have committed the acts charged and also either (i) is found to be of unsound mind and is ordered to be detained in an institution under the provisions now enacted in s. 30 (1) of the Magistrates' Courts Act, 1952, or (ii) is found to be a defective within the meaning of the Mental Deficiency Act, 1913, and is ordered to be detained under the provisions of s. 8 (1) of that Act, that person, while so detained, is undergoing “detention in legal custody” within the meaning of the National Insurance Act, 1946, s. 29 (1) (b) and is thereby disqualified for receiving any benefits under the Act.

Quaere: Whether the position would be the same where a summary reception order was made having no connection with a criminal offence.

FOR THE NATIONAL INSURANCE ACT, 1946, s. 29 (1) (b), see HALSBURY'S STATUTES, Second Edn., Vol. 16, p. 715.

MOTIONS for orders of certiorari to bring up and quash three orders of the National Insurance Commissioner.

On Feb. 12, 1953, Joseph Timmis (the first applicant) was convicted before the Drayton magistrates, Salop, of assault occasioning actual bodily harm to his wife. Having heard the evidence of two doctors the justices were satisfied that Timmis was of unsound mind and a proper person to be detained and, accordingly, made an order that he should be received and detained in Shelton Hospital and that he should be conveyed there by the duly authorised officer of the Salop County Council or a constable of the county under the Criminal Justice Act, 1948, s. 24 (1). On the same day Timmis was admitted to the hospital and has remained there since that date. The local insurance officer for the district of Shrewsbury, acting under the National Insurance Act, 1946, declined to allow Timmis to receive sickness benefit under the Act on the ground that the applicant was disqualified for the receipt thereof as being a person undergoing penal servitude, imprisonment or “detention in legal custody” within the meaning of s. 29 (1) (b) of the National Insurance Act, 1946. On appeal to the local tribunal the applicant's appeal was dismissed. On further appeal to the National Insurance Commissioner the appeal was also dismissed.

On Feb. 22, 1953, Henry John Cox (the second applicant) was found guilty of larceny and housebreaking by the London quarter sessions and, having been found feeble-minded and a defective within the meaning of the Mental Deficiency Act, 1913, was ordered to be sent to the Manor Institution, Epsom, pursuant to s. 8 (1) (b) of that Act. The applicant remained in the institution until the present time, his detention being authorised by continuation orders from time to time under s. 11 (2) of the Act. While in the institution the applicant was from time to time allowed to undertake paid employment and whilst so employed he and his employers made contributions towards sickness benefit. The applicant last worked in April, 1947, and the authorities of the institution received sickness benefit on his behalf till Feb. 28, 1953, when these payments were discontinued on the grounds that the applicant was undergoing “detention in legal custody” within s. 29 (1) (b) of the Act of 1946. The applicant's appeal to the local tribunal was allowed but on further appeal to the National Insurance Commissioner the decision of the local tribunal was reversed.

A On July 2, 1951, Aneurin James (the third applicant) was found guilty of indecent assault before a court of quarter sessions for the county of Buckingham and, having been found to be a feeble-minded person and, therefore, a defective within the meaning of the Mental Deficiency Act, 1913, was ordered to be sent to the P-ws-y Hospital, Marlborough, pursuant to s. 8 (1) of the Act. The applicant has remained in the said hospital till the present time, his detention being authorised by continuation orders made under s. 11 (2) of the Act. The insurance officer acting for the Swindon district declined to allow the applicant to receive sickness benefit under the National Insurance Act, 1946, on the ground that the applicant was disqualified for the receipt thereof as being a person undergoing "detention in legal custody" within the meaning of s. 29 (1) (b) of the Act. On appeal to the local tribunal the applicant's appeal was allowed. On further appeal to the National Insurance Commissioner the decision of the local tribunal was reversed.

B The National Insurance Commissioner found, for the purposes of the appeals of the three applicants, that there was no material difference between the position of the first applicant who was detained as of unsound mind, and the positions of the second and third applicants who were detained as mental defectives.

C *J. P. Widgery* for the applicants.

J. P. Ashworth for the Minister of Pensions and National Insurance.

D **LORD GODDARD, C.J.:** Counsel moves in three cases first on behalf of Joseph Timmis, secondly on behalf of Henry John Cox, and thirdly on behalf of Aneurin James for orders of certiorari to bring up and quash decisions given by the learned commissioner appointed under the National Insurance Act, 1946, whereby he decided that the three persons on whose behalf counsel moves are not entitled to sickness benefit under the Act. Counsel for the Minister of Pensions and National Insurance has taken the point, which he desires to be kept open, that certiorari does not lie on the ground that the statute says that the decision of the commissioner shall be final, but it is unnecessary for us to decide that point and counsel for the respondent has not argued it fully; he has merely reserved his rights because, in the opinion of the court, it is quite clear that these orders must be refused.

E I will take the case, first of all, of the first applicant, Joseph Timmis. Timmis was brought before a court of summary jurisdiction on Feb. 12, 1953, on a charge of assaulting his wife and occasioning her actual bodily harm. The court was F satisfied, as recited in the court's order, that he did the said act, and,

G "the court, having heard the evidence of two duly qualified medical practitioners . . . is satisfied that the said Joseph Timmis is of unsound mind and is a proper person to be detained. It is ordered that the said Joseph Timmis be received and detained in Shelton Hospital, Shrewsbury in the county of Salop and that he be conveyed thereto by the duly authorised officer of the Salop County Council (or a constable of the county of Salop)."

The court made that order pursuant to s. 24 (1) of the Criminal Justice Act, 1948*, which provided:

H "Where a person is charged before a court of summary jurisdiction with any act or omission as an offence punishable on summary conviction with imprisonment, and the court—(a) is satisfied that the person did the act or made the omission charged; and (b) is satisfied on the evidence of at least two duly qualified medical practitioners that the person is of unsound mind; and (c) is also satisfied that he is a proper person to be detained, the court may, in lieu of dealing with him in any other manner, by order direct him

*This section has since been repealed by the Magistrates' Courts Act, 1952, and is replaced by s. 30 (1) of that Act; 32 HALSBURY'S STATUTES (2nd edn.) 449.

to be received and detained in such institution for persons of unsound mind as may be named in the order, and may further direct the duly authorised officer of the local health authority in whose area the court is situated, or any constable, to convey the person of unsound mind forthwith to that institution; and the provisions of the Lunacy and Mental Treatment Acts, 1890 to 1930, shall have effect as if an order made under this section were a summary reception order made under s. 16 of the Lunacy Act, 1890."

That order having been made the point that arises is whether or not the first applicant, who is an insured person under the Act of 1946, and who is now in a mental hospital, is entitled to receive sickness benefit under the provisions of the National Insurance Act, 1946, as a person who is sick and in a hospital.

For the present purposes I think it is only necessary to consider the provisions of s. 29 of the Act of 1946 by reason of the provisions of which the learned commissioner has decided that Timmis is not entitled to receive benefit. Section 29 (1) provides:

"Except where regulations otherwise provide, a person shall be disqualified for receiving any benefit, and an increase of benefit shall not be payable in respect of any person as the beneficiary's wife or husband, for any period during which that person . . . (b) is undergoing penal servitude, imprisonment or detention in legal custody."

The only question in this case is whether the first applicant, being a person committed to an institution under s. 24 of the Criminal Justice Act, 1948, is a person undergoing detention in legal custody. It is observable, and the learned commissioner has mentioned it in his decision, that s. 66 of the Criminal Justice Act, 1948, provides:

"Any person required or authorised by or under this Act to be taken to any place or to be kept in custody shall, while being so taken or kept, be deemed to be in legal custody; and a constable, while taking or keeping any such person as aforesaid, shall have all the powers, authorities, protection and privileges of a constable as well beyond his constableness as within it."

The only point on which I think I feel inclined to differ from the very forcefully argued decision of the learned commissioner is that he seemed to think that s. 66 was not conclusive of this matter. With all respect to the learned commissioner, I think it is perfectly clear without any particularly subtle reasoning that s. 66 means that if a person is committed to a hospital by virtue of the provisions of s. 24, which enables him to be taken by a constable or other person and there kept and detained, he is to be taken to be in legal custody. Counsel for the applicants' argument, with regard to the construction of s. 29 is that, as the words "penal servitude" and "imprisonment" precede the words "detention in legal custody", the legal custody that is referred to there must be punitive or corrective. It seems to me that the section means that a person is to be disqualified for receiving benefit while he is detained by reason of a legal proceeding or as the result of a court proceeding. That is what I think is meant by "legal custody". He is in custody by virtue of a decision and order of a competent court, and the section might be read, I suppose, as saying that he is deprived of benefit while he is detained in legal custody, whether it is imprisonment or any other form of detention. The matter is really put beyond doubt by s. 66 of the Criminal Justice Act, 1948, which provides that a person undergoing this particular form of detention is detained in legal custody. The first applicant was brought before a court, which found that he did commit the offence charged, and also found that he was insane at the time. The offence of assault occasioning actual bodily harm is an offence punishable on summary conviction and, therefore, the court had power to deal with the case without sending the applicant to trial. It seems to me that it would be impossible to say that a person who, having been brought before a court of assize charged with murder or doing grievous

bodily harm and having set up a defence of insanity, is found insane and ordered to be detained during Her Majesty's pleasure (which means that he must be detained as a Broadmoor patient) is not in legal custody while he is in Broadmoor. I do not see any difference between a person sent to Broadmoor by the order of assizes and a person sent to a mental institution for persons of unsound mind, by order of the justices. The two things seem to me to be exactly the same. I suggested during the course of the argument that one way of testing whether a person was in legal custody or not would be to see whether habeas corpus would lie. If habeas corpus were applied for on behalf of the first applicant, the answer would be to produce the order of the justices under which he was committed to the custody of the keeper of the mental institution which would be conclusive of the fact that he was being kept in the mental institution in consequence of a lawful order. He is in legal custody and the court would be bound to refuse an order for habeas corpus. So much for the case of the first applicant. I think it is perfectly clear that he is in legal custody.

The other two cases (those of the second and third applicants) are cases in which the court proceeded under the Mental Deficiency Acts, 1913 to 1938, the two persons being mentally deficient and having been convicted of criminal offences. The only difference between the two cases is that the second applicant has been detained as a mental defective for some thirty years, and the third applicant has only recently been detained as a mental defective. With all respect to the argument of counsel for the applicants, I do not think that that makes any difference. The scheme of the Mental Deficiency Acts is this: Where a mental defective has been convicted of an offence, the court may, if it thinks fit, make an order, in lieu of imprisonment under the Mental Deficiency Act, 1913, s. 8 (1), whereby he is sent to a home for mental defectives where he will get treatment. In this connection it should be remembered that a mental defective is a person who, in law, is responsible for his acts and not, therefore, in the same position as a person of unsound mind. The order in the first instance will last only for a year, but provision is made by which the Board of Control can continue the order and it is a continuance of the order under which he is sent which remains in force so long as the Board of Control keep it in force. I think, therefore, the position is exactly the same as with any other order. It has not expired; it remains in force because it has been continued by lawful and statutory authority by the Board of Control. I can see no difference between persons who are detained under the Mental Deficiency Acts and persons who are detained under s. 24 of the Criminal Justice Act, 1948*. In either case it seems to me that they are in legal custody, that is to say, they are detained under and by virtue of a legal proceeding. It is not necessary for this court to decide the position where a summary reception order is made, which has nothing to do with a criminal offence. Whether there is any difference, I do not know; it may be that there is none; it may be that there is. It is not for this court to give a decision in any case except the one before it. These particular cases are cases where an order has been made by a court exercising criminal jurisdiction in accordance with criminal law. For the foregoing reasons I think the orders must be refused.

LYNSKEY, J.: I agree.

ORMEROD, J.: I agree.

Motions dismissed.

Solicitors: *Official Solicitor* (for the applicants); *Solicitor, Ministry of Pensions and National Insurance.*

[*Reported by* MICHAEL MALONEY, ESQ., *Barrister-at-Law.*]

* See footnote at p. 293, ante.

Re CROSSLEY (A DEBTOR).

[CHANCERY DIVISION (Upjohn, J.), October 18, 1954.]

Bankruptcy—Transfer of proceedings—Transfer from county court to High Court to enable petitioning creditor to receive legal aid—Bankruptcy Rules, 1952 (S.I., 1952, No. 2113), r. 21.

Legal Aid—Assisted person—Trustee in bankruptcy—Proposed proceedings by petitioning creditor in name of trustee—Impropriety of joining petitioning creditor as co-applicant.

On Nov. 6, 1952, in the Wandsworth County Court, a receiving order was made against the debtor on a petition in bankruptcy filed by the petitioning creditor in respect of a judgment debt for £268 17s. The debtor having been adjudged bankrupt, on Jan. 28, 1953, a trustee in bankruptcy was appointed. On investigation of the debtor's affairs, it was thought that certain conveyances made by the debtor might be set aside under the Law of Property Act, 1925, s. 172, but the trustee, having insufficient funds in hand, was unwilling to bring proceedings for this purpose unless he was indemnified against the costs which he would incur and the costs which he would be ordered to pay if the proceedings were unsuccessful. The petitioning creditor, having insufficient means of her own to provide the indemnity required by the trustee, applied for, and was granted on May 10, 1954, a civil aid certificate to take proceedings in the High Court for (a) application to the court for leave to bring proceedings in the name of the trustee to avoid settlements made by the debtor, and (b) to take such proceedings against the debtor, and to enforce any order for costs. On an application by the petitioning creditor to the High Court for an order transferring the bankruptcy proceedings from the county court to the High Court on the ground that the petitioning creditor might have the benefit of legal aid,

HELD: (i) a transfer of the bankruptcy proceedings to the High Court would not be ordered under the Bankruptcy Rules, 1952, r. 21, merely to enable the petitioning creditor to obtain in the High Court legal aid, which was not available in the county court, for the proposed subsequent proceedings for which the county court was the natural and proper forum.

(ii) the transfer to the High Court should be refused also because the proposed subsequent proceedings would have to be brought in the name of the Official Receiver, who would not be entitled to a grant of legal aid, and it would not be right for the petitioning creditor to be joined as co-applicant with the Official Receiver in those proceedings: principle stated by PARKER, J., delivering the judgment of the court in *R. v. Manchester Legal Aid Committee, Ex p. R. A. Brand & Co., Ltd.* ([1952] 1 All E.R. at pp. 485, 486), applied.

AS TO TRANSFER OF BANKRUPTCY PROCEEDINGS, see HALSBURY, Simonds Edn., Vol. 2, p. 593, para. 1189.

Case referred to:

- (1) *R. v. Manchester Legal Aid Committee, Ex p. Brand (R. A.) & Co., Ltd.*, [1952] 1 All E.R. 480; [1952] 2 Q.B. 413; 3rd Digest Supp.

APPLICATION by Mrs. Mabel Rosa Crossley, the petitioning creditor in bankruptcy proceedings in Wandsworth County Court, for an order that the proceedings be transferred to the High Court.

B. Lewis for the applicant, the petitioning creditor.

Muir Hunter for the respondent, the debtor.

UPJOHN, J.: This is an application by the petitioning creditor, Mrs. Mabel Rosa Crossley, for the transfer of bankruptcy proceedings now in the Wandsworth County Court to this court. The relevant facts are, very shortly, these. On the petition of the petitioning creditor a receiving order was made

against the debtor, Mr. Howard Crossley, who is the husband of the petitioning creditor, the amount of the petitioning creditor's judgment debt being some £268, and the only other debt being a sum of some £147 due to some other person. The debtor was duly adjudicated bankrupt, and the Official Receiver was appointed and remains the trustee of the property of the bankrupt. In due course investigations of the debtor's affairs were made, and, putting it shortly (for it is undesirable at this stage that I should say more than is absolutely necessary), it is considered that there is a reasonable prospect of setting aside, under the Law of Property Act, 1925, s. 172, certain conveyances and transfers made by the debtor to a third party. Owing to the fact that the Official Receiver has insufficient funds in hand, he is not willing to bring those proceedings unless he has a proper indemnity against the costs that he will incur and against the costs that he will be ordered to pay if the application is unsuccessful. The petitioning creditor has, so she states in her affidavit, insufficient means to provide the required indemnity. She may be able to provide a sufficient indemnity against the costs which the Official Receiver may be ordered to pay, but she cannot at the same time provide an indemnity against the Official Receiver's own costs. She has, therefore, made this application for transfer of the proceedings to this court in order that she may receive the benefit of the Legal Aid and Advice Act, 1949, and she has already obtained a certificate, to which I shall have to refer in detail later, enabling her, so she says, under the Legal Aid and Advice Act, 1949, to bring proceedings here in the name of the Official Receiver against the bankrupt and the transferee of the various properties. Therefore, the whole basis of this application to transfer is so that the petitioning creditor may receive the benefit of the Legal Aid and Advice Act, 1949, which is not yet available to her in proceedings in the county court.

The relevant rule of the Bankruptcy Rules, 1952, in relation to transfers is r. 21, which confers a complete discretion on the court in the matter of ordering a transfer, but, of course, that discretion must be exercised judicially. The usual ground is for some geographical reason—the assets, or the trustee, or the main body of creditors, or the bankrupt may be situate in a particular area, and it would be convenient to move the proceedings there—but transfers may be made for other reasons; such, for instance, as the magnitude of the application proposed. No such grounds are suggested in this case. It depends solely on the petitioning creditor's desire to have the benefit of legal aid.

The Legal Aid and Advice Act, 1949*, provides that legal aid may be made available in the county court as well as in the High Court, but those responsible for the operation of the Act have not yet thought fit to bring the Act into operation in relation to proceedings in the county court, and, in my judgment, it would not be proper for a court to make an order of transfer solely on the ground on which it is sought in the present case. It seems to me a matter entirely for those responsible for the operation of the Act to consider whether it is desirable that legal aid should be available in the county court. It would not, in my judgment, be a proper judicial exercise of the discretion conferred by the Bankruptcy Rules, 1952, r. 21, to order a transfer so that legal aid may be available in proceedings where, in the natural and proper forum, it has not yet been thought right to make it available. I have not overlooked the fact that these are bankruptcy proceedings, nor the fact that, had the debtor, instead of being resident immediately to the south of the Thames in Wandsworth, been resident just to the north, the whole of the bankruptcy proceedings would have taken place in this court†, and that, subject to the point on the certificate, to which I shall turn in a moment, legal aid would have been available.

* See the Legal Aid and Advice Act, 1949, s. 1, and sched. I, Part I, para. 1 (d), 18 HALSBURY'S STATUTES (2nd edn.) 533, 563.

† See the Bankruptcy Act, 1914, s. 98, s. 99, and sched. III, 2 HALSBURY'S STATUTES (2nd edn.) 414, 448.

The other point depends on the form of the civil aid certificate. It is, so far as is relevant, in this form. It is a certificate that the petitioning creditor

"is entitled, in accordance with the Legal Aid and Advice Act and the regulations and schemes made thereunder, to legal aid as applicant in connection with the following proceedings: (i) to take proceedings in the High Court of Justice, Bankruptcy Court, for (a) application to the court for leave to bring proceedings in the name of the trustee in bankruptcy of [the debtor] to avoid settlements made by [the debtor] and (b) to take such proceedings against [the debtor], and to enforce any order for costs."

Suppose that the proceedings are transferred. It is clear that in this court any application to set aside these conveyances and transfers must be made in the name of the Official Receiver, the trustee of the property of the debtor. Therefore, the court would have before it the trustee, as applicant, and the transferee of the various properties, as respondent, but the petitioning creditor would not be before the court in her own name. In that state of affairs, when the court comes to consider the question of taxation of costs it is quite clear that, if the Official Receiver loses, there will be an unconditional order against him to pay the respondent's costs. It may be that the petitioning creditor can give satisfactory security against that liability, but when the Official Receiver asks for his costs to be taxed under the Legal Aid and Advice Act, 1949, it will at once become apparent that the civil aid certificate is not for the benefit of the Official Receiver, but for the petitioning creditor, who is not a party to the application, and on that form of certificate it would be quite impossible, in my opinion, to order any taxation of the Official Receiver's costs for the purposes of the Act of 1949.

As PARKER, J., delivering the judgment of the Divisional Court, pointed out in *R. v. Manchester Legal Aid Committee, Ex p. R. A. Brand & Co., Ltd.* (1) ([1952] 1 All E.R. at p. 486):

"The truth of the matter is that at the moment there are no specific provisions dealing with the position of a trustee in bankruptcy in relation to the income test."

It seems to me quite clear that the only provision of legal aid that would be of assistance to the Official Receiver and to the petitioning creditor in this case would be a certificate in the name of the Official Receiver, which has not been obtained. It was suggested that that difficulty could be overcome by joining the petitioning creditor as applicant in the proposed proceedings so that her costs could be taxed for the purposes of the Legal Aid and Advice Act, thereby covering those of the trustee in bankruptcy. I cannot think that that could possibly be right. The petitioning creditor has no title to sue in her own name. It is perfectly true, as counsel for the petitioning creditor pointed out, that she would be, in substance, the applicant, and the principal person to benefit if successful, but in law she would not be. The applicant would be the trustee. I should not feel disposed to order a transfer solely for the purpose of facilitating proceedings for which the state may become bound to pay although the assisted person has herself no title to sue. On that ground, therefore, also, in my judgment, this application fails.

The real truth of the whole matter may be summed up in one sentence. The petitioning creditor, quite reasonably from her point of view, is trying to get round the fact that legal aid is not available in the forum where these matters ought to be litigated, and I do not think that it is the duty of this court to assist her to obtain legal aid by the transfer of the proceedings to this court. Accordingly, the application fails.

Application dismissed.

Solicitors: *Raymond S. Hill* (for the applicant); *Savory, Pryor & Blagden* (for the respondent).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

PRESCOTT v. BIRMINGHAM CORPORATION.

[CHANCERY DIVISION (Vaisey, J.), October 6, 7, 15, 1954.]

Local Government—Benefits to old people—Discrimination in favour of class—Transport undertaking—Free travel facilities for aged persons—Whether ultra vires.

A local authority which operated a transport undertaking provided, with the consent of the appropriate licensing authority, free travelling facilities at certain hours on trams and omnibuses within their district for a limited class of women over sixty-four years of age and men over sixty-nine. The scheme was estimated to cost £90,000 per annum. There was no statutory provision which in terms authorised the local authority so to discriminate in favour of any class of persons, nor was there any statutory prohibition of such discrimination.

HELD: the subsidising of particular classes of society was a matter for Parliament alone, and the local authority had no general inherent power to provide such benefits; the scheme, therefore, was ultra vires the local authority and invalid.

Cases referred to:

- (1) *Allchin v. Coulthard*, [1942] 2 All E.R. 39; [1942] 2 K.B. 228; 111 L.J.K.B. 609; 167 L.T. 18; 106 J.P. 216; *affd.* H.L., [1943] 2 All E.R. 352; [1943] A.C. 607; 112 L.J.K.B. 539; 107 J.P. 191; sub nom. *Allchin v. South Shields County Borough*, 169 L.T. 238; 25 Tax Cas. 445; 2nd Digest Supp.
- (2) *Hungerford Market Co. v. City Steamboat Co.*, (1860), 3 E. & E. 365; 30 L.J.Q.B. 25; 3 L.T. 732; 25 J.P. 213; 121 E.R. 479; 44 Digest 99, 787.
- (3) *Newcastle (Duke) v. Workson Urban Council*, [1902] 2 Ch. 145; 71 L.J.Ch. 487; 86 L.T. 405; 38 Digest 108, 775.
- (4) *Northampton Corpn. v. Ellen*, [1904] 1 K.B. 299; 73 L.J.K.B. 329; 90 L.T. 71; 68 J.P. 197; 43 Digest 1091, 227.

ACTION. The plaintiff, Gregory Vincent Prescott, a ratepayer of the City of Birmingham, claimed that a scheme to provide free travel facilities for certain old people, which scheme had been adopted by the defendants, Birmingham Corporation, by a resolution dated Jan. 6, 1953, was illegal and beyond the powers of the defendants, and that the defendants were not entitled to use any part of the general rate fund in operating such a scheme.

F. Blennerhassett for the plaintiff.

M. E. Rowe, Q.C., and *Harold Lightman* for the defendants.

Cur. adv. vult.

Oct. 15. VAISEY, J., read the following judgment. The plaintiff in this action, Mr. Gregory Vincent Prescott, is a ratepayer of the City of Birmingham. The defendants are the corporation of the said city, sued under their proper style and title of the Lord Mayor, Aldermen and Citizens of the City of Birmingham. The plaintiff seeks declarations to the effect that a certain scheme which, having been approved and adopted by the corporation, has now been in force for upwards of a year, is illegal and ultra vires.

The facts are these. The corporation operate a transport undertaking in and about the City of Birmingham, as they have power to do under their private Acts of Parliament. That undertaking includes the running both of trams and of omnibuses. On Jan. 6, 1953, the council of the corporation resolved that, subject to the consent (subsequently given) of the appropriate licensing authority, a scheme should be put into operation providing free travel for certain classes of old people. The free travel was to be available on the corporation's vehicles on every day except Saturday between the hours of 10 a.m. and 4 p.m. for women

over the age of sixty-four years and for men over the age of sixty-nine years, provided that they were on the register of parliamentary electors for the city or satisfied the corporation's transport manager that they were resident in the city and were further qualified as follows, viz., by being either (a) persons in receipt of retirement pensions payable under the National Insurance Act, 1946, or (b) persons in receipt of an old age pension granted by the National Assistance Board under the Old Age Pensions Act, 1936, to persons who were not contributors to national insurance, or (c) persons in receipt of national assistance payable by order book. I will in this judgment refer to persons possessing the qualifications which I have mentioned as "old people". I was informed that the number of old people in Birmingham is about seventy thousand, and that the number of those who have taken advantage of the scheme is about forty thousand. The cost of the scheme was estimated at £90,000 per annum, and the experience of the first year of the operation of the scheme has established that such an estimate was a correct one. A B

Some confusion has been introduced into the case by such inaccurate statements as that the sum of £90,000 has been or was intended to be actually paid out of the corporation's general rate fund to the corporation's transport undertaking. Of course, no such payment has been or could be made, the fact being that the transfer of £90,000 made or intended to be made from the corporation's general rate fund account to the corporation's transport account as representing the additional expenditure arising from the operation of the scheme was or would be a mere matter of inter-departmental book-keeping. The proper method of looking at the matter is explained very clearly by LORD GREENE, M.R., in his judgment in *Alchin v. Coulthard* (1), as follows ([1942] 2 All E.R. at p. 43): C D

"All receipts and expenditure must be paid into and out of the general rate fund; but for the purpose of the internal accounts of the borough separate accounts showing the specified particulars must be kept in respect of each undertaking. This was obviously necessary, since, if the only account kept had been that of the general rate fund, it would have been impossible to ascertain the financial position of the undertakings. However, the obligation to keep these accounts imposes no sort of restriction on the appellants as to the way in which they are to deal with the profits of the undertakings, any more than would be the case with an ordinary trading company which, for purposes of convenience, treated different branches of its undertaking as separate entities for accountancy purposes." E

The income of the corporation is, therefore, in fact one and indivisible, although derived from a variety of sources such as the rates collected from the ratepayers and the takings arising from the corporation's trading activities, transport, water supply and others. The totality of the corporation's liabilities is also one and indivisible. F

Now it is obvious that if forty thousand of the users of its trams and omnibuses are excused from paying fares on parts of six days in every week, the corporation's income will inevitably be reduced by a substantial sum in the course of a year, and it is now known that the annual reduction amounts to £90,000. I am told that the transport undertaking is run at a heavy loss which now amounts to an accumulated total loss of no less than £700,000. That means that the earnings of the trams and omnibuses have been insufficient to meet the cost of running them, so that the deficit or balance of such cost has had to be met from other sources, and I think it follows that the £90,000 is in fact an addition to such deficit or balance. It might be thought that generosity (if that be the right word) to the old people would be more appropriately exercised by an undertaking which was making profits, or at least paying its way, than by one which is working at such a heavy loss. The validity of the scheme now in question cannot be attacked, however, on any such ground as that, because, as I have said, the income of the corporation is indivisible, and so also is the totality of its liabilities, G H

and there is no reason why the corporation should not, if they think fit, arrange to increase the losses on any of its undertakings and in the proverbial manner make up what they lose on the swings out of what they gain on the roundabouts.

The Licensing Authority for the West Midland Traffic Area, being the appropriate licensing authority in the present case, granted the corporation leave to dispense with compliance with such of the conditions attached to their road services licences as precluded them from granting the facilities provided by the scheme. Such leave was expressed to be

“subject to the payment by the corporation to the transport undertaking of the sum of £90,000 for the first year’s operation of the concession.”

This, as I have already said, is an inaccurate description of what actually occurred or was contemplated. No payment has been or could be made by the corporation to the transport undertaking, which is merely the corporation itself under a different aspect. The question which I have to decide seems to me to be simply this: whether the corporation, as a transport undertaking, can, with the leave of the appropriate licensing authority, discriminate between the users of its tramways and omnibuses by providing that some of such users should pay the authorised fares while others are excused from making any payment and so entitled to travel free. The plaintiff says, and I agree, that there is no statutory provision which in terms authorises such discrimination, and the corporation say, and I agree, that there is no statutory prohibition of it. It seems to me that the matter falls to be decided on quite general grounds.

I was referred by counsel for the corporation to three cases bearing on this point, of which the first is *Hungerford Market Co. v. City Steamboat Co.* (2), of which it is sufficient for me to quote a few words from the judgment of COCKBURN, C.J. (3 E. & E. at p. 380):

“... tolls must be fixed and appointed in order to communicate to the public or persons interested the maximum toll they can be called upon to pay; leaving the right of the company to lower or remit the tolls, if it otherwise exist, wholly untouched. We have therefore to consider whether a company entitled to take tolls in return for public service is bound, independently of express provision, to exact the same tolls from all persons alike, or is at liberty, if so minded, to remit the tolls, or any portion of them, to particular individuals at its pleasure and discretion.”

Then he enunciates (*ibid.*, at p. 381) what he describes as a well-known axiom that “everyone is at liberty to renounce a right established in his favour.”

These observations were quoted with approval by FARWELL, J., in *Duke of Newcastle v. Worksop Urban Council* (3) (see [1902] 2 Ch. at p. 161), where the decision was that the lord of a manor owning a fair or market, so long as he does not charge unreasonable tolls, is not bound to charge all persons alike, but may remit part of the toll to favoured persons. Then there is *Northampton Corpn. v. Ellen* (4), where it was held by the Court of Appeal, reversing the judgment of BIGHAM, J., that differentiations in charges between persons in one district and another for a supply of domestic water were not open to any objection; and SIR RICHARD HENN COLLINS, M.R., indicates ([1904] 1 K.B. at p. 316) that that case fell to be decided mainly on first principles, there being no clear statutory prohibition or authority in point.

I feel the force of these decisions, but I am not convinced that they apply to the present case. My doubt, and it is a very serious doubt, may be expressed by saying that the corporation seem to me to be attempting by this scheme to usurp the functions of the legislature, and to redress what they appear to consider to be a nation-wide grievance by local administrative methods. I feel bound to have regard to the probable consequences of my finding that such a scheme as this is within the corporation’s powers, and to ask whether every other corporation operating a transport undertaking would not be forced by public

opinion to follow the example of Birmingham by an equal or greater measure of generosity (again if that be the right word) to old people, irrespective of whether their undertaking was being run at a profit or a loss. If old people are to be financially helped partly by Parliament from the taxes and partly by municipalities from the rates, it seems to me that very unseemly competition would be set up between Parliament and the municipalities and between the municipalities themselves. The subsidising of particular classes of society is, I think, a matter for Parliament, and for Parliament alone. The granting of special travel facilities for children, cripples, invalids, wounded servicemen and others seems to me to be permissible by reason of the special need for transport and the special difficulties of obtaining it which such travellers can plead owing to their tender years or physical disabilities. But plenty, perhaps the majority, of women of sixty-five and over and men of seventy and over find no difficulty whatsoever either in walking or in mounting a tram or omnibus, and it is obvious (and I emphasise this) that it is the economic disability of these old people and nothing else which the corporation are seeking to alleviate by their scheme. Aged persons not already recipients of financial subventions are not within the scheme at all.

The fact is that the scheme puts an annual sum of £90,000 drawn from the pockets of the total body of ratepayers at the disposal of a limited class of persons whose moral claim to free transport and other facilities may be less urgent than that of others outside the scheme, such as the parents of large families, shop assistants and others. I have no doubt that the promoters and supporters of this scheme are actuated by feelings of genuine sympathy and are not consciously acting capriciously; but I cannot think that the corporation have power to depart on so large a scale from that principle of equality which is normally so important an ingredient of justice. If old people can be excused from paying their tram and omnibus fares, I do not see why they should not be excused from all local taxation whatsoever, nor, indeed, do I see why the £90,000 in the present case or any other sum drawn from the general rate fund should not be shared out among the old people if this scheme is within the corporation's powers, for the result to the corporation would be just the same, and the payment in cash rather than in tram tickets might be just as welcome to the recipients. I do not overlook the fact that the corporation is a body incorporated by royal charter and, therefore, *prima facie*, has more ample powers than one which is the creation of statute; but I think that the corporation have no general inherent power to offer free seats in their vehicles or other benefits in money or money's worth to particular individuals or to particular classes of individuals, and to discriminate between the citizens of Birmingham on the large scale and to the wide extent which they do in the present case. Where is the process of discrimination and favouritism to stop? Let me suppose that the council of the corporation were honestly of the opinion that the success of a particular political party at the polls was essential to the public welfare. Would they be entitled to confer pecuniary benefits on the supporters of that party? Plainly not; but where is the difference in principle between that and the proposals of the present scheme? For myself, I cannot see it. Of course, there is no element of venality or corruption here but only, if I am right, an excess of misplaced philanthropic zeal.

I am told that a good many other corporations have adopted or are proposing to adopt schemes similar to this one. It was suggested that the point should be raised on one of the corporation's private bills, and it was also suggested that that course was not followed on account of the "time factor", whatever that may mean. There was, of course, the obvious risk that if express Parliamentary powers were sought, they might have been refused. Whether they would or would not be refused is not a matter on which I ought to express any opinion. I reach my decision in this case with hesitation, for I think that the point is by no means free from doubt, and also with some regret, for any help given to the old people, whether in Birmingham or elsewhere, is likely, in my judgment, to be

very well deserved. The only question is whether this is the way to achieve that end. After coming to the conclusion that it is not, I must declare that the scheme is invalid and ultra vires, and I should also grant liberty to apply for an injunction, suspending its operation during the pendency of any appeal. The plaintiff must have his costs of the action.

Declaration and liberty to apply accordingly.

A Solicitors: *Stanley & Co.*, agents for *R. Evans Parr & Co.*, Birmingham (for the plaintiff); *Sharpe, Pritchard & Co.*, agents for *Town Clerk*, Birmingham (for the defendants).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

B

KEATS v. LONDON COUNTY COUNCIL. SAME v. SAME.
SAME v. SAME.

C

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Parker, JJ.),
October 14, 1954.]

*Town and Country Planning—Enforcement notice—Appeal against notice—
Description of development—Sufficiency of description—Grounds on which
court can quash notice—Town and Country Planning Act, 1947 (c. 51),
s. 23 (4).*

D

In October, 1949, the ground floor and the first floor of premises, which were used for residential purposes on July 1, 1948 (the appointed day under the Town and Country Planning Act, 1947), were let for about five weeks to a firm of builders. After being vacant for a period, the ground floor was let in February, 1950, to a firm of optical manufacturers and the first floor was let in October, 1950, to a firm of tailors. The use of the second floor was residential on July 1, 1948, but, at the time of service of the enforcement notices next mentioned, had changed to light industrial use. In November, 1953, the local planning authority served three enforcement notices under the Town and Country Planning Act, 1947, s. 23 (1), on the owner of the premises requiring him to discontinue the use of the land as an industrial building within the meanings of the Town and Country Planning (Use Classes) Orders, 1948 and 1950. One notice related to the ground floor, another to the first floor and the third to the second floor. The development complained of was stated, in each case, to be "Beginning the use of the land described . . . for the purpose for which the same is now used namely as an industrial building" within the meaning of the orders of 1948 and 1950. Appealing against the notices under s. 23 (4) of the Act of 1947, the owner contended (i) in each case that the description of the development was too vague, and (ii) that, as regards the ground floor and first floor, the development had taken place in 1949 when the premises were let to builders, and that, therefore, no further permission was required in 1950 because the user by the optical manufacturers and the tailors fell within the same class as the user by the builders. The magistrate, being satisfied, in each case, that there was a development for which permission was required and that there was no evidence of permission having been granted, held that under s. 23 (4) he had no jurisdiction to quash the notices. On appeal to the Divisional Court,

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HELD: (i) the description, in the enforcement notices, of the development complained of was sufficiently specific as it referred plainly to the current use of the premises.

(ii) on an appeal against an enforcement notice, the court was required to assume that the development referred to in the notice had taken place; and, therefore, the magistrate had no jurisdiction to inquire whether, owing to a prior use, no development had taken place as alleged so that no permission was required when the premises were let in 1950; and, accordingly, the appeals must be dismissed.

Dicta of LORD GODDARD, C.J., in *Mead v. Plumtree* ([1952] 2 All E.R. at p. 725), applied.

Lincoln County Council (Parts of Lindsey) v. Henshall ([1953] 1 All E.R. 1143), distinguished.

Appeals dismissed.

EDITORIAL NOTE. A distinction may be drawn between the jurisdiction of the court on an appeal against an enforcement notice and its jurisdiction to determine defences where proceedings are taken for disregarding enforcement notices. In the former instance the jurisdiction of the court to quash the notice is limited to the grounds of appeal specified in sub-s. (4) of s. 23 of the Town and Country Planning Act, 1947, 25 HALSBURY'S STATUTES (2nd edn.) 525. In proceedings for disregarding an enforcement notice, defence may be made on other grounds; see *Mead v. Plumtree* ([1952] 2 All E.R. 723). In the present case the court could not entertain, on the appeal against the enforcement notices, a contention that the material change in use was a previous change which began more than four years before the enforcement notices so as to take the cases outside the scope of s. 23 (1) of the Act of 1947. If, however, the proceedings had been for disregarding an enforcement notice, a defence could have been based, it seems, on this ground; see *Lincoln County Council (Parts of Lindsey) v. Henshall* ([1953] 1 All E.R. 1143) where LORD GODDARD, C.J., said (at p. 1145, letter F), "Otherwise the objection has to be taken when a person is prosecuted". *Perrins v. Perrins* ([1951] 1 All E.R. 1075) is not, perhaps, easy to reconcile on this point, but it is suggested that the principle of the distinguishing of that case in *Mead v. Plumtree* ([1952] 2 All E.R. at p. 726) supports the view expressed in this note.

FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, s. 23, see HALSBURY'S STATUTES, Second Edn., Vol. 25, p. 524.

FOR THE TOWN AND COUNTRY PLANNING (USE CLASSES) ORDER, 1950, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 21, p. 176.

Cases referred to:

- (1) *Mead v. Plumtree*, [1952] 2 All E.R. 723; [1953] 1 Q.B. 32; 116 J.P. 589; 3rd Digest Supp.
- (2) *Lincoln County Council (Parts of Lindsey) v. Henshall*, [1953] 1 All E.R. 1143; [1953] 2 Q.B. 178; 117 J.P. 321; 3rd Digest Supp.

CASES STATED by a metropolitan magistrate.

At Old Street Magistrate's Court on Dec. 18, 1953, the appellant, Gerald Keates, preferred complaints that he was a person aggrieved by three enforcement notices dated Nov. 11, 1953, relating to the ground floor, first floor and second floor, respectively, of 127 Southgate Road, Islington, and served on him by the respondents, the London County Council, under the Town and Country Planning Act, 1947, s. 23, and that he desired to appeal against the enforcement notices by virtue of s. 23 (4). The complaints were heard on Feb. 8, Feb. 19, and Mar. 24, 1954, and the following facts were found. On July 1, 1948, the use of all the premises was residential. During the autumn of 1949, the premises were purchased by the appellant's mother, Yetta Keats. Towards the end of October, 1949 (more than four years before the service of the enforcement notices), a firm of builders, the proprietor of which was the appellant's father, went into occupation of the ground floor and first floor, using the ground floor for making

window frames, sashes, doors, and the like, and the first floor for making moulds and plaster moulding, and continued to do so for about five weeks. It was not contested by the respondents that such use, if proved, would be use of the premises as a light industrial building within the meaning of the Town and Country Planning (Use Classes) Order, 1950 (S.I. 1950, No. 1131) or its predecessor the Town and Country Planning (Use Classes) Order, 1948 (S.I. 1948, No. 954). The ground floor then remained empty until about Feb. 15, 1950 (less than four years before the service of the enforcement notice), when it was let to, and used by, a firm of optical manufacturers as a light industrial building within the meaning of the Town and Country Planning (Use Classes) Order, 1950, and it continued to be used as such by various persons up to the date of the hearing. On Dec. 17, 1949, the first floor was let to Louis Sheldon for the purposes of tailoring only, and, in consequence of his using it for residential purposes, he was ejected from it about Aug. 12, 1950, as a result of High Court proceedings. On Oct. 4, 1950 (less than four years before the service of the enforcement notice), the first floor was let to a firm of manufacturing tailors, who used it as a light industrial building within the meaning of the Town and Country Planning (Use Classes) Order, 1950, and it continued to be used as such by various persons up to the date of the hearing. It was not disputed, that, at the time of the service of the enforcement notice, the second floor was being used as a light industrial building within the meaning of the Town and Country Planning (Use Classes) Order, 1950. About March, 1951, the premises were sold by Yetta Keates to the appellant. On, or shortly after, Nov. 11, 1953, enforcement notices relating to each floor were served by the respondents on the appellant who was the proper person on whom the notices should have been served, and who had a right of appeal under the Town and Country Planning Act, 1947, s. 23 (4). The alleged development specified by each of the notices was as follows:

“Beginning the use of the land described . . . for the purpose for which the same is now used namely as an industrial building within the meaning of the Town and Country Planning (Use Classes) Order, 1948, and the Town and Country Planning (Use Classes) Order, 1950.”

There was no evidence, in any of the cases, of permission to develop having been granted. In each of the three cases, it was contended by the appellant that the notice was too vague in that it did not specify the development sufficiently clearly. With regard to the ground floor and first floor, the appellant further contended that the notices were out of time in that the development had been carried out more than four years before the date of the notices. The respondents contended in each case that the notice specified the development sufficiently clearly. With regard to the ground floor and first floor, they contended that the notices were in time, and that, on the true construction of the Town and Country Planning Act, 1947, and the Use Classes Orders of 1948 and 1950, the use of the ground floor as an industrial building should be held to have begun on or about Feb. 15, 1950, and that of the first floor on or about Oct. 4, 1950, both of these dates being less than four years before the date of the notices.

In each case the respondents further contended that, in any event, the court had no jurisdiction to quash the notice even if the court accepted the appellant's contentions. In the case of the ground floor and the first floor the magistrate was of the opinion (a) that, on the facts found by him, he was required by s. 23 (4) of the Act of 1947 to dismiss the appeal unless no permission was required for the development to which the enforcement notice related; and (b) that by reason of the discontinuance of the builders' use of the building substantially before the optical manufacturers went into possession of the ground floor, and the manufacturing tailors went into possession of the first floor, the optical manufacturers' use, in the one case, and the manufacturing tailors' use, in the other case, constituted a “beginning the use” as an industrial building and, therefore, a

development to which the enforcement notice related, and that, in each case, permission was required for such a development.

In the case of the second floor, the magistrate was of the opinion that the enforcement notice sufficiently specified the development to which it related, that the development was carried out, and that permission was required for such development. Being of the opinion that his jurisdiction to quash an enforcement notice was strictly confined to the matters set out in s. 23 (4) (a) of the Act of 1947, the magistrate dismissed all three appeals.

A. P. Marshall, Q.C., and F. R. McQuown for the appellant.
J. S. Daniel for the respondents.

PARKER, J., stated the facts and continued: The learned magistrate took the view that his jurisdiction was strictly limited by the Town and Country Planning Act, 1947, and it is necessary to look at s. 23 to see how the matter came before him. Section 23 (1) provides:

"If it appears to the local planning authority that any development of land has been carried out after the appointed day [July 1, 1948] without the grant of permission . . . the local planning authority may within four years of such development being carried out, if they consider it expedient so to do having regard to the provisions of the development plan and to any other material considerations, serve on the owner and occupier of the land a notice under this section."

By s. 12 (2) of the Act, "development" includes the making of any material change in the use of any buildings or land. By s. 23 (2) a notice served under the section (hereinafter called an "enforcement notice") must specify the development which is alleged to have been carried out and may require the discontinuance of any use of land. Then, by s. 23 (4), it is provided:

"If any person on whom an enforcement notice is served under this section is aggrieved by the notice, he may, at any time within the period mentioned in the last foregoing sub-section, appeal against the notice to a court of summary jurisdiction for the petty sessional division or place within which the land to which the notice relates is situated; and on any such appeal the court—(a) if satisfied that permission was granted under this Part of this Act for the development to which the notice relates, or that no such permission was required in respect thereof, or, as the case may be, that the conditions subject to which such permission was granted have been complied with, shall quash the notice to which the appeal relates . . . (c) in any other case shall dismiss the appeal . . ."

Observe, therefore, from those words that the jurisdiction of the court is strictly limited, as, indeed, this court has held, to the question whether permission was granted for the development to which the notice relates or whether no such permission was required. By s. 24 (1) it is provided that, in any subsequent proceedings to enforce the notice, the owner or occupier shall not be entitled to dispute the validity of the action taken by the local planning authority on any ground which could have been raised by such appeal.

Two points were raised before the magistrate and have been raised before us. The first, which applies to all three cases (ground floor, first floor and second floor) is that in each of the notices the description of the development is too vague. Counsel for the appellant contended that the notice should, at least, state the time of the development, the nature of the development and also the class into which the development falls. He points out that the class is of some importance because there is no change of use within the meaning of the Act if premises are used for a different purpose provided it is within the same class. As regards that point, if the wording on each of these notices had been merely, "the use

of the land as an industrial building ", there might well be complaint in that it was not specific enough, but the notices say, " for the purpose for which the same is now used ". Therefore, it becomes perfectly clear that the complaint is made with regard to the current use at the time when, in the case of the ground floor, the use was by a firm of optical manufacturers.

A The other point which was taken arises on the particular facts of this case. It is said that the notices complain of a beginning of the use of the land which they describe. In the case of the ground floor—and for the purposes of this point there is no distinction between the ground floor and the first floor—in so far as the user was one on which the enforcement notice could, as it were, bite, it must be a user by the optical manufacturers. It was contended on behalf of the appellant, however, that the development under the Act had taken place already, and had taken place when the firm of builders first used the premises at the end of October, 1949; and that, accordingly, the user, by the optical manufacturers and by the builders, falling within the same class, no further permission was required for the use of the premises by the optical manufacturers. B I think that the answer to this argument must be that that was not a matter for the magistrate. The magistrate has to approach the matter under s. 23 (4) C on the basis that the local authority are satisfied that the development referred to in the notice has taken place. He must assume that, and he must assume that the notice is regular and his sole jurisdiction is to ascertain whether, if that be the case, permission was granted or was not required. That has already been decided by this court in *Mead v. Plumtree* (1), where the enforcement notice which was D served was irregular, and irregular on its face, because the necessary date on which it was to take effect did not appear. There was in that case no appeal against the notice under s. 23 (4) of the Act of 1947, but, when the local planning authority sought to enforce the notice and the prosecution took place, the point was then taken that the notice was irregular and this court held that that was a point which could then be taken. LORD GODDARD, C.J., dealing with what could E be contended on an appeal under s. 23 (4), said ([1952] 2 All E.R. at p. 725):

" The recipient can say: ' This notice never ought to have been served on me because I had received, or did not require, permission ', or: ' I have carried out the conditions subject to which permission was granted ', or: ' This notice exceeds what is reasonable for me to be called on to do.' F The sub-section [s. 23 (4)] does not provide for an appeal against the notice on the ground that it is a bad notice because that involves, not an appeal against the notice, but a contention that the recipient never had a notice served on him at all, which is what the appellant contends in this case."

G Leading counsel for the appellant strongly relied on a more recent decision of this court in *Lincoln County Council (Parts of Lindsey) v. Henshall* (2). In that case, it was held that an enforcement notice was a bad notice, and that the justices were entitled to quash it. When one looks at that case more closely, it will be seen that the development complained of there was a development which took place before the appointed day, development which, it was said, contravened previous planning control; but the enforcement notice and the appeal to the justices was on the basis that s. 23 of the Act of 1947 applied. H This court said, in effect, that, in the special circumstances of that case, the justices were entitled to quash the notice because, in fact, no permission was required on the basis that the development took place before the appointed day.

I am quite satisfied in the present case that the magistrate had no jurisdiction to embark on the inquiry on which he was invited to embark, and that his decision should be upheld when he refused to quash the notice. Accordingly, in my view, the magistrate was right in all three cases and the appeals should be dismissed.

LORD GODDARD, C.J.: I agree.

LYNSKEY, J.: I also agree.

Appeals dismissed.

Solicitors: *J. C. Fox, Gamble & Son* (for the appellant); *Solicitor, London County Council* (for the respondents).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

A

Re OVERBURY (deceased). SHEPPARD v. MATTHEWS AND OTHERS.

B

[CHANCERY DIVISION (Harman, J.), October 13, 1954.]

Legitimacy—Presumption of legitimacy—Mother twice married—Child born within nine months of termination of first marriage by death of husband—Second marriage of mother before birth of child—Paternity of child.

C

The mother of the intestate was twice married, first, at the age of twenty-one years, on July 4, 1868, to George Rawlings who died on Jan. 25, 1869, and second, on July 27, 1869, to John William Sheppard. On Sept. 24, 1869, the intestate was born. In the certificate of her birth she was described as "Matilda Rawlings", her father as "John William Sheppard" and her mother as "Matilda Sheppard, late Rawlings, formerly Mock". On May 28, 1941, the intestate died without issue or parents. On a summons to determine for the purposes of the distribution of the intestate's estate the paternity of the intestate,

D

HELD: the presumption that a child born within nine months of the termination of a marriage by the death of the husband was the legitimate offspring of that marriage should prevail and the intestate should be deemed to be the lawful child of the first husband, George Rawlings.

E

Dictum of COHEN, J., in *Re Heath* ([1945] Ch. at p. 422), criticised.

AS TO PRESUMPTION OF LEGITIMACY, see HALSBURY, Simonds Edn., Vol. 3, p. 87, para. 139; and FOR CASES, see DIGEST, Vol. 3, p. 358 et seq., Nos. 1 et seq.

F

Cases referred to:

- (1) *Re Heath*, [1945] Ch. 417; 115 L.J.Ch. 120; 173 L.T. 326; 2nd Digest Supp.
- (2) *Goodright d. Stevens v. Moss* (1777), 2 Cowp. 591; 98 E.R. 1257; 3 Digest 365, 58.
- (3) *Russell v. Russell*, [1924] A.C. 687; 93 L.J.P. 97; 131 L.T. 482; Digest Supp.
- (4) *Re Stollery*, [1926] Ch. 284; 95 L.J.Ch. 259; 134 L.T. 430; 90 J.P. 90; Digest Supp.

G

ADJOURNED SUMMONS for inquiries and to determine whether, for the purpose of tracing the persons beneficially interested in the estate of the intestate, Matilda Rawlings Overbury, George Rawlings, the first husband of the intestate's mother, or John William Sheppard, the second husband of the intestate's mother, should be deemed to be the lawful father of the intestate.

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Matilda Mock, the mother of the intestate, was twice married, first on July 4, 1868, to George Rawlings, who died on Jan. 25, 1869, and secondly to John William Sheppard on July 27, 1869. On Sept. 24, 1869, the intestate was born and, as appears from her certificate of birth, she was named "Matilda Rawlings".

The father was described on the said certificate as "John William Sheppard" and the mother as "Matilda Sheppard, late Rawlings, formerly Mock". The intestate's mother died on Dec. 9, 1882. On Mar. 3, 1901, the intestate married Horace Overbury. She died on May 28, 1941, without leaving issue or parents, and on Nov. 12, 1941, letters of administration to her estate were granted to the widower and the plaintiff, Albert Edward Sheppard, who was the only surviving relative of the said John William Sheppard. On Nov. 3, 1942, the widower died. The first defendant, Edward Matthews, was a son of Rosina Louisa Matthews, who predeceased the intestate and was a sister of the said John William Sheppard. The second defendant, George Rawlings, claimed to be the only surviving descendant of George Rawlings, the first husband of the intestate's mother. The third defendant, Herbert Nelson Mock, was the son of Edward Mock, a brother of the intestate's mother, who survived the intestate. The plaintiff, Albert Edward Sheppard, died after the issue of the summons and on July 6, 1953, letters of administration of the unadministered estate of the intestate were granted to the second defendant, George Rawlings. On Dec. 7, 1950, ROXBURGH, J., ordered an inquiry as to what persons were, on the death of the intestate, beneficially entitled to any property of hers as to which she died intestate.

T. K. Wigan for the plaintiff.

G. D. Morton for the first defendant.

A. A. B. Fuller for the second defendant.

A. P. McNabb for the third defendant.

HARMAN, J., stated the facts and continued: The question is whether the child so born, and stated on the certificate dated Sept. 24, 1869, to be the child of "Matilda Sheppard, late Rawlings, formerly Mock" and "John William Sheppard" ought to be regarded as their child or whether she ought to be regarded as the child of Matilda and her first husband, George Rawlings. The inquiry into the child's next-of-kin will, of course, depend on the answer to that question.

The matter has been argued from three points of view; first of all I have been urged to say that the second husband's relations must share as next-of-kin, having regard to the fact that the birth certificate on its face shows this child to be the child of John William Sheppard and his wife, and that she lived under the name of Sheppard and as his daughter until she married. She was married on Mar. 3, 1901, to Horace Overbury, and she is described on the marriage certificate as the daughter of John William Sheppard, but her christian names "Minnie Matilda" which appear there, show that she had dropped the "Rawlings" with which she began her life. The relations of George Rawlings argue contra that there is a presumption that she was the legitimate child of George Rawlings, to whom her mother was married when, in the normal course of events, she would have been conceived, and if her mother had not subsequently re-married there would have been no doubt—as I suppose there cannot be—that she would have been considered her legitimate offspring.

A third argument is put forward by counsel on behalf of the second defendant, who represents the interests of the maternal relations. He says that I can well conclude that this is a legitimately born child without having to make up my mind as to its paternity. It has often been said that a man can never be in any doubt who his mother was, but it is always a matter of doubt who his father was. Counsel says that that is in accordance with English law, which says that when persons make claims, they must prove them. He says that if I think that neither of Matilda Mock's husbands has been proved to be the father, although the mother was a married woman both at the time of the child's birth and at the time of the child's conception, then I may conclude that the child was legitimate offspring of her mother, and reject both fathers and their relations on the ground that they have not proved their case. That seems to me to be

altogether too ingenious. It seems to me that one can prove a child to be legitimate only by proving the marriage of its parents, or by giving evidence from which the court can infer such marriage, and that involves the identification of the father no less than of the mother.

There appears to be no authority on this subject: in STEPHEN'S DIGEST OF THE LAW OF EVIDENCE (12th edn.) (1936), p. 133, I find this note:

"I am not aware of any decision as to the paternity of a child born, say, six months after the death of one husband, and three months after the mother's marriage to another husband."

That is precisely the problem which confronts me. In *Re Heath* (1), COHEN, J., was in the same position. In a reserved judgment, he did not find it necessary to decide that point, saying, when dealing with counsel's argument ([1945] Ch. at p. 422):

"... Mr. Stranders, for the first defendant, contends, first, that the presumption [of legitimacy] does not apply to posthumous children and, secondly, that it is rebuttable and is rebutted in this case. In my view, his first contention conflicts with the principle on which the rule that a father's or mother's declaration is inadmissible to bastardize the issue born after marriage is based—see per LORD BIRKENHEAD, L.C., citing *Goodright's* case (2) in *Russell v. Russell* (3) ([1924] A.C., at p. 697)—but it avoids a difficult situation which might arise where a child was born within nine months after the first husband's death but after the widow's re-marriage. Unless Mr. Stranders' contention is correct, the presumption of legitimacy would, in such a case, make the child the legitimate child of two fathers. I need not, however, decide whether the presumption applies . . ."

With all respect to the learned judge, I do not agree that the presumption of legitimacy would make a child the legitimate offspring of two fathers: no presumption leads to that result.

There being those two presumptions, i.e., first that the child was the legitimate child of the first marriage, since she was born within nine months of the death of the first husband, and second that the child was the legitimate child of the second marriage since she was born during the subsistence of that marriage, which of them ought to prevail? The argument on the first presumption is that as this child was born within nine months of the dissolution of the first marriage by the death of the first husband, the child is presumed to be the legitimate offspring of that marriage and we need not look any further because the second presumption does not arise. Assuming, however, that both presumptions stand, each is rebuttable by evidence. It has been argued that the circumstances tend both ways. There is the fact that the second christian name given to this child was Rawlings, the surname of the first husband. On the one hand it is said that the mother and Sheppard, her husband at the time of baptism, gave her that name because they knew George Rawlings was the father; on the other hand it is said that it shows that she had, in fact, had relationship with John William Sheppard before the death of George Rawlings.

I must now deal with those arguments. This was a young woman of twenty-one years of age; she had only been married six months when her husband died, and I am asked to suppose that before the six months was out she had ceased to have any marital relations with her first husband and was living with, or cohabiting with, a lover who later became her second husband. I cannot assume without any evidence that that was so. I see no reason to make any such supposition. After all, it is quite a common thing for a woman to be re-married shortly after her first husband has died, especially when her husband is killed in some accident, as this husband was, and his death leaves her destitute. She was carrying this child at the time of her second marriage, and the second husband had no objection to marrying her in those circumstances, and as the

child was baptised in the name of her first husband, that seems to me to point to an admission of the first husband's paternity and to be in accordance with the natural order of things. These considerations seem to me to outweigh the evidence of the two certificates.

Accordingly, I think that all the probabilities point in the favour of the first presumption, and I think that this child ought to be considered, and indeed was in the eyes of the law, the child of George Rawlings, senior, and Matilda his wife, by their marriage of July 4, 1868.

With that expression of opinion, I propose to refer this matter back to the master. The costs will be dealt with on further consideration.

Inquiry to be prosecuted accordingly.

Solicitors: *Stafford Clark & Co.* (for all parties).

[*Reported by PHILIPPA PRICE, Barrister-at-Law.*]

C ETAM, LTD. v. FORTE AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Hodson, L.J., and Lloyd-Jacob, J.), October 12, 13, 1954.]

Landlord and Tenant—New lease—Reasonableness of grant—Covenant by tenant not to apply for new lease—Landlord and Tenant Act, 1927 (c. 36), s. 5 (2), s. 9.

Landlord and Tenant—New lease—Application refused by tribunal and notice of appeal served by tenant before commencement of Landlord and Tenant Act, 1954—"Proceedings . . . pending on an application . . . to the tribunal"—Landlord and Tenant Act, 1954 (c. 56), sched. IX, para. 8.

The E. Co. were retail sellers of women's clothing, and since 1925 they had been tenants of shop premises at Piccadilly Circus, London. On Dec. 5, 1951, when their current lease was about to expire, they obtained from the landlords a new lease, at an increased rent and including a slightly larger area, for a term of twenty-one years from Dec. 25, 1951, subject to a provision, contained in cl. 4 (a) of the lease, that, if at any time during the continuance of the term the lessors should contract to sell or let on long lease with vacant possession the demised premises and their adjoining premises or to pull down or reconstruct such premises, it should be lawful for the lessors to determine the term by six months' previous notice in writing. The lease contained a further covenant by the tenants that, if the tenancy were determined under cl. 4 (a), they would not apply for compensation or a new lease under the Landlord and Tenant Act, 1927, s. 4 and s. 5. Before the lease was executed the tenants obtained legal advice, and there was no evidence of over-reaching on the part of the landlords. After obtaining the new lease the tenants executed structural alterations and works on the premises the cost of which amounted to some £10,000. On Aug. 28, 1953, the landlords entered into a contract to sell the freehold of the premises and their adjoining premises and served on the tenants a notice determining the lease of 1951 under cl. 4 (a) thereof. The tenants thereupon served on the landlords a notice requiring a new lease under s. 5 (1) of the Act of 1927. On Oct. 26, 1953, by which date F., the first respondent, had become the tenants' immediate landlord and the second respondents were F.'s landlords under a lease granted by the purchaser of the freehold, the tenants applied to the county court for the grant of a new lease under s. 5 (2) of the Act of 1927 or for compensation for goodwill under s. 4 of that Act. On Feb. 26, 1954, an interim order was made, under s. 5 (13) of the Act of 1927, authorising

the tenants to continue in occupation of the premises until the completion of the proceedings. On June 25, 1954, the county court rejected the tenants' claim, but ordered a stay of execution. On July 8, 1954, the tenants gave notice of appeal against the rejection of their claim. On Oct. 1, 1954, the Landlord and Tenant Act, 1954, came into operation. By para. 8 of sched. IX to that Act, "Where at the commencement of this Act any proceedings are pending on an application made before the commencement of this Act to the tribunal under s. 5 of the Landlord and Tenant Act, 1927, no further step shall be taken in the proceedings except for the purposes of an order as to costs . . .". On appeal,

Held: (i) the prohibition, enacted by para. 8 of sched. IX to the Landlord and Tenant Act, 1954, against taking further steps in the proceedings did not apply, because after the tribunal had given final judgment there were no "proceedings . . . pending on an application . . . to the tribunal" within the meaning of that paragraph, the appeal from the tribunal not being such a pending proceeding as was there referred to; accordingly the Court of Appeal had jurisdiction to consider the appeal on its merits.

Cropper v. Smith (No. 2) (1884) (8 Ch.D. 148), applied.

(ii) in determining whether the tenants should be granted a new lease under s. 5 of the Landlord and Tenant Act, 1927, the fact that the tenants had entered freely into a covenant not to apply for a new lease under that section was a circumstance which should be taken into consideration, and in all the circumstances it would be unreasonable to order the grant of a new lease.

Per SIR RAYMOND EVERSHED, M.R. (adopting *Holt v. Cadogan* (1930) (46 T.L.R. 271, C.A.)): in determining whether there was adequate (i.e., "solid and valuable") consideration, within s. 9 of the Landlord and Tenant Act, 1927, for the covenant not to apply for a grant of a new lease under s. 5 of that Act the consideration might be sought in matters outside the actual terms of the lease containing the covenant (see p. 318, letter E, post).

Appeal dismissed.

EDITORIAL NOTE. Sections 4 and 5 of the Landlord and Tenant Act, 1927, are among the sections repealed as from Oct. 1, 1954, by the Landlord and Tenant Act, 1954, s. 45 and sched. VII. The superseding legislation is in Part II, ss. 23-45, of that Act; savings for pending claims are in paras. 7-9 of sched. IX to that Act.

AS TO TENANTS' RIGHT TO NEW LEASE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 297, 298, para. 340; and FOR CASES, see DIGEST, Replacement Vol. 31, pp. 631-633, Nos. 7405-7417.

FOR THE LANDLORD AND TENANT ACT, 1954, sched. IX, para. 8, see HALSBURY'S STATUTES, Second Edn., Interim Service (1954), p. 419.

Cases referred to:

- (1) *Cropper v. Smith (No. 2)*, (1884), 8 Ch.D. 148; 54 L.J.Ch. 287; 52 L.T. 94; 36 Digest, Replacement, 787, 1373.
- (2) *Holt v. Cadogan* (1930), 46 T.L.R. 271; 31 Digest, Replacement, 634, 7425.
- (3) *Bullins, Ltd. v. Fytche*, [1948] 1 All E.R. 737; 31 Digest, Replacement, 630, 7399.

APPEAL by the tenants, Etam, Ltd., from an order of His Honour JUDGE BLAGDEN, made at Westminster County Court on June 25, 1954, dismissing an application by the tenants for a new lease, under the Landlord and Tenant Act, 1927, s. 5, of premises known as 48 Regent Street, London, and, alternatively, for compensation for goodwill, under s. 4 of the Act.

On Dec. 5, 1951, Tavistock Restaurants, Ltd., who were then the owners of the freehold of the premises, granted to Etam, Ltd., who were already the tenants, a new lease of the premises for a term of twenty-one years from Dec. 25, 1951. The lease contained a clause, cl. 4 (a), the terms of which are set out in the judgment at p. 314, letter D, post, reserving to the lessors the right to determine the term at an earlier date, in the circumstances therein stated, by six months' previous notice in writing, and a covenant by the lessees not to apply for compensation or for a new lease under s. 4 or s. 5 of the Act of 1927. On Aug. 28, 1953, Tavistock Restaurants, Ltd. entered into a contract to sell the freehold of the premises and served notice on Etam, Ltd., determining their lease in accordance with the provisions of cl. 4 (a) thereof. On Sept. 17, 1953, Etam, Ltd., served a notice on Tavistock Restaurants, Ltd., requiring a new lease under s. 5 of the Act of 1927. On Sept. 30, 1953, the new owners of the freehold granted a lease of the premises for ninety-nine years to Chesham House (Regent Street), Ltd., and on Oct. 6, 1953, Chesham House (Regent Street), Ltd. granted a lease to Mr. Charles Forte for a term of fourteen and a quarter years (less one day) from Sept. 29, 1953, subject to the tenancy of Etam, Ltd. On Oct. 26, 1953, Etam, Ltd. made an application to Westminster County Court under s. 4 and s. 5 of the Act of 1927, the respondents to the application being Tavistock Restaurants, Ltd. On Nov. 24, 1953, on an application by Mr. Charles Forte, an order was made substituting him as respondent in the proceedings in place of Tavistock Restaurants, Ltd., and by an order made on Dec. 31, 1953, Chesham House (Regent Street), Ltd. were added as respondents.

H. J. Phillimore, Q.C., and R. G. Dow for the applicants, Etam, Ltd. (the tenants).

H. Heathcote-Williams, Q.C., and G. Avgherinos for the first respondent, Mr. Forte (the immediate landlord).

D. E. P. Evans, Q.C., and K. J. T. Elphinstone for the second respondents, Chesham House (Regent Street), Ltd. (superior landlords).

SIR RAYMOND EVERSLED, M.R.: This case, which arises on or in consequence of an application under the Landlord and Tenant Act, 1927, s. 4 and s. 5, is, as such cases are apt to be, one of no little complication, and to the complications inherent in this class of case before Oct. 1, 1954, have been added the complications produced by the transitional provisions of the Landlord and Tenant Act, 1954. The tenants, who are appellants in this court, are Etam, Ltd., the well known firm of retail sellers of women's clothing. Counsel for the tenants told us that they have no less than sixty-five shops in various parts of the country. The subject-matter of the present appeal is premises in London known as 48 Regent Street, which is in fact, or may be taken to be, a part of Piccadilly Circus. That is a relevant matter to mention because, as would be clearly conceded, any shop in or in the immediate neighbourhood of Piccadilly Circus is one that for many purposes, including that of advertisement, enjoys very great advantages. The respondents to the present appeal are, first, Mr. Charles Forte, the immediate landlord during the pendency of the tenants' lease, which I shall mention later, and, secondly, Chesham House (Regent Street), Ltd., who are the owners of the reversion expectant on the interest of Mr. Charles Forte. Both those respondents have come on the scene at a date later than that of the commencement of the lease last enjoyed by the tenants.

The tenants have been in occupation of the premises, save an area of some thirty or forty square feet, since 1925. The lease under which they had held the premises came to an end in 1951, and they took the first step necessary to protect their interests by serving a notice upon the then landlords, Tavistock Restaurants, Ltd., that they (the tenants) proposed to make a claim under the Landlord and Tenant Act, 1927, s. 5, for a new lease. Negotiations between the tenants and Tavistock Restaurants, Ltd., or their respective agents, followed

and on Dec. 5, 1951, a new lease of the premises was executed. This lease has certain features of a somewhat unusual character. In the first place the subject-matter demised included some property, immediately adjacent to the subject of the former lease and measuring in superficial area thirty or forty square feet, which had not formerly been leased to the tenants. The object of so including this area was to enable the tenants to erect there a staircase appropriate for use by their customers and thereby to enable the tenants to make use of the first floor in addition to the ground floor as a place where they could exhibit their goods and sell them to their customers. To erect a staircase of that character is a fairly costly enterprise, and it appears that the total cost of the works done amounted to some £10,000, of which about half or rather more was made up of the cost of the structural alterations. A second feature of this lease, which, however, was not unusual in the circumstances, was that there was a substantial increase in the amount of the rent payable. It increased by some £1,750 per annum to the figure of £4,250 per annum. It is to be remembered, however, that the former lease had been in existence for some years and, according to the evidence and the finding of the learned referee, the rental value of the property had in the meantime appreciably gone up. Further it is to be remembered that there was included a small additional area in the demise. I should add, that, according to some of the evidence, £4,250 was less than the market rental, at that time, of the premises. The term of this demise was twenty-one years from Dec. 25, 1951, but it was expressed to be determinable as thereafter mentioned.

The second remarkable feature of the lease is to be found in cl. 4 (a), which is thus expressed:

"If at any time during the continuance of the term hereby created the lessors shall contract to sell or let on long lease with vacant possession the demised premises and their adjoining premises . . . or to pull down or reconstruct such premises it shall be lawful for the lessors to determine the term hereby created by six months' previous notice in writing delivered to the lessees at their registered office . . . And in the event of such notice being duly given this lease and everything herein contained shall as from the date of the expiry of the notice cease and determine and the lessees shall not be entitled to any compensation or damage in respect of such determination save that if the term hereby created shall in consequence of notice cease and determine during the first seven years hereof the lessor shall pay to the lessee . . ."

certain sums. The first figure corresponds to, and was intended to represent, about half the cost of the structural alterations contemplated. The second, and much smaller, figure represented the amount which the tenants had to pay in restoring the decoration of the lessors' premises which they injured in doing their construction work. Thus the term of twenty-one years was so limited as mentioned above, and the lessees were not to be entitled to compensation in respect of the determination of the term save as stated above.

The third, and last, singular feature of the transaction is this. In addition to the general provision of cl. 4 (a) there was a special provision and covenant on the part of the lessees that they would not apply for compensation or a new lease under s. 4 or s. 5 of the Landlord and Tenant Act, 1927, or under any re-enacting Act, "if and when the tenancy hereby granted is determined in manner hereinafter provided in cl. 4 (a)." That is a reference to the power already mentioned to determine the lease.

It will be seen, therefore, on the face of the lease, that the bargain made was to this effect: that the landlords were willing to grant a new lease to the tenants at an enhanced rent, but subject to a right of determination in certain specified events without any limit as to time, by which I mean without any covenant that it would not be exercised within any particular period; and, on the other side, the lessees covenanted in plain terms that, should that right of determination

be exercised, they would not then make any claim under s. 4 or s. 5 of the Landlord and Tenant Act, 1927. The object of that last provision is, I think, obvious enough. It was to enable the lessors, in negotiating with a possible buyer or long-term lessee, to give some assurance that he would not have to meet any claim for a new lease.

Unfortunately for the tenants, this lease, which only came into operation in December, 1951, was determined, according to its language, by a notice, given in exercise of the power which I have mentioned, on Aug. 28, 1953. The tenants had spent a considerable sum of money on making alterations and incorporating the staircase. They feel perhaps and, if I may say so, not unnaturally, that they have been singularly unfortunate in having so small a time during which to enjoy the fruits of this particular enterprise. On the other hand, there is no question whatever that the notice to quit was duly served and was within the terms of the lease which the tenants entered into. It is because of those circumstances that Tavistock Restaurants, Ltd., the original lessors under the 1951 lease, have gone out of the picture and Charles Forte has come in, he being a person who has acquired the premises from Chesham House (Regent Street), Ltd., the present head lessees, and who, being within the definition of "lessors" in the lease of Dec. 5, 1951, is entitled to the benefit of its terms and of the lessees' covenants.

In the circumstances which I have briefly stated, the tenants, notwithstanding the terms of their covenant, proceeded to make an application for a new lease, under s. 5 of the Landlord and Tenant Act, 1927, and that application, as is commonly done, was referred to a referee, Sir Alfred Wort. From him we have had the advantage of a long and careful exposition of the facts, in the course of which he intimated that he thought that there was, as a fact, proved adherent goodwill, as that phrase is understood within the meaning of the Act, and he assessed compensation, if the tribunal should think fit to award it, at a sum of £5,000. He came, however, to the conclusion, again subject to the tribunal's view, that it was not a case in which a new lease should be granted. In the course of his report he dealt with the point taken against the tenants that, by the terms of the lease of 1951, they had contracted out of their right to make the present application. I shall come back presently to this point.

Section 9 of the Landlord and Tenant Act, 1927, provides:

"This Part of this Act [Part I, which includes s. 5 as well as s. 4] shall apply notwithstanding any contract to the contrary, being a contract made at any time after Feb. 8, 1927: Provided that, if on the hearing of a claim or application under this Part of this Act it appears to the tribunal that a contract made after such date as aforesaid, so far as it deprives any person of any right under this Part of this Act, was made for adequate consideration, the tribunal shall in determining the matter give effect thereto."

The learned referee was of opinion that there was no adequate consideration in this case and, therefore, he thought that the whole matter remained open without any regard to the covenant. I shall come back to that point. I should add that, on Feb. 26, 1954, before the referee had made his report*, an interim order had been made under s. 5 (13) of the Act of 1927, designed to protect the occupation of the tenants during the pendency of the proceedings. I am using that last formula without intending to give any definition to it.

The case then went to the learned county court judge, who gave his judgment on June 25, 1954. Again we have the advantage of his considered and careful judgment. Differing in this respect from the view intimated by the referee, the learned county court judge was of opinion that no adherent goodwill had been established, and he went on to say that he thought that it was not, in any event, a case for granting a new lease. In other words, he wholly rejected the claim of

* The referee's report was dated Apr. 13, 1954.

the tenants based on s. 5 of the Act of 1927. He also granted what he described in the judgment as being a stay of execution. The existence of the interim order and the provisions in the final order for a stay have obviously somewhat disturbed those who have represented the respondents and various attempts have been made to get rid of one or other or both of those provisions. On July 13, 1954, the respondents served a cross notice of appeal which relates to the stay. The reason for the respondents' anxiety arises out of the effect of the transitional provisions of the Landlord and Tenant Act, 1954, which I will come to in a moment, but I want to make it plain now that I shall express no view whatever on any of the points that have been made about the validity of the interim order or the stay. I do not think that those are questions which arise on the present occasion.

I will now pass to the Landlord and Tenant Act, 1954, so far as it is relevant. Substantially, its relevance is confined to the transitional provisions which are to be found in sched. IX, and particularly for present purposes in para. 8, which reads:

"Where at the commencement of this Act [i.e., Oct. 1, 1954] any proceedings are pending on an application made before the commencement of this Act to the tribunal under s. 5 of the Landlord and Tenant Act, 1927, no further step shall be taken in the proceedings except for the purposes of an order as to costs; and where the tribunal has made an interim order in the proceedings under s. 5 (13) of that Act authorising the tenant to remain in possession of the property comprised in his tenancy for any period, the tenancy shall be deemed not to have come to an end before the expiration of that period . . ."

Counsel for the tenants, in opening his appeal, drew our attention very naturally and properly, if I may say so, to the terms of that paragraph, and he put forward some grounds for the view that the first part of it covered this case; in other words, that this was a case in which there were "proceedings . . . pending on an application made before the commencement of this Act to the tribunal" inasmuch as there was an appeal still pending from the order made by the tribunal on the application originally made by the tenants. If that submission were well founded it would follow that all that could be done on this appeal would be to make an order as to costs. It is, naturally, unusual for an appellant to intimate that the court to which he has appealed may have no jurisdiction to hear his appeal, but the Act of 1954 received the royal assent and came into operation after the tenants had served their notice of appeal.* Plainly, if counsel for the tenants thought that it might be in the better interest of his clients to say that these proceedings should not continue and that he should be thereupon free to re-litigate the matter under the Act of 1954, it was not only his right but his duty to take that point on his clients' behalf. The respondents were very anxious that that should not happen. The attitude taken on both sides has made it quite plain, as, indeed, I understand, is admittedly the fact, that, generally speaking, the Act of 1954 is more favourable to the tenant in cases of this kind than was the Act of 1927; but I have come to the conclusion that the phrase "any proceedings are pending on an application . . ." is not applicable in the circumstances of the present case.

I think that there are several grounds for supporting that view. One is that in other and adjacent parts of the Act of 1954 there is a similar but distinct formula; one finds it, for example, in substantially the same words in s. 64 (2) and in para. 10 (2) of sched. IX, the schedule with which we are dealing. The formula is

"proceedings on the application (including any proceedings on or in consequence of an appeal) . . ."

* The tenants' notice of appeal was served on July 8, 1954. The Act of 1954 received the royal assent on July 30, 1954.

I appreciate that the words "in consequence of" give, on any view, a particularly wide significance to the parenthesis, but still I am inclined to think that the contrast which the parenthesis necessarily introduces gives some ground for thinking that, in para. 8 of sched. IX, the words "proceedings . . . pending on an application," were not intended to cover the case of an appeal after judgment had been given by the tribunal. There are, however, other grounds also pointing in the same direction. One is the use of the words "to the tribunal" in para. 8 itself. Let me just read the relevant words again—"proceedings are pending on an application made . . . to the tribunal under s. 5." It was fairly pointed out by counsel for Mr. Forte, the immediate landlord, that the words "to the tribunal" would really be otiose except on the view that they were intended to make clear that it was only when the proceedings were pending before the tribunal that para. 8 of sched. IX was intended to take effect. Let me make two further points, both of which were made in the course of the argument. In the first place, if the proceedings are still pending after judgment by the tribunal and after service of the notice of appeal, then this curious result follows. This court could make, but could only make, an order as to costs, and that would leave the judgment of the tribunal standing. The second point was this. In the present case the appellants are the tenants and, if the first part of para. 8 applies to this case, then they may well be able to say that they are given expressly the right in the second part of the paragraph to litigate the matter anew under the Act of 1954. Whether they would be successful or not I am not concerned to decide. If, however, the appellant was the landlord and the appeal was no longer capable of being heard on its merits, it is clear that the landlord would be left without any remedy whatsoever. Finally, our attention was drawn—LLOYD-JACOB, J., looked up certain of the references for us—to decisions of the court, not on this language, but on somewhat similar language. I will refer by way of example only to one case, namely, *Cropper v. Smith* (No. 2) (1), where the question arose on the phrase "action . . . or . . . legal proceedings . . . is pending" in s. 18 (10) of the Patents, Designs, and Trade Marks Act, 1883. I have said that the case is not, on the language, parallel, but that case and other cases referred to (the references may be found in STROUD'S JUDICIAL DICTIONARY (3rd edn.), vol. 3, pp. 2141-2143, under the word "pending") show, I think, clearly enough that there is no inclination in the courts to give, a priori, a wide meaning to a formula like "proceedings pending" or "matters pending".

The point was made that this court might (and there is authority for the view that in many cases it should) refer this case back to the county court judge, and that, in such case, there would be "proceedings pending" before the tribunal even after an appeal. In my opinion, however, this consideration is not sufficient to outweigh the others which I have already mentioned which point the other way. For, in the case supposed, it may, to my mind, fairly be said that the proceedings ultimately "pending" before the tribunal were so pending, not on the original application, but by, and by virtue of, an order of reference by this court. To my mind, the proceedings are no longer pending within the meaning of sched. IX, para. 8, to the Act of 1954 after the tribunal has given its final judgment. For those reasons, therefore, although it has not been the concern of the respondents here to argue to the contrary, I am satisfied in my own mind that para. 8 of sched. IX to the Act of 1954 does not apply to this case, and it, therefore, has become necessary for us to consider the matter on its merits.

I think that there is a relatively short answer to this case. The Landlord and Tenant Act, 1927, s. 5 (2), which states the jurisdiction of the tribunal in such a case as this, says that the tribunal may, if it considers the grant of a new tenancy is in all the circumstances reasonable, order the grant of a new tenancy. Thus it is a question of fact in the discretion of the tribunal to say whether in

any case and having regard to all the circumstances it would be reasonable to grant a new tenancy. The sub-section (s. 5 (2)) then provides:

"but if the tribunal is precluded on any of the grounds mentioned in para. (b) of the following sub-section from making such an order the tribunal may award such compensation as is provided under the last foregoing section."

I think that the proper construction of these words is tolerably clear and their effect is this. They add the limitation that a tribunal though it *prima facie* regards the grant of a new tenancy otherwise as reasonable may nevertheless be debarred from making the necessary order because of one or other of the special grounds mentioned in s. 5 (3) (b); and in that event it may award compensation instead, the compensation awarded being arrived at in accordance with the principles set out in s. 4.

In this case reliance was placed by Mr. Forte on certain of the special prohibitions, if I may so describe them, in s. 5 (3) (b). So far as now is relevant (for some have since been abandoned), they include s. 5 (3) (b) (ii), as Mr. Forte intends to remodel the premises. He also claims that the grant of a lease of the premises would not be consistent with good estate management: see s. 5 (3) (b) (iv). On the facts, the learned judge was favourable to the landlords on both those matters, but we have not heard full argument on them. It is not in doubt that the premises are going to be remodelled if the appeal should fail. We have seen the scheme presented graphically whereby what has hitherto been the shop premises of Etan, Ltd., will be incorporated into a large restaurant, the Monico Restaurant being the present component part of it. It was, however, said by counsel for the tenants that the remodelling was not being done, or was not intended to be done, by Mr. Forte himself, but by a separate person in the eye of the law, namely, Forte & Co., Ltd., with which, no doubt, Mr. Forte is closely connected. I find it not necessary in this case to express my view on the question whether either of the prohibitions which I have mentioned operate, because I am satisfied, as the learned judge was satisfied, that in all the circumstances it would not be reasonable in any case to order the grant of a new tenancy.

I now come back to the lease and the provision therein whereby the tenants covenanted not to make any claim under the Landlord and Tenant Act, 1927, s. 4 and s. 5. It is not in doubt that, in cases where there is such a provision, it is for the landlord to show that there is "adequate consideration", within the proviso to s. 9 of the Act. To borrow the language of LORD HANWORTH, M.R., sitting in the Divisional Court, in *Holt v. Cadogan* (2) (46 T.L.R. at p. 272) "adequate" is to be treated as meaning "solid and valuable". It is for the landlord to show that there is a solid and valuable consideration. The learned referee thought that there was not such a consideration, but I venture to think that his grounds for that view are, wrongly, confined to a consideration of the terms of the lease itself. The learned judge also intimated that he was against the landlords on this matter, although he had heard no argument on the point. I do not propose to express a view whether the landlords have established adequate consideration. I only observe that according to *Holt v. Cadogan* (2), from which I see no ground for dissenting, the consideration may be sought in matters outside the actual terms of the lease itself. I am not, therefore, to be taken as expressing approval or disapproval of the view taken by the referee or the judge on that question. I am, however, quite clear in my mind that the fact of the tenants having entered into such a covenant in the circumstances that have been proved before us is a matter relevant to be taken into account in considering the question of reasonableness. I have already read s. 9 of the Act of 1927.* By virtue of that section, s. 4 and s. 5 are to apply notwithstanding the covenant, but that is not to say that the fact of the covenant having been

* It is set out at p. 315, letter E, ante.

entered into is wholly to be ignored. Counsel for the tenants, indeed, conceded that its existence was a circumstance relevant to the question of reasonableness, and I think it a highly significant circumstance. After all, we are here dealing with a very substantial and successful business [Etam, Ltd.] which, during the negotiations, acted at arm's length with the then landlord and acted with the aid of agents, solicitors and so forth. There is no possible ground in this case for charging the then lessors with any dishonesty or deception. The lease was, therefore, entered into by the tenants' board of directors, or their representatives, with their eyes open. It has, of course, turned out for them to be an unfortunate bargain, but it is quite plain, when they made this arrangement, that there was to be no question of a further term if the events which have happened should occur. In the absence, therefore, of any indication of over-reaching, it seems to me that the making of that bargain is a most significant consideration. The circumstances which gave rise to the coming into operation of the covenant are likewise significant. They were that the premises were to be remodelled and reconstructed, and the lease to the first respondent, Mr. Forte, was, of course, for the purpose of his carrying out that work. As I have said, I express no view on it but, even if there is force in the technical point in relation to s. 5 (3) (b) (ii) of the Act of 1927 that it is not Mr. Forte but Forte & Co., Ltd., which is doing the remodelling, still those facts are relevant circumstances on any view of it.

Without, therefore, taking more time—indeed, I am anxious to say as little as possible for reasons which I will explain—I think, with the learned judge (though I may have put the emphasis somewhat differently) that it plainly would not be reasonable to order the grant of a new lease; and I base my decision on that conclusion rather than on consideration of one or other of what I have called the prohibitions in s. 5 (3) (b) of the Act of 1927. It follows, therefore, as counsel for the tenants conceded, that no question arises of an award of compensation in lieu of ordering a new lease.

There is lastly this. One of the most vexed questions under the Act of 1927 has been the exact inter-action of s. 4 and s. 5. As the law at present stands according to the reported cases—I have in mind, by way of example, *Butlins, Ltd. v. Fytche* (3), where SOMERVELL, L.J., dealt with the matter ([1948] 1 All E.R. at p. 741)—the failure of an application under s. 5 is not a bar to an application for compensation under s. 4, provided that the applicant-tenant has then gone out of possession. It has been intimated by counsel for the tenants that, subject again to the effect of the transitional provisions of the Act of 1954, they may desire to claim compensation under s. 4, or under the corresponding section* of the Act of 1954, and a preliminary objection, no doubt, to that claim will be the point made on the covenant against making any such claim. That being so, I desire, as I have already sufficiently intimated, to avoid expressing any view of my own on the adequacy of the consideration within the meaning of s. 9 of the Act of 1927, because it is not relevant to my conclusion. I prefer that it should be considered by the tribunal that hears the fresh application for compensation if such an application is made. That tribunal ought to be free to consider the point entirely de novo and not regard the matter as in any way concluded by the view expressed by the learned referee in this case and by the learned judge, who, as I have said, did not hear any argument on it. I think that is sufficient for present purposes. I confine the basis of my judgment to my view that in all the circumstances of this case it would be unreasonable to order the grant of a new tenancy to the tenants. I base myself on that matter rather than on the particular application of one or other of the limiting factors in s. 5 (3). For the reasons which I have stated I think that this appeal fails and should be dismissed.

* It is thought that the reference is to s. 37 of the Landlord and Tenant Act, 1954.

HODSON, L.J.: I agree with the judgment which has been delivered by SIR RAYMOND EVERSHED, M.R., and with the grounds on which that judgment is based. For my part, I think it better not to say anything about the issues in this case which may hinder or embarrass the parties if, unhappily, they become involved in future disputes about this matter. I think that the judgment of this court can rest, as I think the judgment of the learned county court judge rested, on the view that, under s. 5 (2) of the Landlord and Tenant Act, 1927, it was unreasonable in all the circumstances to grant a new tenancy, and I rely, as the learned county court judge relied in part, on the circumstance that in 1951 the tenants, in signing the lease on that date, agreed not to take proceedings for compensation under the Landlord and Tenant Act, 1927, and accepted the lease with the terms thereof in satisfaction of their claims. In saying that, I am not closing the door on argument, under s. 9 of the Act of 1927, whether, in itself, the agreement deprived the tenants of their rights under the Act, but I am not assenting to the tentative view expressed by the learned county court judge and the learned referee who considered the matter, namely, that the consideration was not adequate. The tenants are a limited company, owning a substantial chain of shops, negotiating with the landlords through their directors, with the consideration before them of what was likely to happen in future, and with their eyes open the directors entered into this bargain. It seems to me, to put it at its lowest, difficult for them thereafter to resist the contention that an agreement entered into by them was made for adequate consideration. I agree that the appeal fails.

LLOYD-JACOB, J.: I also agree that in the circumstances disclosed in this appeal it would not be reasonable to order the grant of a new tenancy.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Adler & Perowne* (for the tenants); *Paisner & Co.* (for the immediate landlord); *Slaughter & May* (for the superior landlords).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Re HOOKER'S SETTLEMENT. HERON v. PUBLIC TRUSTEE AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), October 18, 1954.]

Settlement—Revocation—Power to revoke with consent of a judge of the Chancery Division—Validity.

Court—Consent—Person cannot impose duty on court to give consent.

In a voluntary settlement dated Oct. 17, 1917, it was provided: "The settlor may at any time during her life with the consent of a judge of the Chancery Division of the High Court of Justice from time to time by any deed or deeds revoke or vary either wholly or partially the trusts and powers of and concerning the whole or any part of the trust fund and of the income therefrom respectively" By a deed dated Dec. 14, 1953, the settlor purported to revoke all the trusts of the settlement, and she now applied for the consent of a judge of the Chancery Division.

HELD: a private person could not impose on a judge the jurisdiction or duty to adjudicate on such a matter, and the provision was improper and inconsistent with the practice of the courts; accordingly the application would be dismissed.

Dictum of SIMONDS, J., in *Re H.'s Settlement* ([1939] W.N. 318), applied.

AS TO PROTECTIVE PROVISIONS OF A SETTLEMENT, see HALSBURY, *Hailsham Edn.*, Vol. 29, p. 596, para. 867; and FOR CASES, see DIGEST, Vol. 40, pp. 546, 547, Nos. 884-897; AS TO JURISDICTION OF COURT BY CONSENT, see HALSBURY, *Simonds Edn.*, Vol. 9, p. 352, para. 824.

Cases referred to:

- (1) *Re H.'s Settlement*, [1939] W.N. 318; Digest Supp.
- (2) *Re Baker*, [1936] Ch. 61; 105 L.J.Ch. 33; 154 L.T. 101; Digest Supp.
- (3) *Re Phillips*, [1931] 1 Ch. 347; 100 L.J.Ch. 65; 144 L.T. 178; Digest Supp.
- (4) *Re Greaves*, [1954] 1 All E.R. 771; [1954] Ch. 434.

ADJOURNED SUMMONS under R.S.C., Ord. 55, r. 3, for an order consenting to the execution by the plaintiff of a deed made on Dec. 14, 1953, between the plaintiff of the one part and the trustees, the first and second defendants, of the other part, whereby in pursuance of the power contained in that behalf in cl. 7 of a settlement dated Oct. 17, 1917, the plaintiff revoked all the trusts and powers whatsoever in the said settlement to the intent that all the property then or thereafter to be comprised in the settlement should thenceforth be held on trust for the plaintiff absolutely and that the first and second defendants might be authorised by the court to administer the said property in accordance with the provisions of the said deed of 1953.

J. A. Plowman, Q.C., and *Peter Foster* for the plaintiff, the settlor.

D. H. McMullen for the first and second defendants, the trustees of the settlement.

Milner Holland, Q.C., and *W. S. Wigglesworth* for the third defendant, only child of the plaintiff and interested in remainder expectant on the death of the plaintiff.

DANCKWERTS, J.: This is an application of a somewhat unusual character. It is concerned with a clause in a settlement dated Oct. 17, 1917, made by the plaintiff, who is now Mrs. Heron, a widow. She was born on June 22, 1900, and so was only seventeen years old when the settlement was made, but no objection has been taken on that ground. She married Horace Willets Heron on Aug. 8, 1918, and he died on Jan. 6, 1953. There was one child of the marriage, Michael Roger Heron, who was born on Apr. 5, 1922, and consequently is well over the age of twenty-one years.

The settlement was in very ordinary form as regards the beneficial provisions.

There was the usual trust for life for the plaintiff, followed by a power of appointment amongst her issue, and the usual provision in default of appointment for her child or children by any marriage who should attain the age of twenty-one years, or, being daughters, marry under that age. Therefore, the third defendant, Michael Roger Heron, being the only child of the plaintiff, acquired a vested interest, expectant on his mother's life interest, under the terms of the settlement.

Clause 7 of the settlement provides:

"The settlor may at any time during her life with the consent of a judge of the Chancery Division of the High Court of Justice from time to time by any deed or deeds revoke or vary either wholly or partially the trusts and powers of and concerning the whole or any part of the trust fund and of the income therefrom respectively but without derogating from the effect of any previous exercise of any of the powers hereinbefore contained or declared of all or any parts of the trust fund and of the income therefrom respectively."

By the present application the plaintiff asks for an order to be made by the court consenting to the execution by her of a deed of revocation which she made on Dec. 14, 1953, in pursuance of the power which is supposed to be contained in cl. 7 of the settlement.

The evidence in the case, I am told, is of a controversial and possibly unpleasant nature, but it has not been read, as a preliminary point has been raised as to the jurisdiction of the court to make any order and the validity of the application which has been made by the plaintiff in this case.

In *Re H.'s Settlement* (1), a rather similar point came before SIMONDS, J. In that case the settlement contained the following clause:

"The settlor may from time to time or at any time by deed revocable or irrevocable with the consent of the Chancery Division of the High Court revoke all or any of the trusts hereinbefore declared and may direct that the part or parts of the trust fund to which such revocation extends shall be held in trust for herself absolutely or otherwise as she may think proper."

In that case two sisters had executed similar settlements and apparently they had married husbands who had considerable means. The court was asked in an application (which was substantially unopposed, as far as I can see) to make an order authorising revocation under the terms of that provision of the settlement. SIMONDS, J., expressed the view that a settlor was not entitled to make any power or trust exercisable with the consent of the Chancery Division, or with the consent of a judge of that division. He said that the legislature could impose on the court a duty to exercise a discretion, but in the learned judge's opinion, a private person could not do so. Such a discretion should be made exercisable by trustees, and the court should only be asked to exercise it if the trustees were unwilling or failed to do so. In that case, however, for reasons which I do not wholly apprehend, the judge made the order, on the ground that it would be a hardship on the settlors not to do so in the circumstances.

A clause somewhat similar, but not the same, came before FARWELL, J., in *Re Baker* (2). FARWELL, J. (sitting not as a judge of the Chancery Division, but as a bankruptcy judge) came to the conclusion that a clause giving the settlor power to revoke the whole of the trusts in the settlement with the consent either of the trustee or of a judge of the Chancery Division was not fraudulent and void under the provisions of the Law of Property Act, 1925, s. 172 (1). It is true that in his judgment FARWELL, J., seems to have thought that a judge of the Chancery Division would not refuse to exercise the jurisdiction, and would apparently consider whether it was for the benefit of the settlor that the power should be exercised, having regard also, it seems, to the interests of his creditors. In that case, however, FARWELL, J., was not himself being asked to exercise the jurisdiction and was merely considering whether a clause—which, it is to be observed, was not in the same form as that now under consideration, because it gave the

power to the trustee as an alternative to the court—was fraudulent having regard to the interests of creditors.

I have also been referred to some cases, *Re Phillips* (3) and *Re Greaves* (4), which are of rather a different character and seem to me to have nothing to do with the present case.

A In my judgment, the view which was expressed by SIMONDS, J., in *Re H.'s Settlement* (1) is the right view. I think that an ordinary person has not the power, which the legislature has, to impose on a judge of the Chancery Division a jurisdiction which is not given him by the procedure of the courts or by any statute. This is an attempt to make the judge an arbitrator without his consent. It is to be observed in the present case that there is not even a reference to the Chancery Division, but to "a judge of the Chancery Division". It is an attempt, B apparently, to compel a judge in the Chancery Division, an individual judge, to adjudicate on a private matter. It is true that as it is contained in a settlement, at first consideration there seems to be a certain plausibility about a power of revocation of this character, but the matter is capable of greater extension in a very undesirable and improper manner if a settlor be entitled to require the co-operation of a judge of the High Court in this manner. A judge could be compelled to act as arbitrator in commercial disputes, or even, as it seems to C me, in a dispute relating to a decision on a race. It seems to me wholly unjustifiable and something which cannot be allowed to pass.

It is urged that as this settlement was made in 1917, the same consideration which induced SIMONDS, J., in *Re H.'s Settlement* (1), to give his decision on the case before him should be applied in the present case, because the settlement was executed long before the hearing of that case. I do not think that that is D an admissible argument. If parties choose to put in a settlement a clause which is not valid or proper, they must abide by the result, and, if it is rejected, they must suffer the consequences. Moreover, there is a further consideration to which junior counsel for the third defendant called my attention, that in the edition of KEY & ELPHINSTONE'S PRECEDENTS IN CONVEYANCING which was available in 1917 (10th edn., vol. 2, p. 643) there was a clause of a different E character, which could have been used by a settlor who wished to provide for circumstances of this kind, and which left the matter to the trustees, subject to the power which trustees always possess of applying to the court if they are in doubt how they should act.

F In the result, therefore, I come to the conclusion that cl. 7 is not a proper clause. It is an attempt to compel the adjudication of a matter by a judge in the Chancery Division which is not provided for by the law and is improper and is inconsistent with the proper practice of the courts. Accordingly, the preliminary objection succeeds, and I must refuse to hear the summons any further. The summons will be dismissed.

Application dismissed.

Solicitors: *Burton, Yeates & Hart*, agents for *Malcolm, Wilson & Cobby*, Worthing (for the plaintiff); *Cartwright, Cunningham, Haselgrove & Co.* (for the first and second defendants); *Edridges & Drummonds*, Croydon (for the third defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

ALVION STEAMSHIP CORPORATION PANAMA v. GALBAN LOBO TRADING COMPANY S.A. OF HAVANA.

[QUEEN'S BENCH DIVISION (McNair, J.), October 20, 1954.]

Shipping—Charterparty—Lay days—Loading—"Weather working days"—Regard to be had to working hours.

By a charterparty a ship was chartered to load sugar in Cuba. Lay days for loading were to be allowed to the charterers at an average rate "per weather working day", Sundays and holidays and Saturday afternoons excepted. Demurrage was payable for detention longer than the permitted time for loading. Time lost was to be calculated in accordance with the custom of the port. At the ports of loading there were customary normal working periods amounting to eight hours daily on weekdays, other than Saturdays, and to four hours on Saturdays. Disputes having arisen as to the computation of lay time and an umpire having stated his award in the form of a Special Case,

Held: in construing the phrase "weather working day" regard is to be had to working hours rather than to non-working hours, and thus, if by the custom of a port eight hours are worked on weekdays (other than Saturdays) and four hours on Saturdays, it is the operation of weather during those working hours that must be considered in determining whether a day was wholly or in part a weather working day.

Branckelou S.S. Co. v. Lamport & Holt ([1897] 1 Q.B. 570) and "*Z*" *S.S. Co., Ltd. v. Amtorg, New York* (1933) (61 Lloyd's Rep. 97), applied.

Per McNAIR, J.: it seems to me quite impossible that *Bennetts & Co. v. Brown* ([1908] 1 K.B. 490) and *British Mexican Shipping Co., Ltd. v. Lockett Brothers & Co., Ltd.* ([1911] 1 K.B. 264) can stand together. If it had been necessary, I should have felt myself bound to follow the later decision and to disregard the decision in *Bennetts & Co. v. Brown* (see p. 328, letter E. post).

AS TO WEATHER WORKING DAYS, see HALSBURY, Hailsham Edn., Vol. 30, pp. 342, 343, para. 523 text and notes (t), (u); and FOR CASES, see DIGEST, Vol. 41, pp. 573, 574, Nos. 3975, 3976.

Cases referred to:

- (1) *Branckelou S.S. Co. v. Lamport & Holt*, [1897] 1 Q.B. 570; 66 L.J.Q.B. 382; 2 Com. Cas. 89; 41 Digest 573, 3975.
- (2) *Bennetts & Co. v. Brown*, [1908] 1 K.B. 490; 77 L.J.K.B. 515; 98 L.T. 281; 41 Digest 574, 3976.
- (3) "*Z*" *S.S. Co., Ltd. v. Amtorg, New York*, (1933), 61 Lloyd's Rep. 97.
- (4) *Nielsen v. Wait*, (1885), 16 Q.B.D. 67; 54 L.T. 344; sub nom. *Neilson & Co. v. Wait & Co.*, 55 L.J.Q.B. 87; 41 Digest 527, 3555.
- (5) *British Mexican Shipping Co., Ltd. v. Lockett Brothers & Co., Ltd.*, [1911] 1 K.B. 264; 80 L.J.K.B. 462; 103 L.T. 868; 41 Digest 619, 4504.

SPECIAL CASE stated by an umpire.

By a charterparty dated London, Sept. 1, 1951, the charterers chartered the claimants' vessel Rubystone to load a cargo of sugar of seven thousand tons maximum, six thousand three hundred tons minimum, at two safe ports in Cuba for discharge in Piraeus.

The charterparty stated that lay days for loading were to begin

"at the next working period according to the custom of the port after captain reports ship ready to receive cargo. Sundays and holidays excepted."

The charterparty further stated:

"Lay days at the average rate of 5,000 bags (of 330 pounds) or equivalent in 100 pound bags at ports on the north side of Cienfuegos; 4,500 bags

(of 330 pounds) or equivalent in 100 pound bags at other ports provided vessel can receive at these rates per weather working day, Sundays and holidays and Saturday afternoons excepted, shall be allowed to the said charterers (if steamer is not sooner loaded) for loading and waiting for order

The charterparty also stipulated that

A " . . . time lost or saved is to be calculated separately for each loading port and in accordance with the custom of the port."

B Disputes as to demurrage having arisen under the charterparty the matter was referred to arbitration. In the arbitration and on the Special Case the shipowners were the claimants and the charterers were respondents. Each appointed one arbitrator. The arbitrators failed to agree and an umpire was appointed. At the request of the charterers' arbitrator the umpire stated his award in the form of a Special Case. He reserved for the decision of the court the following question of law:

C "Whether upon the facts found and upon the true construction of the charterparty and the weight of evidence the respondents were correct in applying the principle of a day of 8 hours and 4 hours on Saturday to their computation of lay time."

He found the following facts:

"(a) That the vessel loaded at Cardenas and Havana both being ports on the north side of the island of Cuba in conformity with the charterparty.

D "(b) That the vessel loaded a total of 162,690 bags of 100 pounds each as follows: 90,000 at Cardenas and 72,690 at Havana.

"(c) That the total lay time allowed thereby to the charterers including allowances of rain and winch breakdowns for loading the complete cargo, was 9 days 6 hours 53 minutes comprising 5 days 3 hours 38 minutes at Cardenas and 4 days 3 hours 15 minutes at Havana.

E "(d) That the vessel arrived at Cardenas at 11.54 a.m. on Sunday, Sept. 30, commenced loading at 1.45 p.m. Oct. 1, 1951"

F The lay time started from 1 p.m. on that day. The loading was completed at 4.45 p.m. on Oct. 8. The ship sailed for Havana on Oct. 9 and arrived in Havana at 2.30 p.m. on Oct. 10, a recognised holiday. The umpire took the view that the lay time at Havana started at 7 a.m. on Oct. 11 and found "that the loading was finally completed at 3.20 p.m. on Oct. 18". The umpire also found

"That at all material times there was an established custom of the port at Cardenas and Havana that the normal working periods were as follows:— 7 a.m. to 11 a.m. and 1 p.m. to 5 p.m. = 8 hours. Saturdays—7 a.m. to 11 a.m. = 4 hours."

G In his award the umpire, having set out certain details as regards certain days for the preparation of holds found that the charterers were liable to the shipowners for twenty-nine minutes demurrage at Cardenas and for ten minutes at Havana which he assessed for the two ports at £9 13s. 5d. As the respondents had withheld freight in the sum of £244 8s. 6d. the total award to the shipowners amounted to £254 1s. 11d. The award continued:

H "If the court should find and determine that a weather working day at the loading ports is one of 24 hours, contrary to my findings, then my award as set out above, shall not stand",

and the umpire then stated the alternative amounts of demurrage payable.

Eustace Roskill, Q.C., and *R. A. MacCrindle* for the shipowners.

A. A. Mocatta, Q.C., and *P. T. Bucknill* for the charterers.

McNAIR, J., stated the facts and continued: The first question is the extent to which the learned umpire has left this matter to the court—whether, for instance, he has left to this court a question of the proper calculation of fractions of days and matters of that kind. I am quite clear that the only question which is left to me on this award is the short and naked question set out in the passage which precedes para. 1 of the award, namely, whether on the facts found, etc., the charterers were correct in applying the principle of a day of eight hours and four hours on Saturday to their computation of lay time. Accordingly I express no view at all as to the other subsidiary points of contest on the method of calculation but confine myself solely to the question whether, in effect, in construing the phrase “weather working days” regard is to be had, as the shipowners say, to a calendar day of twenty-four hours or whether, as the charterers say, only to the working hours contained in a calendar day.

As I understand the argument which was addressed to the umpire and which was fully addressed to me, what the charterers say is that, inasmuch as at these two ports in Havana there was an established custom or practice that the working hours on ordinary weekdays should be eight hours specified in the way in which they are set out in the award and that on Saturdays the working hours should be four hours, in any determination of whether a particular day was a “weather working day” or not, wholly or in part, it is the operation of weather during those working hours that is to be considered. They further say that, even if that be not the true construction of the phrase “weather working days” standing alone, there is in this award a definite finding of a customary meaning of the phrase “weather working days” to that effect.

I have been told by counsel for the shipowners that the phrase “weather working day” first came into use, so far as is recorded in the authorities, just before the beginning of the century, and I have been referred to a number of cases dealing with “days”, “working days” and “weather working days”. The argument on behalf of the shipowners may be summarised in this way: first, that the word “day” or “days”, by authority, has been determined to mean a calendar day—a Monday, Tuesday, Wednesday or Thursday—and, further, that “working day” means such a calendar day on which work is done, including the whole of that calendar day starting at midnight and continuing to the following midnight; and that “weather working day” similarly means a calendar day on which weather permits work, looking at the problem in relation to the whole of the twenty-four hours of the calendar day and not solely or particularly in relation to the working hours of that calendar day.

On the other hand, on behalf of the charterers it is said, in effect, that the whole conception of the words “working day” necessarily involves that it is the times during which work is done to which regard is to be had, and that when considering “weather working day” the same approach is to be made: it is to be considered, as regards a particular day, whether during the working hours the weather does, or would, interfere with the loading or discharging as the case may be.

Of the authorities to which I have been referred the first which has particular relevance on this point is the case of *Branchelour S.S. Co. v. Lamport & Holt* (1). In that case, LORD RUSSELL OF KILLOWEN, C.J., had to consider (and I think it was the first time it was considered in these courts) the meaning of the phrase “weather working day”, and he used this language ([1897] 1 Q.B. at p. 572):

“It is suggested by the plaintiffs that when any substantial amount of work is done upon a particular day the ship is entitled to reckon that as a whole weather working day. I hope I am not contradicting any authority when I say that I consider that contention to be absurd. The charterparty provides that the charterers are to have so many weather working days: suppose a particular day to begin with fine weather and that two or three hours’ work is done; then the weather changes, and a state of things arises

in which it would be unreasonable for the charterers' men to work at all: are the charterers to be charged with two or three hours' work as a whole day? I think that such a view is unreasonable and inequitable, and in the absence of any binding authority in its favour I decline to assent to it."

He then continued to discuss that problem with different solutions, and said (*ibid.*, at p. 573):

"I think, however, that the most equitable view is to charge half a day against the charterers where substantial work is done, though not amounting to half a day, and to charge a full day against them where substantially a full day's work, though not amounting to twelve hours, is done; no smaller fraction than half a day should, however, be taken into consideration, and if the time worked is quite insignificant it should not be charged at all."

It is quite clear, in my judgment, from that version of LORD RUSSELL'S judgment (and it would seem to be the corrected version) that LORD RUSSELL is saying that the question of whether a particular day is to be considered a weather working day has to be determined by seeing to what extent the weather interfered with working during the twelve hours—twelve hours clearly being the normal working hours at that time; and it would be quite inconsistent with his judgment to say that you have to look, not at the working hours, but at the twenty-four hours of the day. The matter is put quite clearly in that sense in the version of the judgment stated in the LAW REPORTS, and I, for my part, think a fair reading of the judgment in the COMMERCIAL CASES also leads to the same result.

Then the matter is next considered in *Bennetts & Co. v. Brown* (2) where there is a reported judgment of WALTON, J., which has in later years presented some difficulty, because it is quite clear that WALTON, J., there did refuse to accept as admissible evidence, evidence of a custom which appeared to him to control the meaning of the words "weather working days" because he said that "weather working days" had a perfectly natural meaning as days on which the work of discharging was not prevented by bad weather. As far as I can understand the judgment of WALTON, J., in that case, there is nothing in it which is in any way inconsistent with the view which I have deduced to be the view of LORD RUSSELL in the *Branchclow* case (1), namely, that what is to be regarded in determining the meaning of "weather working day" is the working hours and not the non-working hours. In my view any other method of computation must involve this striking absurdity: for instance, assuming that in a particular port the working hours are eight hours in the day and assuming that the eight hours in the calendar day which precede the beginning of the eight hours working day are rainy and that the eight hours which succeed the end of the eight hours working day are also rainy but the intervening eight hours of the working day are fine, it seems to me that on the shipowners' construction in such a case, even though the loading was not interfered with at all by rain because the ship had worked the ordinary hours of the port, yet the charterers would be entitled, on those facts, to say that there has not been wholly a "weather working day" because only one period of eight hours out of the three eight-hour periods in the day was uninterrupted by rain. That is a result to which one should not be driven unless the clear language of the clause drives one to it. I do not find in this case that it does.

The construction which is contended for by the charterers seems to me, with great respect to the argument of counsel for the shipowners, not to be inconsistent with the judgment of GODDARD, J., in "*Z*" *S.S. Co., Ltd. v. Amtorg, New York* (3) but to be reinforced by it, because it is clear from the passage in the judgment of GODDARD, J. (61 Lloyd's Rep. at p. 101) that his decision was based wholly, as I understand it, on there being no evidence, in that case, that "days" meant any particular number of hours or that they should start at one time and end at another. Here the umpire on any view has found facts as to the working

hours, and it seems to me that if similar facts have been before GODDARD, J., in that case his conclusion would have been the other way.

I find that, purely as a matter of construction applied to the facts as found by the umpire, namely, applied to his findings of fact as to the working hours—whether it is right or wrong to call that a question of principle I know not—he has come to the right conclusion.

It is put alternatively by the charterers that, whether that result be right as a matter of construction, the umpire here has, in fact, found a custom and he has found a custom which controls the matter and which is not inconsistent with the meaning of the phrase "weather working day" uncontrolled by custom. I think, on reflection, that counsel for the shipowners is probably right in submitting to me that the finding recited in para. (e), namely, that at all material times there was an established custom of the port that the normal working periods were as set out, does not really amount to a finding as to the customary meaning of the phrase "weather working day" and, accordingly, had I not thought that in the concept of the phrase "weather working day" uncontrolled by custom there was a reference to "working hours of the port", I should not have been disposed to hold that this finding was sufficient to establish a customary meaning different from the meaning which I would have arrived at on that hypothesis as a matter of pure construction.

I have been referred to certain authorities, such as *Nielsen v. Wait* (4) and others, to show that a custom is admissible to control words of this nature, but I do not think that the precise finding of the umpire here was intended to have, or does in fact have, that effect. Accordingly, it is not necessary for me to express a final view. The point has been debated, however, whether the decision of WALTON, J., in *Bennetts v. Brown* (2), to which I have referred, can stand in view of the later decision of the Court of Appeal in *British Mexican Shipping Co., Ltd. v. Lockett Brothers & Co., Ltd.* (5). The view has been expressed in SCRUTTON ON CHARTERPARTIES (11th edn.) (the last edition for which SCRUTTON, L.J., and MACKINNON, J., were responsible) that the latter case does overrule, or seems to overrule, the case of *Bennetts v. Brown* (2). For my part it seems to me quite impossible that the two cases can stand together. I can see no distinction between them. If it had been necessary (which it is not) I should have felt myself bound to follow the later decision in the *British Mexican* case (5) and disregard the earlier decision in *Bennetts v. Brown* (2), notwithstanding the respect that any commercial lawyer shows for a judgment of WALTON, J.

Accordingly, seeing that I have not been left any consideration of the details of the calculation but merely the question of principle, I affirm the award as set out by the umpire.

Award affirmed.

Solicitors: *Stokes & Mitalfe* (for the shipowners); *Stocken, May, Sykes & Dearman* (for the charterers).

[Reported by MICHAEL MALONEY, ESQ., Barrister-at-Law.]

Re CAMERON (*deceased*). CURRIE v. MILLIGAN AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), October 20, 21, 1954.]

Annuitant—Rights as to property charged—Continuing charge on income—Gift of share of income of trust fund to be made up to minimum sum.

A By his will dated June 2, 1927, a testator who died on Feb. 23, 1929, constituted a residuary trust fund and by cl. 12 directed his trustees to pay one-third of the income thereof to his wife for her life and continued "... if one-third of the income of the trust fund shall in any year during the life of my said wife amount to less than £6,500 per annum free of English income and supertax my trustees shall in respect of that year pay . . . to my said wife out of the income of the trust fund in addition to one-third of the income thereof such further sum as will give to her a net income for that year of £6,500 free of English income and supertax". By cl. 13, the testator provided that "Subject to the interest of my said wife in part of the income of the trust fund under the last preceding clause" his trustees should on his son's attaining the age of twenty-five years (which did not happen) hold the income of the trust fund on protective trusts for the son during his life. The testator made dispositions in favour of the son's issue and provided finally by cl. 18, that "If the trusts hereinbefore declared shall fail or determine then subject to the trusts powers and provisions hereinbefore declared and contained" the trustees should hold the trust fund in trust for such of named persons as were living at such failure or determination. It was claimed that the widow was entitled to a continuing charge on the income of the trust fund during her life in respect of the difference between one-third of the income of the trust fund in any year and £6,500 free of income tax and surtax, and, therefore, that a deficiency in her income in any year ought to be made up out of accumulations of surplus income of previous years and the surplus income of subsequent years.

D HELD: on the true construction of the will, the payments to the widow in respect of a year were payable out of the income of the trust fund for that year only, especially in view of the fact that, while it was a characteristic of a continuing charge on income that the charge extended to each and every part of the income, cl. 13 of the will referred to the widow's interest in "part of the income" of the trust fund.

E *Re Coller's Deed Trusts* ([1937] 3 All E.R. 292), considered.

F Per curiam: having regard to the extraordinary incidence of a continuing charge if strictly applied, the court will be slow to find a continuing charge except in a very clear case (see p. 332, letter H, post).

AS TO RIGHTS OF ANNUITANT AS TO PROPERTY CHARGED, see HALSBURY, Hailsham Edn., Vol. 28, p. 202, para. 369; and FOR CASES, see DIGEST, Vol. 39, pp. 143-148, Nos. 373-422.

Cases referred to:

- G (1) *Re Coller's Deed Trusts*, [1937] 3 All E.R. 292; [1939] Ch. 277; 106 L.J.Ch. 326; 157 L.T. 84; Digest Supp.
(2) *Re Platt*, [1916] 2 Ch. 563; 86 L.J.Ch. 114; 115 L.T. 524; 39 Digest 153, 457.

H ADJOURNED SUMMONS to determine amongst other questions whether on the true construction of the will of Alastair Cameron, deceased, and in the events which had happened and having regard to the insufficiency since 1938 of the income of the trust fund constituted by the said will to provide the defendant May Addison Cameron with such further sum as would give her a net income of £6,500 (as reduced by the Finance Act, 1941, s. 25, and the Finance (No. 2) Act, 1945, s. 20) free of income tax and surtax (a) accumulations of surplus income made pursuant to cl. 15 and cl. 16 of the said will during the lifetime of the testator's son, Frederick John Alastair Cameron, and (b) the income arising

from the accumulations so made were or was applicable for the purpose of providing the said defendant with the said net income of £6,500 (so reduced as aforesaid).

By cl. 9 of his will dated June 2, 1927, the testator devised and bequeathed his residuary real and personal property on the usual trusts for conversion. Clause 10 contained administrative directions for the payment of debts and expenses, and cl. 11 directions to the trustees to invest. Clause 12 provided:

"My trustees shall pay or cause to be paid one-third of the income of the residue of the said moneys (which moneys and the property for the time being . . . are hereinafter called 'the trust fund') to my said wife for her life"

and the testator declared that if (as was the fact) the testator had made no settlement in favour of his wife and

"if one-third of the income of the trust fund shall in any year during the life of my said wife amount to less than £6,500 per annum free of English income and supertax my trustees shall in respect of that year pay or cause to be paid to my said wife out of the income of the trust fund in addition to one-third of the income thereof such further sum as will give to her a net income for that year of £6,500 free of English income and supertax."

Clause 13 (1) provided:

"Subject to the interest of my said wife in part of the income of the trust fund under the last preceding clause hereof my trustees shall upon my said son Frederick John Alastair Cameron attaining the age of twenty-five years hold the income of the trust fund upon (subject as hereinafter mentioned) protective trusts for my said son during the remainder of his life."

Clause 14 provided:

"After the death of my said son my trustees shall (subject to the interest aforesaid of my said wife in part of the income of the trust fund during her life) stand possessed of the capital and future income of the trust fund in trust for the issue of my said son . . ."

as he should appoint as therein mentioned and in default in trust for the children of the son who attained twenty-one or being female married.

Clause 15 provided that if (as happened) the testator's son Frederick Cameron should be under twenty-five at the testator's death the trustees might until he attained twenty-five apply

"the whole or such part as they in their discretion shall think fit of the income which my said son would if he had attained the age of twenty-five years be entitled to receive under the trusts hereinbefore contained"

for his maintenance as therein mentioned and

"shall accumulate the residue of such income and hold such accumulations and the resulting income thereof for the person or persons who shall eventually become entitled to the principal fund from which the same shall have proceeded with power at their discretion to apply the said accumulations or any part thereof during the infancy of my said son as if the same were income arising in the then current year."

Clause 16 provided that unless (as did not happen) the testator should in his lifetime have made a settlement which would provide an income of £1,000 for his son

"then upon my said son attaining the age of twenty-one years and until he shall attain the age of twenty-five years my trustees shall pay to him out of the income referred to in the last preceding clause hereof such sums as with any income provided for him by any settlement will make up his income to the sum of £1,000 per annum at least and shall accumulate the remainder (if any) of such income and hold such accumulations and the resulting

income thereof in the same manner and for the same purposes as if they were made in pursuance of the last preceding clause hereof."

Clause 18 provided:

"If the trusts hereinbefore declared shall fail or determine then subject to the trusts powers and provisions hereinbefore declared and contained and to the powers by law vested in my trustees and to every or any exercise of such powers my trustees shall hold the trust fund and the income thereof in trust for such of . . . [naming certain persons specifically] as shall be living at the failure or determination of the prior trusts hereinbefore contained"

with a substitutional clause in favour of the issue of the named persons.

The testator died on Feb. 23, 1929. Frederick Cameron, the son and only child of the testator, was born on Oct. 5, 1916, and died on Aug. 19, 1940, having attained the age of twenty-one years but not the age of twenty-five. He had married, but had no issue. The trusts declared in favour of Frederick Cameron and his children by cl. 13 to cl. 16 of the testator's will failed or determined on his death without issue on Aug. 19, 1940, and of the beneficial provisions in the will which precede cl. 18 the only subsisting provision was that in cl. 12 for the payment of income to the widow. His LORDSHIP held (in answer to a question not the subject of this report) that the phrase in cl. 18 of the will "If the trusts hereinbefore declared shall fail or determine" referred to all the prior trusts relating to the residuary trust fund and, therefore, that the time at which the class of persons in favour of whom a trust of the capital of the trust fund was declared by cl. 18 fell to be ascertained was the time of the death of the widow, the defendant May Addison Cameron.

Until 1938, the income of the trust fund had been sufficient to provide the widow's benefits in full and the trustees purported to deal with the remainder of the income in accordance with cl. 15, and, for a short period, cl. 16. Substantial amounts of surplus income were accumulated. Since 1938, the income had been insufficient to provide the widow with £6,500 per annum free of income tax and surtax (even as reduced by the Finance Act, 1941, s. 25, and the Finance (No. 2) Act, 1945, s. 20), and the question therefore arose whether the widow was entitled to have recourse to the accumulations and the income produced by the accumulations fund in order to make up her income so far as possible to the full amount.

Two arguments were advanced on behalf of the widow: (i) that the widow was entitled to a continuing charge (limited to her lifetime) on the income of the trust fund in respect of the difference between one-third of the annual income and £6,500 per annum free of income tax and surtax; and (ii) that on the true construction of cl. 15 and cl. 16, the words "during the infancy" in cl. 15 ought to be rejected as being inconsistent with the context, so that the trustees were empowered to apply the accumulations fund in any year as if it were income of the trust fund for that year. This report is limited to the point raised by the first argument.

H. A. Rose for the plaintiff, the surviving trustee of the will.

W. T. Eleerston for the first five defendants, persons named in cl. 18 of the will who survived the testator's son, or the personal representatives of such persons.

Arthur Bagwall for the sixth to the ninth defendants, interested under the substitutional provisions of cl. 18.

Owen Swingland for the tenth defendant, the testator's widow.

ROXBURGH, J.: The testator, who was a man of great wealth, provided that his widow should receive a specified portion of income, with a proviso that if it fell short of a certain sum free of income tax and surtax, the aliquot portion of income should be made up to a specified sum. The whole approach to the problem must necessarily be artificial, because if there is one thing that can be predicated

with certainty it is that this testator, who died in 1929, never for one moment dreamt of the possibility that, owing to the lamentable events since that date, the income of his estate in any particular year might fall short of the amount required to provide the full sum which he intended his widow to have. I stress that, because much has been said about giving priority to an intention to benefit his widow. It is obvious from the large sum that he has given her that he intended her to be amply, or perhaps more than amply, provided for; but the question which I have to determine is one which I am sure he could not, as a reasonable man, have possibly contemplated. Therefore, I resile altogether from the suggestion that it is possible to interpret this will in any other manner than by looking strictly and particularly at the words that he has used. Again I resile from the suggestion that there is some kind of presumption of law which should actuate me in my approach. There is, of course, the well-known case of *Re Coller's Deed Trusts* (1) which is none the less difficult because it is well known. The difficulty, as Mr. Bagnall, counsel for the sixth to the ninth defendants, in his short but extremely able argument pointed out, is the reconciliation of the absolute principle laid down by ROMER, L.J. ([1937]) 3 All E.R. at p. 294), with the approbation of the decision in *Re Platt* (2). A reconciliation there may well be, and I think it is perhaps material for me to say this much for the purposes of the present case, that if there is a continuing charge on income, then as the annuitant has a charge on each and every part of income, strictly speaking, nobody during the life of the annuitant can have anything without the consent of the annuitant; but as everybody knows, though there may be a charge on each and every part of a fund, that does not in the least mean that each and every part of the fund will be required to meet the charge. That doctrine, if given unfettered play, would produce such ridiculous results that it becomes necessary to invoke the idea that if the trustees pay over some part of the income to some other beneficiary without the consent of the annuitant, technically they have committed a breach of trust, although it is a breach of trust which is justified. If that is the reconciliation, it does not make a great appeal to me, and I do not know of any other. At any rate, ROMER, L.J., said with absolute certainty one thing on which, I think, this case will largely turn. He said ([1937] 3 All E.R. at p. 294):

"But what is to happen to the surplus remaining in any year after the annuity and all arrears up to that time have been satisfied? I cannot think that the answer to this question admits of any doubt. Where any property is charged with, or is subject to, a trust for payment of an annuity, the annuitant is entitled to demand, and can, by taking the appropriate steps, ensure, that every part of that property is made available for payment of the annuity, and the right of the annuitant must prevail, whatever may be the nature of the property that is charged or is the subject-matter of the trust. Where, therefore, the property in question is the income of a fund, the annuitant is in strictness [and I would emphasise those two words, "in strictness"] entitled to require that the surplus income in any year, after keeping down the current instalments of the annuity, and any existing arrears, shall, within the limits permissible by law, be accumulated for the purpose of meeting subsequent instalments. If this be the right, as I think it is, of an annuitant whose annuity is a continuing charge upon the income of a fund until paid in full, any directions in the instrument creating the annuity that are inconsistent with that right indicate that the annuity is not meant to be so charged."

Having regard to the extraordinary incidence of a continuing charge, if strictly applied—and I must confess that I do not know if I am right in thinking that the words "in strictness" mean "according to the principles of equity", but I think that they must—one would be slow, I should have thought, to find a continuing charge except in a very clear case. I do not altogether relish a situation in which the law says that a man has an equitable right, but that he would be

so unreasonable in enforcing it that the court would never assist him. That appears to be the position with regard to these continuing charges in certain cases.

One thing that is clear is that this question is a question of construction in the first instance. The words of the gift which in this case are quite unusual in their form though not unusual in their substance, are contained in cl. 12 of the will and are as follows:

A "My trustees shall pay or cause to be paid one-third of the income of the residue of the said moneys", which are defined as "the trust fund", "to my wife for her life". So far, that is simple, and then comes the following additional clause which creates what in law, I think, is undoubtedly an annuity:

B "and if one-third of the income of the trust fund shall in any year during the life of my said wife amount to less than £6,500 per annum free of English income and supertax my trustees shall in respect of that year pay or cause to be paid to my said wife out of the income of the trust fund in addition to one-third of the income thereof such further sum as will give to her a net income for that year of £6,500 free of English income and supertax."

C A fantastic gross income is required to produce that net sum, and, of course, the gross income of this estate, great though it is, is quite insufficient to provide that sum, even though it is reduced by the operation of the Finance Act, 1941, s. 25 (now re-enacted in the Income Tax Act, 1952, s. 486). The will goes on in cl. 13:

D "Subject to the interest of my said wife in part of the income of the trust fund under the last preceding clause hereof my trustees shall upon my son attaining the age of twenty-five years hold the income of the trust fund upon (subject as hereinafter mentioned) protective trusts for my said son during the remainder of his life."

E The testator had only one son, who was born on Oct. 5, 1916. The son died on Aug. 19, 1940, so that he attained twenty-one, but he did not attain twenty-five. He was married, but there is no provision under this will for any wife of his. He was quite a small boy when the testator died, and he had no issue. By cl. 14 of his will the testator provided:

F "After the death of my said son my trustees shall (subject to the interest aforesaid of my said wife in part of the income of the trust fund during her life) stand possessed of the capital and future income of the trust fund in trust for the issue of my said son in such shares and in such manner "

as his son should appoint. As the testator's son had no issue, of course, he could not exercise the power of appointment, and the trusts in favour of issue in default of appointment also failed.

G [His LORDSHIP then read cl. 15, cl. 16 and cl. 18 of the will and continued:] Now, I must confess that if cl. 12 (which is the primary clause) stood alone, I should, on the whole, be inclined to say that there was not a continuing charge on income. That depends on how I construe the words

"shall in respect of that year pay or cause to be paid to my said wife out of the income of the trust fund in addition to one-third of the income thereof such further sum as will give to her a net income for that year of "

H so much. Mr. Swingland, on behalf of the widow, in a very able argument, said that the testator did not say "out of the income of the trust fund in that year", and, therefore, presumably meant "out of the income of the trust fund generally"; but, on the whole, though it is a matter of first impression, it seems to me that from the context in this clause must be implied the limitation of the income to the income of the particular year. That seems to me to be exactly what he is talking about; that and nothing else.

However, I should be very slow to decide the case on that ground if I could find no other, because that, after all, is a question of first impression and I can well believe that it might strike other people quite differently. Some people may not be so impressed as I am by the extreme improbability that anybody in a will of this sort would want to create a continuing charge on income when it has the vast consequences indicated by the judgment of ROMER, L.J., in *Re Coller's Deed Trusts* (1). I think that the matter is concluded by the next clause, cl. 13, which begins: "Subject to the interest of my said wife in part of the income of the trust fund . . .". There are two things to notice about that. It may be of some significance that he uses the word "interest" and not the word "charge" or simply the words "Subject to". He says "Subject to the interest", an unusual phrase which, so far as I am concerned, seems to me to point away from a charge rather than in the direction of a charge. But that is a small point compared with this next one which counsel for the sixth to the ninth defendants produced, which is that if there is a continuing charge, its very nature involves a charge on each and every part of the income, as ROMER, L.J., said quite specifically ([1937] 3 All E.R. at p. 295). Therefore, it seems to me that by saying that it is an interest in a part of the income of the trust fund—and he said it more than once, but it gains no additional strength by repetition—he has in effect said that it is not a continuing charge. That seems to me to be a devastating point. The fact that not all the income would ever be expected to be required in the days when the will was made is, to my mind, beside the point. If there is a continuing charge, it is because the will is construed as saying that income is only to be dealt with subject to a continuing charge by the annuitant on each and every part thereof; and this phrase, in my opinion, is quite inconsistent with that conception. I think that there are other indications which point in the same direction, but I must confess that I regard that as almost conclusive.

[HIS LORDSHIP considered the further argument advanced on behalf of the widow, which he rejected, and continued:] That being so, I have come to the conclusion that there is no continuing charge on income. It has not been contended that there is a charge on capital. The result of that is that the widow has no power to resort to the accumulations or to the income of the accumulations in right of her annuity.

Order accordingly.

Solicitors: *Johnson, Jecks & Landons* (for the plaintiff and the tenth defendant); *Ely Robb & Co.* (for the first five defendants); *Lee, Bolton & Lee* (for the remaining defendants).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

R. v. DAVIES.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Lynskey and Ormerod, J.J.),
October 25, 1954.]

*Criminal Law—Fraudulent conversion—Director of “public company”—
Comparing a private company within Companies Act, 1948 (c. 38)—Private
company included in term “public company”—Larceny Act, 1916 (c. 50),
s. 20 (1) (ii).*

A *Criminal Law—Fraud by officer of company going into liquidation—Fraudulent
transfer by director—Attempted cancellation of indebtedness to company—
Whether transfer of property—Companies Act, 1948 (c. 38), s. 330 (b).*

The appellant was convicted on each of seven counts in an indictment. By
two of these counts he was charged under s. 20 (1) (ii) of the Larceny Act,
1916, with conversion in that he “being a director of a public company,
B namely “O., Ltd., fraudulently misapplied certain moneys. O., Ltd., of
which at the material time the appellant was a director, was a private
company within the meaning of that term in the Companies Act, 1948.
The appellant appealed against his conviction on these two counts on the
ground that O., Ltd., was not a public company.

C On May 1, 1952, the company had passed a resolution for voluntary
winding-up. By the seventh count the appellant was charged under s. 330
(b) of the Companies Act, 1948, that he, on Feb. 13, 1952, being a director
of O., Ltd., did with intent to defraud creditors of the company attempt
to transfer to himself a debt of £30,000 owing from him to the company.
By s. 330 (b) of the Companies Act, 1948, an officer of a company is guilty
of a misdemeanour if with intent to defraud creditors he has caused to be
D made a “transfer of . . . the property of the company”.

HELD: (i) the term “public company” in s. 20 (1) (ii) of the Larceny
Act, 1916, included a company which came within the definition of “private
company” in s. 28 of the Companies Act, 1948, and accordingly the appeal
against conviction on the two counts first above mentioned was dismissed.

Re Lysaght ([1898] 1 Ch. 115), and *Re White* ([1913] 1 Ch. 231), applied.

E (ii) the conviction on the seventh count must be quashed because the count
disclosed no offence as the cancellation by a company of a debt due to itself
was not a transfer of property within s. 330 (b) of the Companies Act,
1948.

Appeal on seventh count allowed; appeal on other counts dismissed.

F FOR THE LARCENY ACT, 1916, s. 20 (1), see HALSBURY'S STATUTES,
Second Edn., Vol. 5, p. 1022; and FOR THE COMPANIES ACT, 1948, s. 330 (b),
see *ibid.*, Vol. 3, p. 713.

Case referred to:

(1) *Re Lysaght*, [1898] 1 Ch. 115; 67 L.J.Ch. 65; 77 L.T. 637; 9 Digest 36, 23.

(2) *Macintyre v. Connell*, (1851), 1 Sim. N.S. 225; 20 L.J.Ch. 284; 18 L.T.O.S.
24; 61 E.R. 87; 9 Digest 36, 21.

G (3) *Re White*, [1913] 1 Ch. 231; 82 L.J.Ch. 149; 108 L.T. 319; 9 Digest
36, 24.

APPEAL against conviction.

H The appellant, David Evan Marlgwyn Hamilton Davies, was convicted on
July 16, 1954, before Mr. Commissioner MACASKIE, Q.C., at Surrey Assizes on an
indictment containing seven counts, viz., two counts of obtaining a valuable
security by false pretences contrary to the Larceny Act, 1916, s. 32 (1), one of
forgery, one of uttering a forged document, two of fraudulent conversion of
property contrary to the Larceny Act, 1916, s. 20 (1) (ii), and one of attempted
fraudulent transfer of property within the meaning of the Companies Act, 1948,
s. 330 (b), and was sentenced to three years' imprisonment on the charges of
forgery and uttering forged documents and to others terms of imprisonment on
other charges to run concurrently.

The two counts of fraudulent conversion alleged that the appellant "being a director of a certain public company, namely P. Orchard, Ltd. unlawfully and fraudulently applied for the use of the . . . Limited the sum of . . ., the property of P. Orchard, Ltd." The terms of the count for attempted fraudulent transfer are set out in the judgment.

Viscount Hailsham, Q.C., and H. P. B. Dow for the appellant.
W. A. L. Raeburn, Q.C., and M. Littman for the Crown.

LORD GODDARD, C.J., delivered the judgment of the court. The appellant in this case was convicted before Mr. Commissioner MACASKIE, Q.C., at the last assizes for the county of Surrey on an indictment containing seven counts relating to his serious misconduct as a director of a company called P. Orchard, Ltd. The jury returned a verdict of guilty on all seven counts, and the prisoner received varying sentences of imprisonment, all of them to run concurrently, including a sentence of three years for forgery and uttering forged documents. [His Lordship referred to a refusal of leave to appeal against conviction on the forgery count and continued:] Three other points were argued as a matter of law by counsel for the appellant. If they had succeeded they would have worked no advantage to the prisoner because the conviction on the forgery count on which he received a sentence of three years stands: and for the other offences he received less sentences which run concurrently with that sentence of three years. However, as counsel for the appellant says, if the appellant has been convicted of offences of which he ought not to have been convicted he has a right to have those taken away though it would make no difference to his sentence.

The first point taken on his behalf concerns two counts charging him with offences as a director of a certain public company, namely, P. Orchard, Ltd. He is described as a director of a public company, and the objection is that P. Orchard, Ltd. is what is described in the Companies Act, 1948, as a private company. The offences were fraudulently applying moneys to the use of another company, not a public company, of which he was a director contrary to the Larceny Act, 1916, s. 20 (1) (ii).

The Larceny Act, 1916, s. 20, deals with many sorts of conversion, but for this purpose the relevant paragraph is sub-s. (1) (ii) which states that every person who

"being a director, member or officer of any body corporate or public company, fraudulently takes or applies for his own use or benefit, or for any use or purposes other than the use or purposes of such body corporate or public company, any of the property of such body corporate or public company . . ."

shall be guilty of a misdemeanour. That has been an offence in one form or another since the year 1857.

The Act, 20 & 21 Vict. c. 54 of that year, entitled,

"An Act to make better provision for the punishment of frauds committed by trustees, bankers and other persons intrusted with property", provided by s. 1:

"If any person being a trustee of any property for the benefit, either wholly or partially, of some other person, or for any public or charitable purpose, shall, with intent to defraud, convert or appropriate the same or any part thereof to or for his own use or purposes, or shall, with intent aforesaid, otherwise dispose of or destroy such property or any part thereof, he shall be guilty of a misdemeanour."

That was reproduced in s. 81 of the Larceny Act, 1861, and when that was repealed by the Larceny Act, 1916, it re-appeared as part of s. 20 dealing with conversion by other persons as well.

It is perfectly true that the words "public company" are used in s. 20 of the Larceny Act, 1916. It is quite obvious that the legislature was dealing with two sorts of corporations: first, a body corporate, by which they meant a chartered company, a statutory company, a body corporate at common law; and second, a public company, which term appears to have been intended to describe a company incorporated by some public Act. Any company that is incorporated under the provisions of the Companies Act is a public company for this purpose, although there may be species of public companies, that is to say, companies incorporated under the Companies Act which rank as private companies and have certain rights and privileges.

SIR NATHANIEL LINDLEY, M.R., said in the case of *Re Lysaght* (1) ([1898] 1 Ch. at p. 122):

"I desire to add one word as to what is a public company. I thought that the meaning of a public company was settled as long ago as *Macintyre v. Connell* (2), and I take it that any company registered under the Companies Act, 1862, is a public company within the meaning of that expression in the Apportionment Act."

If a company is a public company for the purposes of the Apportionment Act, 1870, it is a public company for the purposes of the Larceny Act. It is true that the Larceny Act is a penal statute, but it shows what is the meaning of "public company". The expressions "Public company" and "body corporate", are intended to be contrasted with anything in the nature of a partnership or association which is not an incorporated body. We think that "public company" for this purpose means a company which is incorporated under the provisions of the Companies Acts, as a private company is, and for one reason because this has been an offence ever since 1857. Private companies require just the same protection as any other sort of trading company because very often directors of private companies fail to distinguish between their own property and the property of the company as they may have turned their own business into the company. They turn their business into a company for many reasons, sometimes because they do not want to be at the risk of bankruptcy. Therefore, anybody who gets credit, if credit can be obtained, would do better to get it through the medium of a company; and it is all the more important, therefore, that a company should not be deprived of its assets, because it will be the company which will have been paid and only the company which can be sued.

We have no doubt that we ought to hold that "public company" in this case means a company which is incorporated under the provisions of the Companies Act. NEVILLE, J., no mean authority on matters relating to companies, in the case of *Re White* (3), put it in this way. Having cited the passage from the judgment of LINDLEY, M.R. in *Re Lysaght* (1), he said ([1913] 1 Ch. at p. 238):

"With that proposition I respectfully agree, but of course it does not decide whether a private company under the Act of 1908 is a public company. I am of opinion, however, that there is really no such distinction between private companies and other companies under the Act of 1908 as enables me to say, with regard to the provisions of the Apportionment Act, 1870, that a particular class of companies are private companies and other companies are public companies. I think therefore that the Apportionment Act does apply to private companies under the Act of 1908."

Earlier in his judgment he said (*ibid.*):

"But it seems to me that the use of the words 'private company' is not conclusive, because I think that phrase is only a convenient way of referring to a particular class of public companies for the purposes of the Act."

For the reasons which we have endeavoured to give, we think it is quite clear in this case that a company registered as a private company is for the purposes

of the Larceny Act, 1916, s. 20, a public company. It is a company registered under a public Act, and it is a company of which particulars have to be filed at Somerset House. We should give it the same meaning for the purposes of this Act as was given in the cases to which we have referred, though they were dealing with another Act.

[His LORDSHIP then referred to the second point urged on behalf of the appellant in relation to his conviction on the count for fraudulent conversion, and having found that there was nothing in the second point and that the convictions were proper and should be upheld, continued:] The last point which counsel for the appellant has taken on his behalf is one which we think is a good point and on which the conviction must be quashed. That is in respect of the seventh count, which charges him that:

“on or about Feb. 13, 1952 in the county of Surrey being an officer, namely a director, of a company named P. Orchard, Ltd. which on May 1, 1952, subsequently passed a resolution for voluntary winding-up, did with intent to defraud creditors of the said company attempt to transfer to himself property of the said company, to wit an indebtedness in the sum of £30,000 then owing by him to the said company.”

In the opinion of the court, that is clearly a demurrable count and discloses no offence at all because it alleges that he, being indebted to the company, induced the company to transfer their debt to him. It is quite unnecessary to go through the somewhat technical story which is supposed to justify this count, but assuming that he owed the company £30,000 and by some means, however dishonest or however questionable, or even honest, he induced the company to cancel the debt, that is not a transfer of the property from the company to him. He was the debtor of the company. The result of the transaction that took place was that the company were induced to treat, or might have been induced to treat if the transaction had gone through, the debt as cancelled. How that is said to be a transfer of property I cannot understand. It is not necessary for us as we are deciding the point on this ground to go into the question whether it would be possible to frame a charge of an attempt to commit this particular offence. We need not give any decision on that because we are clearly of opinion that this count was demurrable and, therefore, the conviction on that count is quashed but, as I have said, that makes no difference to the sentence.

Conviction on seventh count quashed; appeal dismissed on other counts.

Solicitors: *Ernest W. Long & Co.* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

MARTELL AND OTHERS v. CONSETT IRON CO., LTD.

[CHANCERY DIVISION (Danckwerts, J.), October 12, 13, 14, 22, 1954.]

Maintenances of Action—Common interest—Pollution action—Action brought by riparian owner and owners of fishery—Deeds of indemnity executed by trustees of anglers' association to provide for plaintiffs' costs—Application by defendant to stay proceedings.

- A The Anglers Co-operative Association (referred to hereinafter as "the association") was an unincorporated body having some five thousand members in addition to club members. Membership was not confined to anglers, but included anyone who felt that he might be affected by the pollution of rivers or other waters. The objects of the association were:
- B " (a) to promote and protect the interests of anglers, the owners or occupiers of fisheries . . . in Great Britain . . . and to assist such owners and occupiers (financially or otherwise) to secure the protection of the law against any invasion of their legal rights; (b) to watch over, maintain and improve the condition and purity and volume of rivers, lakes and other freshwater, and of the coastal sea water in and around Great Britain . . . (c) to promote, encourage and assist improvements in methods of preventing pollution and of purifying effluents generally and research in such matters and all other matters affecting angling, fish culture and kindred subjects." The property and affairs of the association were managed by a trustee company (A. C. A. Trustee Co., Ltd.), which was incorporated for that purpose in 1948. Some of the main objects of the trustee company were:
- D (a) to promote and protect the interests of anglers; (b) "to undertake or assist financially or otherwise in promoting or opposing litigation in any cases affecting the interests of anglers, fishery owners, and others interested in angling, the preservation, improvement or purity of freshwater fisheries or any inland water in Great Britain and to indemnify any member of the association in respect of any action taken or to be taken or defended or to be defended or any liability incurred or to be incurred by him in any case
- E in which the association may consider it conducive to the interests of its members so to do, so far as may legally be done without infringing the law against maintenance and champerty"; and (c) to watch over, maintain and improve the condition and purity of all rivers, lakes and other freshwater in Great Britain which contained fish. Among the club members of the association was an angling club which was the tenant of the fishing rights
- F on a part of the River Derwent. The club had some 150 members, who were miners and other persons earning about £8 a week. In 1951 the club feared that their fishing in the River Derwent was being injured by the discharge into the river of foul and heated effluents from the iron works of the C. company, a large and powerful company, and, as the club had insufficient means of their own to take action in the matter, they applied for assistance
- G to the association. On the advice of the association, the club approached M., a riparian owner on the part of the river which was affected, and at the club's suggestion she became a member of the association and agreed to become a co-plaintiff with the trustees of the club in an action for pollution of the river. On Oct. 29, 1951, the trustee company executed deeds of indemnity in favour of the plaintiffs (M. and the trustees of the club), to
- H provide for any costs incurred by the plaintiffs in any action against the C. company so long as the plaintiffs remained members of the association and gave the entire conduct of the proceedings to the association. The plaintiffs thereupon commenced an action against the C. company for pollution of the river. On an application by the C. company for a stay of proceedings on the ground that the action was illegally maintained,
- HELD: the support received by the plaintiffs in carrying on the action,

being based on a bona fide community of interest, was not unlawful, and the application was dismissed.

British Cash & Parcel Conveyors, Ltd. v. Lamson Store Service Co., Ltd. ([1908] 1 K.B. 1006), applied.

Per curiam: "A doctrine [i.e., the doctrine of maintenance] which was evolved to deal with cases of oppression should not be allowed to become an instrument of oppression, which it must be if humble men are not allowed to combine or to receive contributions to meet a powerful adversary" (see p. 349, letter F, post).

Quaere, whether an application for stay of proceedings was an appropriate remedy for unlawful maintenance.

AS TO EXCEPTION FROM MAINTENANCE ON GROUND OF COMMON INTEREST, see HALSBURY, Simonds Edn., Vol. 1, p. 41, para. 82; and FOR CASES, see DIGEST, Vol. 1, pp. 79-82, Nos. 638-666.

Cases referred to:

- (1) *Findon (Finden) v. Parker*, (1843), 11 M. & W. 675; 12 L.J.Ex. 444; 1 L.T.O.S. 289; 7 J.P. 385; 152 E.R. 976; 1 Digest 81, 661.
- (2) *Neville v. London "Express" Newspaper, Ltd.*, [1919] A.C. 368; 88 L.J.K.B. 282; 120 L.T. 299; 17 Digest 155, 560.
- (3) *Wallis v. Portland (Duke)*, (1797), 3 Ves. 494; 30 E.R. 1123; *affd.* H.L., (1798), 8 Bro. Par. Cas. 191; 3 E.R. 508; 1 Digest 68, 566.
- (4) *Bradlaugh v. Newdegate*, (1883), 11 Q.B.D. 1; 52 L.J.Q.B. 454; 1 Digest 69, 569.
- (5) *Master v. Miller*, (1791), 4 Term Rep. 320; 100 E.R. 1042; *affd.* Exch., (1793), 5 Term Rep. 367; 101 E.R. 205; 1 Digest 78, 631.
- (6) *Alabaster v. Harness*, [1895] 1 Q.B. 339; 64 L.J.Q.B. 76; 71 L.T. 740; 1 Digest 83, 681.
- (7) *Oram v. Hutt*, [1914] 1 Ch. 98; 83 L.J.Ch. 161; 110 L.T. 187; 78 J.P. 51; 1 Digest 84, 683.
- (8) *Skelton v. Barter*, [1916] 1 K.B. 321; 85 L.J.K.B. 181; 114 L.T. 56; 9 B.W.C.C. 97; 1 Digest 68, 561.
- (9) *Baker v. Jones*, [1954] 2 All E.R. 553.
- (10) *Weld-Blundell v. Stephens*, [1920] A.C. 956; 89 L.J.K.B. 705; 123 L.T. 593; 17 Digest 114, 237.
- (11) *Plating Co. v. Farquharson*, (1881), 17 Ch.D. 49; 50 L.J.Ch. 406; 44 L.T. 389; 45 J.P. 568; 1 Digest 83, 680.
- (12) *Greig v. National Amalgamated Union of Shop Assistants, Warehousemen, & Clerks*, (1906), 22 T.L.R. 274; 1 Digest 84, 682.
- (13) *British Cash & Parcel Conveyors, Ltd. v. Lamson Store Service Co., Ltd.*, [1908] 1 K.B. 1006; 77 L.J.K.B. 649; 98 L.T. 875; 1 Digest 84, 685.
- (14) *Fitzroy v. Carr*, [1905] 2 K.B. 364; 74 L.J.K.B. 829; 93 L.T. 499; 1 Digest 76, 617.
- (15) *Holden v. Thompson*, [1907] 2 K.B. 489; 76 L.J.K.B. 889; 97 L.T. 138; 1 Digest 82, 670.
- (16) *Richardson v. Mellish*, (1824), 2 Bing. 229 (130 E.R. 294); 3 L.J.O.S.C.P. 265; 12 Digest, Replacement, 270, 2078.
- (17) *Wild v. Simpson*, [1919] 2 K.B. 544; 88 L.J.K.B. 1085; 121 L.T. 326; 1 Digest Supp.

NOTICE by Consett Iron Co., Ltd., the defendant in an action for pollution of a river, of application for an order that all proceedings in the action be stayed on the ground that it was illegally maintained and oppressive and vexatious and an abuse of the process of the court.

Sir Andrew Clark, Q.C., and K. J. T. Elphinstone for the defendant company.
Charles Russell, Q.C., and G. H. Newsom for the plaintiffs.

Cur. adv. vult.

Oct. 22. **DANCKWERTS, J.**, read the following judgment: This is an application by the defendant company in a pollution action. The plaintiffs are a Mrs. Martell, who is a riparian proprietor (beneficially, it appears that she is only tenant for life) on the River Derwent on the boundaries of Northumberland and Durham, and six other plaintiffs, who are the trustees of the Derwent Angling Association, an unincorporated association with some 150 members, which has been tenant of the fishing rights on this part of the Derwent for a number of years. It is claimed in the action that the defendant company, which has an issued capital of £3,300,000 and has had iron works for many years at Consett in Durham, near to the River Derwent, is discharging foul and heated effluents into the River Derwent by means of the Howden Burn, with disastrous results to fish. The defendants' application is that all proceedings should be stayed on the ground that the action is illegally maintained and oppressive and vexatious and an abuse of the process of the court.

There is, in substance, no dispute about the facts on which the application is based, and they are these. The Derwent Angling Association, believing that their fishing in the River Derwent was being injured by effluents from the defendant company's works, and being unwilling to engage in litigation with such a financially powerful adversary on their own resources, in 1951 applied for assistance to the Anglers Co-operative Association, an unincorporated association, of which the Derwent Angling Association were members as a club. The objects of the Anglers Co-operative Association (who have some five thousand members, in addition to club members) are:

"(a) to promote and protect the interests of anglers, the owners or occupiers of fisheries (actual or potential) in Great Britain and Northern Ireland and to assist such owners and occupiers (financially or otherwise) to secure the protection of the law against any invasion of their legal rights; (b) to watch over, maintain and improve the condition and purity and volume of rivers, lakes and other freshwater, and of the coastal sea water in and around Great Britain and Northern Ireland; (c) to promote, encourage and assist improvements in methods of preventing pollution and of purifying effluents generally and research in such matters and all other matters affecting angling, fish culture and kindred subjects."

The membership of the association is not confined to anglers and eligibility is expressed in sufficiently wide terms to include anyone who feels that he may be affected by pollution of rivers or other waters. Rule 2 of the association says:

"Any person, firm, incorporated company, club or association interested in angling, fish culture, the manufacture or sale of fishing tackle or accessories, catering for [a misprint for "or"] the condition, purity or volume of inland or coastal waters, shall be qualified to be members of this association."

The reference to "catering", which at first sight seems incongruous, is, it appears, directed to the interests of the proprietors or occupiers of inns or cafés whose business is dependent on the attraction of fishing or other use of waters.

The Anglers Co-operative Association was sympathetic to the appeal of the Derwent Angling Association, and assistance was provided for the latter in the manner to be mentioned. Before beginning proceedings, however, advice was given to the Derwent Angling Association that they should endeavour to procure a riparian proprietor to be co-plaintiff. Accordingly, Mrs. Martell was approached (through her agents). She was willing to be made a plaintiff, provided that she incurred no liability for costs. Mrs. Martell was then in Australia, so the arrangements were made through her solicitor and attorney, Mr. Pybus, and Mrs. Martell was made a member of the Anglers Co-operative Association, her annual

subscription being paid, it appears, by the Derwent Angling Association. On Oct. 29, 1951, two deeds of indemnity, in favour of Mrs. Martell and the trustees of the Derwent Angling Association, respectively, were executed by a company called "A.C.A. Trustee Co., Ltd." This company was incorporated on June 5, 1948, with a nominal capital of £100, divided into two thousand shares of 1s. each, of which twelve shares have been issued for cash. The main objects of this company are:

"(i) to manage the property and affairs of the Anglers Co-operative Association; (ii) to hold in trust for the benefit of the members from time to time of the said association . . . the whole assets and undertaking of the association; (iii) to promote and protect the interests of anglers, companies, firms, clubs and associations . . . (xiii) to undertake or assist financially or otherwise in promoting or opposing litigation in any cases affecting the interests of anglers, fishery owners, and others interested in angling, the preservation, improvement or purity of freshwater fisheries or any inland water in Great Britain and to indemnify any member of the association in respect of any action taken or to be taken or defended or to be defended or any liability incurred or to be incurred by him in any case in which the association may consider it conducive to the interests of its members so to do, so far as may legally be done without infringing the law against maintenance and champerty; (xiv) to watch over, maintain and improve the condition, purity and volume of all rivers, lakes and other freshwater in Great Britain and Northern Ireland which now contain fish."

The indemnities thus given provide for any costs incurred by the plaintiffs in any action against the defendant company so long as the plaintiffs remain members of the Anglers Co-operative Association and give the conduct of the proceedings, including the retention of solicitors, counsel and expert witnesses and the matter of settlement, compromise or discontinuance of the action, to the Anglers Co-operative Association.

It is claimed on behalf of the defendant company that these deeds of indemnity constitute the tort and crime of maintenance, and, therefore, the plaintiffs' action should be stayed. The merits of the action are not in issue or to be treated as relevant, it is said, for the purposes of the application. It is contended on behalf of the defendant company that the action should be stayed and the plaintiffs should not have the chance to have their case heard so long as they receive the assistance of these indemnities without which the plaintiffs would not feel able to face the formidable expense which, it is well known, the carrying on of a pollution action involves. If this contention is correct, it may be thought that there is something wrong with the state of the law. In an appeal by the Anglers Co-operative Association (circulated without reference to this particular action) it is claimed that

"it is the lamentable fact that there are many hundreds of polluters operating today, knowing perfectly well that they are in the wrong but believing that no one can afford to start an expensive action for an injunction to stop them."

This happens to be a case about the interests of anglers, but the principle involved is of much greater importance. It would be disingenuous to disregard the difficulties which the man of small financial resources (not confined to the legal aid class) faces in conditions of the present day in defending such rights as he may have against infringement by powerful commercial corporations or adversaries who may draw their strength from the rates or the national exchequer. If such a man may not avail himself of the help of sympathisers, his condition may be serious indeed. His relative position is still more unfavourable if his powerful commercial opponents may deduct the costs of such litigation as trade expenses.

The English law of maintenance was the product of particular abuses which arose in the conditions of English medieval society. Grievances of those times produced a series of statutes imposing penalties on the offences of maintenance and champerty. According to SIR WILLIAM HOLDSWORTH'S HISTORY OF ENGLISH LAW (3rd edn., vol. III, p. 397), maintenance was not at first a private wrong: it was made actionable by stat. 4 Edw. 3 c. 11 (which was repealed by the Statute Law Revision and Civil Procedure Act, 1881). There is, however, no doubt that it has for a long time been treated as a common law misdemeanour and a tort. In BLACKSTONE'S COMMENTARIES, IV, 134, maintenance is defined as

"an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it."

LORD ABINGER, C.B., in *Findon (Finden) v. Parker* (1), said (11 M. & W. at p. 682):

"The law of maintenance, as I understand it upon the modern constructions, is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions, or to make defences which they have no right to make."

VISCOUNT HALDANE, in *Neville v. London "Express" Newspaper, Ltd.* (2), said ([1919] A.C. at p. 390):

"... the broad rule remains unrepealed by any statute that it is unlawful for a stranger to render officious assistance by money or otherwise to another person in a suit in which that third person has himself no legal interest, for its prosecution or defence."

I observe that each of these definitions qualifies the interference which gives rise to the wrong with the words "officious" or "improperly". It may be that the argument for the defendant company in the present case was not intended to avoid this qualification, when it was contended that all maintenance was unlawful unless it fell within one of the recognised and (as it was claimed) strictly limited cases of justified interference or "excuses". These exceptions from the general rule were said to be (i) near relationship between the maintainer and the person maintained; (ii) charity; and (iii) where the maintainer and the person maintained have a common interest in the subject-matter of the suit, which, it is said, must be such an interest as is recognised by the law and not merely a sentimental interest. Counsel for the defendant company referred me to a number of authorities in support of his propositions, which I will proceed to examine.

In *Wallis v. Duke of Portland* (3), LORD LOUGHBOROUGH, L.C. (whose decision was affirmed in the House of Lords), dismissed a bill for discovery of a transaction which would amount to maintenance, on the ground (3 Ves. at p. 503) that it was "not fit for a court of equity to permit this suit to proceed any farther". In the course of his judgment, LORD LOUGHBOROUGH, L.C., said (*ibid.*, at p. 502):

"... it is laid down ... that maintenance is not *malum prohibitum*, but *malum in se*: that parties shall not by their countenance aid the prosecution of suits of any kind; which every person must bring upon his own bottom and at his own expense."

In *Bradlaugh v. Newdegate* (4), the plaintiff having sat and voted as a member of Parliament without having made and subscribed the oath required under the Parliamentary Oaths Act, 1866, s. 5, the defendant, who was also a member of Parliament, procured a common informer to sue the plaintiff for the penalty and, after the action had begun, gave him an indemnity against the costs of the proceedings. The action failed, as the House of Lords decided that s. 5 of the Act of 1866 did not enable a common informer to sue for the penalty. The plaintiff, being unable to recover his costs from the impeachable informer, brought an action of maintenance against the defendant, which succeeded, as

it was held that the defendant and the informer had no common interest in the result of the action for the penalty. In the judgment of LORD COLERIDGE, C.J., there is the following passage (11 Q.B.D. at p. 11):

"It is said, however, that the defendant had or believed that he had a common interest with Mr. Clarke in the result of the suit, and that, therefore, his finding Mr. Clarke the whole money for the litigation was not maintenance. As a general rule there is no doubt that such common interest, believed on reasonable grounds to exist, will make justifiable that which would otherwise be maintenance. The oldest authorities, authorities which hold a multitude of things to be maintenance which would not be held so now, all lay down this qualification. BROOKE, FITZHERBERT, ROLLE, HAWKINS, VINER, COMYNS, to cite no more, all concur in this. BULLER, J., in his celebrated judgment in *Master v. Miller* (5) strongly insists upon it. But then the instances they give show the sort of interest which is intended. A master for a servant, or a servant for a master; an heir; a brother; a son-in-law; a brother-in-law; a fellow commoner defending rights of common; a landlord defending his tenant in a suit for tithes; a rich man giving money to a poor man out of charity to maintain a right which he would otherwise lose. But in all these cases the interest spoken of is an actual valuable interest in the result of the suit itself, either present, or contingent, or future, or the interest which consanguinity or affinity to the suitor give to the man who aids him, or the interest arising from the connection of the parties, e.g., as master and servant, or that which charity and compassion give a man in behalf of a poor man who, but for the aid of his rich helper, could not assert his rights, or would be oppressed and overborne in his endeavour to maintain them."

Alabaster v. Harness (6), was a case in which the defendant, who was interested in the sale of certain electric appliances for the treatment of disease, had instigated an expert, whose favourable report on the appliances had been adversely criticised by the plaintiffs in their newspaper, to bring a libel action, which was unsuccessful, against the plaintiffs. The plaintiffs, who had been unable to obtain satisfaction for their costs, brought an action against the defendant for maintenance. It was held by the Court of Appeal that the action was maintainable on the ground that the defendant had no common interest in the action for libel. LORD ESHER, M.R., said ([1895] 1 Q.B. at p. 342):

"The doctrine of maintenance, which appears in the Year Books, and was discussed briefly by LORD LOUGHBOROUGH in *Wallis v. Duke of Portland* (3), and more elaborately by LORD COLERIDGE, C.J., in *Bradlaugh v. Newdegate* (4), does not appear to me to be founded so much on general principles of right and wrong or of natural justice as on considerations of public policy. I do not know that, apart from any specific law on the subject, there would necessarily be anything wrong in assisting another man in his litigation. But it seems to have been thought that litigation might be increased in a way that would be mischievous to the public interest if it could be encouraged and assisted by persons who would not be responsible for the consequences of it, when unsuccessful. LORD LOUGHBOROUGH, in *Wallis v. Duke of Portland* (3), says that the rule is, 'that parties shall not by their countenance aid the prosecution of suits of any kind, which every person must bring upon his own bottom, and at his own expense'. But the law from the earliest times has countenanced some relaxation of the utmost strictness of that rule; and some particular cases have been specifically allowed as constituting excuses for that interference in the suit of another which would otherwise have amounted to maintenance."

It is easy to understand that the defendant in that case may well have thought that he had a legitimate interest in trying to get the criticisms of his appliances

destroyed in the course of the libel action, but that case is one of several decisions holding that one person has not a legitimate interest in supporting another person's libel or slander action. *Oram v. Hutt* (7) is another example. Payment of the costs of a slander action brought by an officer of a union out of the funds of the union in pursuance of an indemnity was held by the Court of Appeal to be obnoxious to the law of maintenance and ultra vires, even though the officer had been slandered by way of his office as well as personally. It appears that the union might have brought a slander action for slanders uttered in the same speech, but LORD SUMNER said ([1914] 1 Ch. at p. 106), "a common cause is not a common interest". *Skelton v. Barter* (8) was, I think, referred to by way of contrast, as a case in which an approved society, it was held, might properly suggest to an injured workman that he should take proceedings against his employer and indemnify him against costs, because the intention of the National Insurance Act, 1911, was that compensation should primarily be paid by an employer rather than out of the funds administered through the approved society.

Baker v. Jones (9) may be said to show that the action of maintenance is still alive today. LYNKEY, J., said ([1954] 2 All E.R. at p. 559):

"Maintenance in earlier days was a far-reaching and important branch both of civil and criminal law. The common law does not approve of the intervention of any man in the litigation of another with which he has no lawful concern, whether that litigation is well founded or not. In these days, however, of insurance policies giving an indemnity against both damages and costs to wrongdoers, trade unions whose rules provide for paying the legal costs of their members, and the Legal Aid Acts, maintenance is not now regarded with the same repugnance as it was by the old common law. The offence and tort of maintenance, however, still exists, and the common law rules, although much modified and, as some say, almost atrophied, still must be applied."

LYNKEY, J., found himself compelled to apply the law of maintenance in the case which he had before him, but that case was very different from the present. It was simply another example of an ultra vires application of the funds of an unincorporated association in the payment of costs incurred in two libel actions brought against officers and members of the central council of the association. I have now to consider the decision of the House of Lords in *Nerille v. London "Express" Newspaper, Ltd.* (2). Their Lordships were considerably divided on the points which were decided in that case. They held, by a majority of three to two, that an action for damages for maintenance will not lie in the absence of proof of special damage; and they held, by a differently constituted majority of three to two, that the success of the maintained litigation, whether an action or a defence, is not a bar to the right of action for maintenance. LORD FINLAY, L.C., was the only one of the Lords who was in the majority on each of the points; the other four Lords were in the dissenting minority on one or other of the points decided. The plaintiff, who brought the action against the London "Express" Newspaper, can have had very little merit on his side, for he had been held by YOUNGER, J. (in two actions by some 125 plaintiffs) to have launched a fraudulent scheme for the purposes of his land development venture. On the other hand, London "Express" Newspaper, Ltd., in offering to take legal proceedings at their own expense on behalf of all the defrauded prizewinners who sent in their names to the solicitors employed by the newspaper, may be thought to have been officious, to say the least. The nature of the action for maintenance, however, was discussed at length in the House of Lords, and the question is whether, by reason of their Lordships' observations, I am compelled to hold the support given to the plaintiffs in the present case to be unlawful maintenance. It should be noticed that, according to the decision of the majority in the House of Lords, the plaintiff's action for maintenance failed because the plaintiff failed to prove special damage, although he had been compelled to repay money which he had

obtained by fraud and to pay costs in respect of his having resisted payment. LORD FINLAY's view was ([1919] A.C. at p. 380):

"It cannot be regarded as damage sufficient to maintain an action that the plaintiff has had to discharge his legal obligations or that he has incurred expenses in endeavouring to evade them."

Accordingly, though it is said that the success of the maintained litigation is not a bar to the action for maintenance, it must be difficult to prove special damage when the plaintiff in the maintenance action has been unsuccessful.

I have carefully considered the speech of LORD FINLAY, L.C., in that case, and I cannot find any consideration by him of the amount or nature of the common interest or other circumstances which will justify the support of an action or defence by outside parties. LORD FINLAY, as it seems to me, was devoting his mind entirely to the two questions: (i) Must the plaintiff prove that he has suffered damage? and (ii) Must he have been successful in the proceedings that were unlawfully maintained? VISCOUNT HALDANE was among those who dissented from the opinion of the majority on the question of the necessity of damage being proved. He made some observations on the nature of maintenance (*ibid.*, at p. 389):

"It is true that the courts are not today disposed to extend the principle, and that various exceptions to or legal excuses for it, such as that resting upon motives of charity, have been introduced. A common interest, speaking generally, may make justifiable that which would otherwise be maintenance. But the common interest must be one of a character which is such that the law recognises it. Such an interest is held to be possessed when in litigation a master assists his servant, or a servant his master, or help is given to an heir, or a near relative, or to a poor man out of charity, to maintain a right which he might otherwise lose. But in the present case none of these justifications are present, for the case is simply one of a newspaper undertaking to conduct a suit for any reader with a case who may apply to it, whether rich or poor and without distinction of person."

I do not feel difficulty in agreeing with the conclusion in the last sentence. It may well be wrong that a newspaper, principally concerned with improving its circulation, should be allowed, on the ostensible ground of public duty, to stimulate litigation and maintain proceedings. It seems to me quite a different matter for a number of persons who fear present or future interference with their proprietary rights or an attack on their conditions of living to combine together to resist or attack aggressors. Further, what may have been the last word on public policy in 1919 is not necessarily the test in 1954.

In this context I would refer to the observations of LORD SHAW OF DUNFERMLINE ([1919] A.C. at p. 414) in *Neville's case* (2):

"The search in HAWKINS' PLEAS OF THE CROWN would yield a rich reward to those who inquired as to the extraordinary lengths to which in certain ages, and by certain authors, the doctrine of maintenance was carried. As, for instance, this: Maintainers, it is said, include all such as assisted 'by opening the evidence to the jury; or by giving evidence officiously without being called upon to do it; or by speaking in the cause as one of the counsel with the party; or by retaining an attorney for him; or perhaps by barely going along with him to inquire for a person learned in the law'.* It was as if law courts were a plague-ridden or infected area, to help another into which was an injury and a crime. Needless to say, these things, once claimed as being part of the common law of England, have long since disappeared. They are repugnant to sensible and modern ideas. What remains of the doctrine deserves, in these circumstances, a scrupulous examination: and I am of opinion that the test of maintenance is the test

* See HAWKINS' PLEAS OF THE CROWN (8th edn.), vol. 1, p. 455.

of the quality of the act itself as it bears upon the attainment of justice in the particular case, and that the test either of tort or of offence is primarily whether it contains that quality which is essential both by the statute and the common law of England."

With these remarks of LORD SHAW OF DUNFERMLINE I respectfully agree, and I ask the rhetorical question: How can such a doctrine founded on considerations of public policy become at some point frozen into immutable respectability, so as to be no longer capable of alteration? No wonder that LORD DUNEDIN in *Webb-Blundell v. Stephens* (10) ([1920] A.C. at p. 977) described the action of maintenance as "a cumbersome curiosity of English law". It seems to me that unless the law of maintenance is capable of keeping up with modern thought, it must die in a lingering and discredited old age.

I now turn to cases which show a different picture. *Plating Co. v. Farquharson* (11) was not a case of an action of maintenance. Unsuccessful defendants in an action for infringement of a patent for nickel-plating, having given notice of appeal, procured the insertion in a newspaper of an advertisement inviting the trade to subscribe towards the expenses of the appeal and offering a reward of £100 to anyone who could produce documentary evidence that nickel-plating was done before 1869. The plaintiffs in the action moved for committal of the publishers of the newspaper for contempt of court. It was held that, as all the persons engaged in the trade of plating had a common interest in resisting the claims of the plaintiffs, an advertisement asking them to contribute to the expenses of defending the proceedings was open to no objection. It is interesting to observe that the advertisement stated that several influential firms had already come forward and volunteered to pay their share of the expenses. If the contentions of the defendant company in the present case are correct, the plaintiffs in *Farquharson's* case (11) could have attacked the defendants on the ground of unlawful maintenance of the defence in the action. SIR GEORGE JESSEL, M.R., however, said (17 Ch.D. at p. 54):

"All the trade is interested in freeing the trade from monopoly of any kind, whether by patent or otherwise; and we know that it is customary for the members of a trade to combine for that purpose, on the same principle that people claiming a right of common are allowed to combine to assist a defendant who is interfered with by the lord, on the ground that right of common does not exist, the doctrine being that where you have a common interest you have a right to contribute to the defence. It is, within my certain knowledge, and has been for many years, a common practice that if a patentee attacks one manufacturer the other manufacturers combine together to defend the case, so that the whole expense shall not be thrown on the one that is attacked. Otherwise, they might be attacked in detail, and although it might be a bad patent, they might all lose their cases owing to the great expense of defending them effectually."

In *Greig v. National Amalgamated Union of Shop Assistants, Warehousemen, & Clerks* (12), the union were held liable in an action for maintenance by an employer against whom an unsuccessful action for libel had been brought by the union in the name of a member whom the employer had dismissed. The union had, however, maintained successful proceedings against the employer by the member for a week's salary, and as to this LORD ALVERSTONE, C.J., said (22 T.L.R. at p. 275) that

"Rumins's original statement of complaint to the union was a perfectly proper one, and, if the union had merely taken the proper steps to protect his interest in recovering the wages due, he did not think—though he would not actually decide the question—that an action such as this would lie. The original intervention of the union appeared to him to be legitimate and justifiable, and no complaint could be made of its action in assisting him to obtain his wages. So far the matter was clear."

British Cash & Parcel Conveyors, Ltd. v. Lamson Store Service Co., Ltd. (13) was a case of rival traders. The plaintiffs in the maintenance action had managed to obtain contracts for the use of their apparatus (for transmitting cash in a shop) with two former customers of the defendants and a third customer who alleged that he contracted with the plaintiffs by mistake. The plaintiffs' apparatus proved unsatisfactory, and as a result the customers entered into contracts with the defendants, who gave them indemnities against proceedings by the plaintiffs. The plaintiffs claimed that this amounted to unlawful maintenance by the defendants. It was held by the Court of Appeal that in giving these contracts of indemnity the defendants were acting in the legitimate defence of their commercial interests, and were not liable for maintenance. SIR H. H. COZENS-HARDY, M.R., said ([1908] 1 K.B. at p. 1012):

"Beyond all doubt there was a time when what the defendants did would have been regarded as criminal. But there is little use in citing ancient text-books on this branch of law. The law has been modified in accordance with modern ideas of propriety. The language of LORD ABINGER in *Findon v. Parker* (1) (11 M. & W. at p. 682) is explicit: 'The law of maintenance, as I understand it upon the modern constructions, is confined to cases where a man improperly, and for the purposes of stirring up litigation and strife, encourages others either to bring actions, or to make defences which they have no right to make'. And in the sixty-five years which have elapsed since *Findon v. Parker* (1) this principle has been carried even further. I may refer also to *Fitzroy v. Carr* (14). It is common knowledge that contracts of indemnity are recognised and unquestionably valid, and none the less because they may involve and indeed contemplate the institution or the defence of an action. The whole business of marine insurance depends upon this. And perhaps the familiar insurances against claims under the Workmen's Compensation Act are a still better example. In my opinion all that was done by the defendants falls under and is protected by this principle. The defendants had a business interest, a commercial interest, which fully justified the indemnities or guarantees which they gave."

There is also a very instructive passage in the judgment of FLETCHER MOULTON, L.J. (*ibid.*, at p. 1013):

"The truth of the matter is that the common law doctrine of maintenance took its origin several centuries ago and was formulated by text-writers and defined by legal decisions in such a way as to indicate plainly the views entertained on the subject by the courts of those days. But these decisions were based on the notions then existing as to public policy and the proper mode of conducting legal proceedings. Those notions have long since passed away, and it is indisputable that the old common law of maintenance is to a large extent obsolete. As pointed out by the present Master of the Rolls in *Fitzroy v. Carr* (14), the purchase of a chose in action amounted to maintenance in the olden times, and therefore was not only a civil wrong, but a crime. Yet for hundreds of years such transactions have been held valid, and the rights arising out of them have been enforced by the courts of equity and are now enforceable in all the courts of the realm. Similarly in olden times it was maintenance to give evidence without being subpoenaed so to do. Today it is looked upon as part of the duty of citizens to be ready and willing to assist the administration of justice by giving evidence when they can do so usefully. In the presence of changes such as these it appears to me to be idle to look upon the courts as administering the old common law as to maintenance. The present legal doctrine of maintenance is due to an attempt on the part of the courts to carve out of the old law such remnant as is in consonance with our modern notions of public policy. The position of the courts in this respect is not unlike that which may be observed in their treatment of contracts in restraint of trade, though the change of view with

regard to maintenance is far more complete. Speaking for myself, I doubt whether any of the attempts at giving definitions of what constitutes maintenance in the present day are either successful or useful. They suffer from the vice of being based upon definitions of ancient date which were framed to express the law at a time when it was radically different from what it is at the present day, and these old definitions are sought to be made serviceable by strings of exceptions which are neither based on any logical principle nor in their nature afford any warrant that they are exhaustive. These exceptions only indicate such cases as have suggested themselves to the mind of the court, and it is impossible to be certain that there are not many other exceptions which have equal validity. A good example of this is given by the case of *Holden v. Thompson* (15), in which PHILLIMORE and BRAY, J.J., rightly in my opinion, accepted the interest arising from community of religion as adequate justification for a man assisting a co-religionist in a dispute relating to religious matters, although such an exception is not made, so far as I know, in any of the attempted definitions of maintenance. That there is still such a thing as maintenance in the eye of the law and that it constitutes a civil wrong and perhaps a crime is undoubted, and the general character of the mischief against which it is directed is familiar to us all. It is directed against wanton and officious intermeddling with the disputes of others in which the defendant has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse. But in my opinion it is far easier to say what is not maintenance than to say what is maintenance."

BUCKLEY, L.J., expressed similar views. He said ([1908] 1 K.B. at p. 1021):

" . . . it is not maintenance to uphold a party in litigation in whose result the party accused of maintenance has a real and bona fide interest."

It is, moreover, interesting to observe (*ibid.*, at p. 1020) that BUCKLEY, L.J., treats *Plating Co. v. Farquharson* (11) as an instance of the kind of common interest which prevents the support from amounting to maintenance. In the result, the members of the Court of Appeal were unanimous, and I do not find that the views expressed by them are in any way inconsistent with the decision of the House of Lords in *Neville v. London "Express" Newspaper, Ltd.* (2) or in any way affected by that decision.

A doctrine which was evolved to deal with cases of oppression should not be allowed to become an instrument of oppression, which it must be if humble men are not allowed to combine or to receive contributions to meet a powerful adversary. If it is right for members of a trade union to combine to assert the right of a trade unionist to his wages, and it is right for a number of manufacturers to combine to protect the freedom of an individual trader to make his goods, why is it wrong for persons whose livelihood or recreation will be adversely affected by pollution of waters to combine to defeat an aggression against the rights of one or more of them? What is the interest recognised by the law, and to be distinguished from "a sentimental interest", which exists in the cases of the trade unionists and the persons who carry on a similar trade, but does not exist in the case of persons who possess fishing rights or who wish to preserve the purity of the waters of the country's rivers or streams? In all these cases, persons combine, as SIR GEORGE JESSEL, M.R., said (17 Ch.D. at p. 54), in *Plating Co. v. Farquharson* (11), lest they

"might be attacked in detail, and . . . they might all lose their cases owing to the great expense of defending them effectually."

I agree with LYNSEY, J., in the view which he expressed in *Baker v. Jones* (9) that the Legal Aid Acts show the change in public opinion on the question of

supporting litigation. Even LORD ESHER, M.R., in *Alabaster v. Harness* (6) ([1895] 1 Q.B. at p. 342) did not think that,

“apart from any specific law on the subject, there would necessarily be anything wrong in assisting another man in his litigation.”

The specific law to which he referred is now a collection of out-of-date rules which no longer fit the conditions of modern life and were based on a conception of public policy which has long since become obsolete. No wonder public policy has been termed “a very unruly horse”: see per BURROUGH, J., in *Richardson v. Mellish* (16) (2 Bing. at p. 252). Of course, there can be abuses which the law must check. One is familiar with the former false “legal aid societies”, usually consisting of one man, that supplied legal aid and advice for a percentage of the sum recovered. But the remedies of champerty and barratry should be competent to deal with that evil. Support of legal proceedings, based on a bona fide community of pecuniary interest or religion or principles or problems, is quite different and, in my view, the law would be wrong and oppressive if such support were to be treated as a crime or a civil wrong. I do not believe that the law is in that condition.

It was said on behalf of the defendant company that the maintenance of the present action was oppressive to the defendant company. I do not see that it is any more oppressive than the angry reactions of the ants are to an elephant which knocks over an anthill. What was meant, no doubt, was that, if maintenance is a civil wrong and a crime, the unlawful support of an action against a party is oppressive. If, however, the support given is legitimate and is not a wrong, the maintenance of the action is not oppressive, and this ground of complaint disappears.

There is another point with which I will deal briefly. The suggestion that the support received by the plaintiffs in this action might fall within the range of charity was treated somewhat derisively on behalf of the defendant company, but I am not satisfied that a valid argument may not be put forward on behalf of the plaintiffs on this ground. Poverty is not based on the standard of destitution, and in the cases on charitable trusts it has long been recognised that charitable assistance may be provided for persons who are not among the poorest members of the community. It was argued that in the law of maintenance the exception of charity only permitted assistance in the most absolute case of poverty, where the litigant could not even initiate litigation at all without financial assistance. It seems to me peculiar if the rule is so strict as that, and I do not think the proposition is supported by the cases. In my view, this is a relative matter, which must depend on the circumstances of the case. The Derwent Angling Association have some 150 members, and do not exclude rich men from membership, but the evidence was that the members in fact were miners and other persons earning about £8 per week or less, a class with sufficient means for their ordinary needs but not able to face the cost of a pollution action without outside assistance. The suggestion that they might form a fighting fund by putting aside a small sum each week out of their wages appears to me unreal and impracticable. Much was made of the position of Mrs. Martell, as a property owner, with a husband drawing the pay and allowances of a naval captain. Mrs. Martell was, in fact, it appears, only tenant for life, and did not receive much net income from the estate. The suggestion was, I think, that the estate might be mortgaged in order to raise the amount required to carry on the action — a somewhat bleak prospect for a property owner, it might be supposed. In any case, I do not think that it is right to regard Mrs. Martell as more than a nominal plaintiff in reality. The action was not of her seeking and she was only brought in, as a riparian owner, at the suggestion of the Anglers Co-operative Association and agreed to the use of her name on the terms that she should not become liable for costs. In these circumstances, I doubt whether Mrs. Martell's financial position is really relevant in considering the question of charity. It is not necessary,

however, to consider the point further. Indeed, it may be that it is merely another aspect of the main question in the case.

In the result, I take the view that the support received by the plaintiffs in the carrying on of the action is not unlawful. This is enough to dispose of the application, and it is not really necessary for me to deal with the question whether an application for the stay of proceedings is an appropriate remedy (on the assumption that there is a case of unlawful maintenance). I will observe, however, that, if it is a proper procedure, it is strange that no previous exercise of the jurisdiction of the court to stay proceedings in such a case can be produced. *Wallis v. Duke of Portland* (3), before LORD LOUGHBOROUGH, L.C., is not such a case. There is a not unfavourable comment by ATKIN, L.J. ([1919] 2 K.B. at p. 564) in *Wild v. Simpson* (17), and a passing reference to an injunction against the unlawful maintenance of proceedings by LORD FINLAY ([1919] A.C. at p. 383) in *Neville v. London "Express" Newspaper, Ltd.* (2). I am not satisfied, however, either that such jurisdiction exists in this kind of case or that it would be proper to stop proceedings at an early stage when, in the result, the applicant may turn out, by reason of the absence of damage, to have no cause of action for maintenance.

Finally, it was suggested that the bringing of a civil action with the support of the Anglers Co-operative Association was improper and an abuse, because the Salmon and Freshwater Fisheries Act, 1923, and the Rivers (Prevention of Pollution) Act, 1951, provided for criminal proceedings, in connection with which the question of unlawful maintenance could not arise. The effectiveness of proceedings under these Acts, however, has not been established, and the suggestion that the adoption of civil proceedings took place in the present case because the costs of such proceedings are more profitable to the legal profession is, I am satisfied, entirely unfounded and unworthy. Accordingly, the application is dismissed with costs.

Application dismissed.

Solicitors: *Allen & Overy* (for the defendant company); *Gerrish & Co.* (for the plaintiffs).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

WOOLLARD v. WOOLLARD.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Mr. Commissioner Latey, Q.C.), October 6, 7, 8, 11, 12, 1954.]

Divorce—Cruelty—Criminal conduct—Husband's convictions for crime—Justifiable remonstrances by wife—Unjust resentment by husband—Injury to wife's health.

The parties were married in 1934 and there were no children of the marriage. On Jan. 16, 1939, the husband was convicted of fraudulently converting a cheque and was placed on probation. In about March, 1939, the husband was adjudicated bankrupt. On July 1, 1941, the husband was convicted of larceny as a bailee of furniture and sentenced to six months' imprisonment. On the husband's release from prison the wife told him she could not go back to him, and when they met one evening in the street he told her that she would not get away from him, put his hands round her throat, shook her, and then followed her to her mother's house. The wife called for the police and the husband left. In 1942 the wife agreed to the husband's request for a reconciliation on condition that he "turned over a new leaf." In 1947 the husband was convicted of larceny of a film projector but the conviction was quashed on appeal. In June, 1949, at the husband's instigation, he being still an undischarged bankrupt, the wife opened a banking account in her own name at the bank of which her

employer was a customer. She paid in money which the husband gave her and withdrew money as instructed by him. On July 17, 1951, the husband was convicted at the Central Criminal Court of obtaining money by false pretences and sentenced to three and a half years' imprisonment. At least one sum paid into the banking account was shown at the trial to have been fraudulently obtained by the husband. The police questioned the wife, but came to the conclusion that she had taken no part in the husband's fraudulent transactions. While the husband was in prison the wife received numerous telephone calls from persons who stated that the husband had told them that she was receiving money on his, the husband's, behalf, out of which their debts would be satisfied. The husband did not deny to the wife the falsity of the statements which he had made to these persons, and merely told her not to worry. The wife visited and wrote to the husband while he was in prison. The letters were at first affectionate but in April, 1952, she blamed the husband for her bad state of health and in July, 1952, she made it clear that she would not return to him because she could not face any more trouble. In about August, 1952, she ceased to visit him in prison and early in 1953 told him that she was considering a divorce. The husband thereupon wrote several bitter and resentful letters to the wife. The wife petitioned for divorce on the ground that the husband had treated her with cruelty.

HELD: the husband was guilty of cruelty by reason of the following circumstances, viz., his activities since the marriage which resulted in his being thrice convicted for crime, the wife's justifiable remonstrances in 1941 and his unjust resentment then and subsequently, his failure to keep his promise to reform, and the injury to her health in 1951 and 1952 as the result of his conduct; he was to be held responsible for the consequences of his actions on the wife's well-being, and, accordingly, she would be granted a decree nisi.

Observations of DENNING, L.J., in *Westall v. Westall* (1949) (65 T.L.R. at p. 337), applied.

AS TO CRUELTY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 649-654, paras. 954-962; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 293-311, Nos. 2384-2590.

Cases referred to:

- (1) *Fearn v. Fearn*, [1948] 1 All E.R. 459; [1948] P. 241; [1948] L.J.R. 1043; 2nd Digest Supp.
- (2) *Westall v. Westall*, (1949), 65 T.L.R. 337; 2nd Digest Supp.
- (3) *Squire v. Squire*, [1948] 2 All E.R. 51; [1949] P. 51; [1948] L.J.R. 1345; 112 J.P. 319; 2nd Digest Supp.
- (4) *Kaslefsky v. Kaslefsky*, [1950] 2 All E.R. 398; [1951] P. 38; 114 J.P. 404; 2nd Digest Supp.
- (5) *Eastland v. Eastland*, [1954] 3 All E.R. 159.
- (6) *Warburton v. Warburton*, (1953), *The Times*, July 10.
- (7) *Jamieson v. Jamieson*, [1952] 1 All E.R. 875; [1952] A.C. 525; 1952 S.C. (H.L.) 44; 116 J.P. 226; 3rd Digest Supp.
- (8) *Thompson v. Thompson*, (1901), 85 L.T. 172; 27 Digest, Replacement, 306, 2534.
- (9) *Bosworthick v. Bosworthick*, (1901), 86 L.T. 121; 27 Digest, Replacement, 333, 2775.
- (10) *Boyd v. Boyd*, [1938] 4 All E.R. 181; 108 L.J.P. 25; 159 L.T. 522; 102 J.P. 525; Digest Supp.
- (11) *Edwards v. Edwards*, [1948] 1 All E.R. 157; [1948] P. 268; [1948] L.J.R. 670; 112 J.P. 109; 2nd Digest Supp.

PETITION by the wife for divorce.

The parties were married on Aug. 18, 1934, and there were no children of the marriage. By her petition dated June 16, 1953, the wife alleged, *inter alia*:

“ 6. That since the celebration of the marriage the [husband] has treated the [wife] with cruelty . . . 8. That on Jan. 16, 1939, the [husband] was tried and convicted at the Middlesex Quarter Sessions for the fraudulent conversion of a cheque for £127 8s. and was bound over on probation. 9. That on July 1, 1941, the [husband] was arrested and convicted at the Westminster Magistrate's Court for larceny as a bailee in respect of certain furniture and was sentenced to six months' imprisonment. 10. That when the [husband] was released from this sentence the [wife] told him she could not go back to him. The [wife] met the [husband] in the Marylebone Road between 8.30 and 9.00 p.m. and the [husband] then told the [wife] she would not get away from him, and put his hands round her neck, and shook her, only stopping because someone passed by. The [wife] got free and went home to her . . . mother, but the [husband] followed her there, and the [wife] had to seek police protection. Ultimately, the next year on the [husband's] oral promise to behave decently the [wife] did return to the [husband]. 11. That in or about the year 1944, the [husband] was arrested . . . but he was . . . released after a hearing in court. 12. That [in] 1947 . . . the [husband] was arrested, tried, and convicted, at the Kingston Quarter Sessions for the larceny of a film projector. The [husband] appealed against this conviction and it was quashed by the Court of Criminal Appeal. 13. That in . . . 1951 . . . the [husband] was arrested, tried and convicted, at the Central Criminal Court . . . for obtaining various sums of money by false pretences with intent to defraud, and sentenced to three years and six months . . . 15. That by reason of the criminal offences and convictions of the [husband] as aforesaid, the [wife] suffered in health.”

By his answer the husband denied that he was guilty of cruelty as alleged or at all. By notice dated June 30, 1954, the wife set out further allegations under para. 6 of her petition, *inter alia*:

“(v) At about the end of May, 1949, the [husband] told the [wife] that in connection with certain Dutch transactions he wanted to open a bank account, but could not do so in his own name, as he was an undischarged bankrupt. The [wife] accordingly opened a bank account for the [husband] in her name at . . . Bank . . . Hampstead. From time to time the [husband] paid, or gave to the [wife] to pay, moneys into the said account, and the [wife] on his instructions drew money out of the . . . account . . . some of the . . . moneys paid into the . . . account were moneys in respect of which the [husband] was sentenced at the Central Criminal Court . . . on charges of obtaining money . . . by false pretences . . . The [wife] alleges that the [husband] induced her to operate the . . . account, well knowing that thereby he might involve the [wife] in his criminal activities, and put her in jeopardy of the criminal law, and greatly embarrassed and distressed her particularly by reason of the fact that the [wife], on behalf of her employer continued to have dealings with the . . . bank. (vi) (a) On July 17, 1951, the [husband] was sentenced at the Central Criminal Court . . . as is set forth in para. 13 of the petition. The [husband] falsely informed various persons that the [wife] would be receiving money from Holland on his behalf, and, whilst the [husband] was in prison, the [wife] had telephone calls from one [M.] requesting she paid over to him money which she was receiving from Holland and which the [husband] owed him, causing the [wife] great embarrassment and distress. (b) The [wife] received similar requests from . . . the landlady . . . to whom the [husband] owed money, in respect of the alleged money from Holland. (c) The [wife] received many telephone calls from various other persons, including

persons named [B.] and [K.] who stated the [husband] owed them money, and had informed them the [wife] was in receipt of moneys on behalf of the [husband] from Holland, and that the [wife] would satisfy their debts out of the said moneys, greatly distressing her. (d) When the [wife] visited the [husband] in prison and told him of these matters, the [husband] did not deny the falsity of what he had told the persons set out . . . above; was utterly indifferent to the embarrassment and humiliation caused thereby to the [wife] and merely told her not to worry."

The husband did not deny the convictions referred to in the wife's petition and although she made other allegations of cruelty, these were rejected by the commissioner so that the only issue was, as stated by the commissioner, whether the effect on the wife of the husband's convictions and course of criminal conduct constituted cruelty.

P. R. Hollins for the wife.

J. C. Mortimer and *D. G. Knight* for the husband.

MR. COMMISSIONER LATEY, Q.C., having rejected certain allegations of the wife as not amounting to cruelty, stated that the gravamen of the case might fairly be described as a course of crime alleged to have worn down the wife's health, and, having referred to the husband's conviction and subsequent bankruptcy in 1939 and to his conviction in 1941, held that if there had been cruelty by the husband it had been condoned by the wife on their reconciliation early in 1942. The commissioner then referred to the subsequent arrests and convictions set out in para. 11 and para. 12 of the petition and continued: In 1948 the husband got to know a man named M. and the latter's aged mother [Mrs. M.]. In less than a year the husband extracted by fraud from this lady sums totalling some £1,700; his wife being quite unaware of what he was doing. In June, 1949, his wife opened a banking account in her own name at the bank of which her employer was a customer; she said that she did so at her husband's request because, so he said, as an undischarged bankrupt he himself could not open an account. All the moneys paid in and paid out by cheque emanated from him, though she signed the cheques. In effect he operated the account. He explained that all the money paid in came from moneys paid to him in respect of patent rights and that most of it came from Holland and Australia. He claimed that none of the moneys improperly obtained from Mrs. M. went through the account; but a detective sergeant in his evidence showed that at any rate one item of £45, paid in on Aug. 11, 1949, was proved during the trial at the Central Criminal Court to have come from that source. For these frauds the husband was sentenced on July 17, 1951, to three and a half years' imprisonment. To his wife he strenuously professed his innocence and said that he had been made a scapegoat for another man, and for some time thereafter she believed him. Quite naturally any honest wife would be upset by such an event in her life, but what I have to decide is whether this conviction, coupled with his previous convictions since the marriage, injured or jeopardised her health.

I do not find that the conviction in 1939 affected her health adversely, although it was a melancholy augury for the future. As to the incidents in 1941 I have heard no evidence that the husband's conduct affected her health at that time; but it is abundantly clear that she was very much upset by what had happened and by his vague threat and rough handling. Here was an act on his part which might well have raised a fear in her mind that she could not entrust herself to his care; but in view of the subsequent reconciliation this single direct act of cruelty, as I find it, was condoned. It is common ground that after the reconciliation they lived together very happily for three years. When he was arrested in 1947 on what turned out to be an abortive charge, owing to past experiences she was very worried; but having regard to the quashing of his sentence that episode cannot be held against him. From then, almost up to the time of his

conviction in 1951 he and the wife were continuing to have normal marital relations: but, she says, when he was arrested in 1951 it seemed worse than before.

At this stage it is relevant to refer to the precise allegations contained in the particulars of the petition. [The commissioner read para. (v) of the particulars*, which referred to the bank account opened in June, 1949, and continued:] The whole of that paragraph is supported by the evidence of the wife and the detective sergeant. She was questioned by the police about the source of the money which had been paid into the banking account, and though the police came to the conclusion that she had no part in her husband's fraudulent transactions, obviously she must have been upset by the mere suspicion of participation in them. When he was in gaol she visited him monthly for some months and wrote many letters to him breathing the utmost affection and fervent hopes for a complete reunion in due course.

[The commissioner read extracts from the wife's letters and continued:] She has, however, given evidence of the sufferings she endured and the effect on her nervous health at this time. She has spoken of being upset by the somewhat unsettled life which she had had to lead since 1949, and in these letters written to him in prison she speaks quite, as it were, incidentally of the way in which her health has been affected. [After reading from more of the wife's letters the commissioner continued:] Her doctor has corroborated that since 1949 he often had to treat her for her anxiety state, which became worse after her husband's conviction in 1951, and that worsening he attributed to the fact of her husband's conviction. True, the doctor expressed the opinion that her life became easier after her husband went to prison, but that expression of opinion was too vague to give me any assistance. At any rate, he confirmed the fact that the wife's nervous system had been thoroughly upset. The husband attributed her nervous indisposition to an unhappy home life, a domineering mother and excessive domestic work. Her mother died in May, 1952, and there is no doubt that the wife worked very hard at home. She describes a good deal of the work she is doing in a letter to her husband dated Dec. 13, 1951. My conclusion is that it was a combination of both influences which upset her nerves, coupled with the melancholy circumstances necessarily surrounding her visits to her husband in gaol; but, as she very fairly put it herself, if it had not been for her worries over her husband the home difficulties would have gone for nought. I attach no importance to the fact that in her early letters to her husband in gaol she made no allusion to his past indiscretions; it merely proves the loyalty and the nobility of her character.

Early in 1952 her feelings underwent a change after she had been dunned by creditors of her husband who had told her that he had told them to look to her for payment, although she had nothing but her wages. [The commissioner read para. (vi) of the particulars† which set out the husband's conduct subsequent to the husband's conviction on July 17, 1951, and continued:] The wife has supported all those allegations by her evidence, which I accept. Gradually she realised that all her husband's professions of being the victim of misfortune and of never being in the wrong were sheer humbug, and on Apr. 13, 1952, she wrote a letter in which she directly blamed him for her bad health. On July 12, 1952, she made it clear by letter that she would not return to him, saying that she felt she could not face any more trouble, and that she could not convince herself that there would be no more. [The commissioner read extracts from letters from the wife and continued:] In about August, 1952, she ceased to visit her husband in gaol and she decided to bring divorce proceedings as she intimated to him by a letter of Feb. 10, 1953. Her change of attitude and her decision to take divorce proceedings brought on her a series of bitter and resentful letters

* See p. 353, letter E, ante.

† See p. 353, letter G, ante.

from her husband, letters abounding in expressions of self-pity and self-righteousness, and in scurrilous reflections on what he considered her disloyalty. With due regard to the fact that he was in prison, those letters do him little credit, considering the way in which she had stuck to him through thick and thin, save for her temporary refusal to return to him in 1941. He hurled these reproaches at her without a word of gratitude for the love and affection she had bestowed on him for so long. He was released from prison in February, 1954, and apart from forcing himself on her on several occasions to try to induce her to start life afresh that is the end of this sorry story.

He is now working as a motor driver. In the witness-box he was aggressive, argumentative and, as the wife had pointed out, almost invariably seeking to show he was never in the wrong except when he could not get over the facts of his convictions. In the main, I much prefer the wife as a witness of truth. She was calm and collected; she showed no vindictiveness against the husband and did not hesitate to give him praise now and then, as when she said that if in funds he was generous to her. Despite the verdict of the jury in 1951 (before whom the husband had pleaded Not Guilty and had gone into the witness-box in his own defence) the wife still thought he was innocent and thus wrote him the loyal and loving letters to which I have referred. It was not until she became certain in her own mind, from information received of his guilt, that she decided on divorce proceedings. This revulsion of feeling, coupled with her husband's epistolary outbursts of indignation, might very well have retarded her recovery from a state of nervous upset which she had reached. Matters which occur after a petition is filed are admissible to throw light on the conduct and disposition of an accused party prior to the commencement of proceedings and, therefore, one cannot ignore the fact that after her husband's release she was subjected to a certain amount of molestation on his part which was not calculated to lessen her fears for the future. Perhaps I ought to say that, although condonation has not been pleaded, her affectionate letters to him in prison did not constitute condonation: *Fearn v. Fearn* (1).

Those being the facts as I find them, did the husband's conduct constitute cruelty as it has been defined and explained in these courts? In most European countries and in some of the British Dominions (for instance, South Australia), conviction for a serious crime is a ground for divorce. That is not so, however, in England. Counsel for the husband in a well-reasoned address submitted that on the hypothesis that the court accepted the wife's evidence in substance as against the husband's (which I do), cruelty was not made out, and he cited to me the observations of DENNING, L.J., in *Westall v. Westall* (2). The report does not set out the facts of that case but, nevertheless, those observations have been taken as a guide to a large extent in cases of cruelty in this division. DENNING, L.J., said (65 T.L.R. at p. 337):

"Although malignity is not an essential element of cruelty as *Squire v. Squire* (3) shows, nevertheless intention is an element in this sense, that there must be conduct which is, in some way, aimed by one person at the other . . . Defects of temperament, like defects of health, must ordinarily be accepted for better or for worse. When there is no intent to injure, they are not to be regarded as cruelty unless they are not only aimed at the other party but also are plainly and distinctly proved, not merely to cause passing distress or emotional upset, but actually to cause injury to health . . . I would point out that there is much conduct which may be injurious to the health of the other but which if not aimed at him is not cruelty. The conduct of the habitual drunkard, the gambler, the criminal or the profligate may cause his wife to break down in health but it is not cruelty unless, combined with some conduct which is aimed at her, as, for example, when her justifiable remonstrances provoke unjust resentment on his part directed at her."

DENNING, L.J., gave a further explanation of what he meant by "aimed at" in *Kaslefsky v. Kaslefsky* (4).

A Counsel for the husband submitted there was no evidence of "justifiable remonstrances" in the present case. I find, however, that there were after the husband's release from prison in 1941. There was also an exhibition of "unjust resentment" by the husband by way of the Marylebone incident*. Further, there were "justifiable remonstrances" by the wife in letters to him in gaol, and "unjust resentment" in his subsequent letters to her. But counsel called in aid the decision of KARMINSKI, J., in *Eastland v. Eastland* (5). In that case the gravamen of the wife's charge of cruelty in an undefended plea for divorce was her husband's failure to make provision for her maintenance, his irresponsibility and his shiftlessness. The court found that although the wife's health had suffered it was not a case where the husband desired to injure her; and it was held that although hardship and unhappiness had been caused by the husband's grave defects of character as well as by his conduct, his conduct was negative; it was not aimed at the wife, nor directed against her, and, therefore, deplorable though it may have been, it fell short of cruelty. In that case the charges of cruelty by the wife fell far short of those in the present case. Bearing in mind that the only issue left in the present case is whether the effect on the wife of the various convictions constitutes cruelty, *Eastland v. Eastland* (5), having regard to its context, hardly assists—although KARMINSKI, J., most usefully reviewed the authorities on the principles to be applied.

B Counsel for the husband prayed in aid the wife's belief in her husband's innocence in 1951 and her anxious waiting for the result of his unsuccessful application for leave to appeal. That, to my mind, only serves to show what a loyal wife she was, hoping that his professions of innocence would be accepted. Her attitude in no way detracted from the effect of his conduct on her health, especially as she was worried by the fear that she might be accused of participation in his crime. Counsel also prayed in aid the judgments of the Court of Appeal in *Warburton v. Warburton* (6). That was similar to the present case except that there was in that case only one conviction of the husband since the marriage, as compared with three in the present case. JENKINS, L.J., said:

E "It is not possible to hold that this one criminal act of larceny in respect of which the husband was convicted after the marriage amounted to cruelty towards his wife . . . it is easy to imagine cases where the criminal career of the husband might in some way implicate the wife against her will, as, for example, in a case where the matrimonial home was made a receptacle for stolen goods. To a case of that sort other considerations might apply . . . Nor is this a case in which there have been repeated thefts by the husband during the marriage."

F HODSON, L.J., said:

G "It was not a case of a man who had previously lived a criminal life and had promised his wife to reform and to lead a different life after marriage . . . I do not wish to be taken as saying that in no circumstances could persistence in a course of criminal conduct be a basis for a charge of cruelty where the necessary ingredients are present of physical injury or apprehension of the same."

H In *Warburton v. Warburton* (6) the Court of Appeal found there was no injury to health. In the present case I find there was injury to the wife's health, and the question is whether it can be attributed to the conviction of 1951 coupled with the background of the earlier convictions since the marriage. I have considered in their context the authorities on the principle that cruelty must be "aimed at" the suffering spouse, including the pronouncements, to which I have already referred, of DENNING, L.J. Counsel for the wife referred me to *Jamieson*

* Set out in para. 10 of the petition, p. 353, letter B, ante.

v. *Jamieson* (7), in which it was laid down that though actual intention to hurt may in a doubtful case be decisive, it is not essential to impute to the wrongdoer a wilful intention to injure the aggrieved spouse in order to establish a charge of cruelty. On that point the speeches of LORD NORMAND and LORD MERRIMAN bear out the proposition I have just read. I have also considered three cases cited by counsel for the wife in which sexual offences against girls by the husbands were held to constitute cruelty against the wives: *Thompson v. Thompson* (8); *Bosworthick v. Bosworthick* (9); and *Boyd v. Boyd* (10), which is also mentioned in *Edwards v. Edwards* (11). Counsel for the wife pointed out that the Court of Appeal in *Warburton v. Warburton* (6) did not shut the door completely to a case like the present, which has to be considered on its facts, and it appears to me that the present case possesses some of the elements of exception envisaged by their lordships in *Warburton v. Warburton* (6).

I find, therefore, that by the circumstance of the husband's indulging in activities since the marriage which resulted in three convictions, and by reason of her justifiable remonstrances in 1941 and his unjust resentment (both practically repeated in 1952 and 1953), by his promise to reform which he failed to realise in 1951, by the injury to her health which she suffered in 1951 and 1952 as the result of his conduct, including the fear and embarrassment which she experienced on realising how she might have been involved in the husband's trial at the Central Criminal Court as a result of her opening a banking account at his instigation, he was guilty of cruelty, and he must be held to be responsible for the consequences of his actions on his wife's well being. I therefore pronounce a decree nisi of divorce on the ground of the husband's cruelty.

Decree nisi.

Solicitors: *Harold Knewright & Cox* (for the wife); *P. G. W. Simes* (for the husband).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

COOPER v. COOPER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Karminski, J.), October 15, 1954.]

Justices—Desertion—Constructive desertion—Expulsive words—Previous cruelty charge dismissed—Repetition of evidence relating to expulsive words—Estoppel.

Res Judicata—Husband and wife—Persistent cruelty—Dismissal of summons—Fresh summons on ground of constructive desertion—Evidence of expulsive words repeated at hearing of fresh summons.

The wife left the matrimonial home on Apr. 2, 1954, and, on her complaint to the justices that the husband had been guilty of persistent cruelty towards her, a summons was issued against him. The complaint was heard on Apr. 23, 1954. The wife gave evidence of physical violence and quarrels and produced to the justices two notes; in one her husband had told her to "clear out" and in the other, dated Mar. 27, he had told her to "get out". After producing the latter note the wife said in evidence, "I said I would go in my time not his. He said I can . . . He kept on saying 'pack your bags and get out'. I thought it was not any good going on like this so I left." She admitted that the notes were written because she had demanded that the husband put in writing what, she alleged, were his frequent words to the same effect. She alleged that this course of conduct by the husband had caused injury to her health. No other evidence was called for the wife, and the complaint was dismissed on a submission that the husband had no case to answer. On May 11, 1954, a further summons was issued against the husband on the wife's complaint that he had deserted her. As particulars of desertion the wife's solicitors stated by letter dated May 27, 1954, that,

apart from the notes "clear out" and "get out" signed by the husband, he drove her from the matrimonial home by expulsive words and conduct. At the beginning of the hearing of the complaint on May 28, 1954, the wife produced again the note dated Mar. 27, and the husband objected that the wife was attempting to re-open the trial which had taken place on Apr. 23, 1954. The justices ruled that such evidence was inadmissible. The wife was, therefore, unable to adduce any evidence which would be accepted as admissible and her complaint was dismissed. On appeal,

HELD: the evidence given by the wife on Apr. 23, 1954, of expulsive words was given as part of the background of her case, and in so far as it was specifically directed to any issue, was directed to the possible effect on her health; and the dismissal on that date of her charge of cruelty did not estop the wife from using appropriate facts previously adduced in evidence on the charge of cruelty as evidence of desertion.

Foster v. Foster ([1953] 2 All E.R. 518), applied.

Per curiam: if and in so far as it is laid down in *Bright v. Bright* ([1953] 2 All E.R. 939, see at p. 949), that because it has appeared, in the course of the hearing of a charge of cruelty, that the husband wished or told the wife to leave him, the dismissal of that charge operates as an estoppel from using that class of evidence subsequently in support of a charge of constructive desertion, that decision is in conflict with the decision of the Divisional Court in *Foster v. Foster* ([1953] 2 All E.R. 518) and should not be accepted (see at p. 362, letter E, and p. 363, letter B, post).

AS TO CONSTRUCTIVE DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 655, 656, para. 964; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 350-352, Nos. 2897-2913.

Cases referred to:

- (1) *Pike v. Pike*, [1953] 1 All E.R. 232; 3rd Digest Supp.
- (2) *Bright v. Bright*, [1953] 2 All E.R. 939; 117 J.P. 529; 3rd Digest Supp.
- (3) *Hill v. Hill*, [1954] 1 All E.R. 491; [1954] P. 291; 118 J.P. 163.
- (4) *Foster v. Foster*, [1953] 2 All E.R. 518; 117 J.P. 377; 3rd Digest Supp.
- (5) *Hoystead v. Taxation Comr.*, [1926] A.C. 155; 95 L.J.P.C. 79; 134 L.T. 354; Digest Supp.

APPEALS by the wife against orders of Edmonton justices sitting at Tottenham, dated Apr. 23, 1954, and May 28, 1954.

On Apr. 2, 1954, the wife left the matrimonial home and on her complaint that the husband had been guilty of persistent cruelty towards her the justices issued a summons against the husband. On Apr. 23, 1954, the justices dismissed the complaint giving as their reasons:

"This was a complaint heard before the justices on the grounds of persistent cruelty, and the summons, after hearing only the wife on oath, was dismissed. The justices were of the opinion that cruelty had not been made out, and that the various acts of disagreement between the parties had, in many instances, been contributed to by the [wife's] attitude. No physical assaults of a serious nature were provided to the satisfaction of the justices; and in any verbal disagreement the wife proved to be the equal of the husband, as elicited in cross examination. Having carefully considered all aspects of the wife's evidence, the justices did not feel the husband had to repudiate, on oath, the complaint laid against him, and accordingly the summons was dismissed."

On May 11, 1954, the justices issued a further summons against the husband on the wife's complaints that he had resented her and had wilfully neglected to provide reasonable maintenance for her. On May 28, 1954, the justices dismissed the complaint giving as their reasons:

"Counsel for the wife indicated that, to support her complaint for

constructive desertion on this day, the wife would rely solely on evidence which had already been tendered in previous proceedings at this court on Apr. 23, 1954, which summons was dismissed by this court on that date. Following a preliminary legal argument, in the course of which we were asked to consider the following cases: *Pike v. Pike* (1); *Bright v. Bright* (2); *Hill v. Hill* (3); *Foster v. Foster* (4); we ruled against such evidence being admitted. Therefore, upon the wife tendering such evidence in her examination in chief, the husband objected and we upheld the objection. In view of our ruling, the wife was not in a position to give any evidence which could be accepted as admissible to support her contention, and we therefore dismissed the summons."

The wife appealed against both of the justices' decisions. The Divisional Court held that the justices had dismissed the charge of persistent cruelty on the merits of the case, and, accordingly, dismissed that appeal. This report deals with the appeal against the dismissal on May 28, 1954, of the charges of desertion and wilful neglect to maintain.

R. W. Vick for the wife.

G. J. Shindler for the husband.

LORD MERRIMAN, P., stated the facts and continued: I am anxious to avoid any expression of opinion about the merits of this case, but I am firmly of opinion that the submission to the justices by counsel for the husband came too soon, and that the decision of the justices to hear no further evidence, or, indeed, to admit neither the note dated Mar. 27, nor any other evidence relating to expulsive words as the cause of the wife leaving home, was wrong, because it was premature. In my opinion the course the justices adopted was wrong, and there is no escape from our ordering a re-hearing of the wife's charges of desertion and wilful neglect to maintain.

It seems to me that in essence the present case is completely covered by a decision of this court in *Foster v. Foster* (4), where the same sort of question arose, but in a more complicated form. I do not propose to go through the details of that case beyond saying that instead of the same petty sessional division being concerned with the affairs of the spouses, the wife had failed in a charge of cruelty before the Dorking justices and had succeeded in a charge of desertion before the Sutton justices, and that there was unquestionably an overlap, which very often occurs, between allegations in support of a charge of cruelty and allegations in support of a charge of desertion. It is true to say that when that case came before the Sutton justices there was no formal pleading of estoppel. In courts of summary jurisdiction there is not such a formal plea of the issue, in my experience, as would have to be raised in the High Court. When the case came before us, we did treat the matter, on the principle that we were bound to deal with anything with which the justices ought to have dealt, as if the plea of estoppel had formally been raised, and I am going to read a passage from my own judgment, with which COLLINGWOOD, J., although he added considerations of his own, expressly agreed. Dealing with the question of estoppel, I said ([1953] 2 All E.R. at p. 522):

"If the case before the Sutton justices had been an attempt to make a fresh charge of persistent cruelty by including in the course of conduct relied on an alleged incident of Aug. 28, the day before her complaint to the Dorking justices, I should be inclined to hold that she was estopped from re-opening that charge."

In so far as WILLMER, J., in *Bright v. Bright* (2) held that estoppel operated against an attempt to introduce into the course of conduct something of the same nature as that which had been put forward before but which had not been

introduced on the former occasion, I respectfully agree, as this passage shows. Then I go on (*ibid.*):

“ Obviously, the mere fact that there was better and more detailed evidence, supported by independent witnesses of that incident, would be irrelevant. But at Dorking there was no charge of desertion on Sept. 4, before the court. It is true that, whether by amendment of the summons after she had left home or by the issue of a fresh summons returnable at the same time, all of which is a mere matter of machinery, a charge of desertion could have been made before the Dorking justices on Sept. 17, but, in my opinion, the wife was not bound to put the charge of desertion before the Dorking justices under the penalty of being estopped from afterwards alleging that she had been deserted before the date of that hearing. I think, perhaps, the matter can best be tested by supposing, for the sake of argument, that those steps had been taken, and that there had been before the justices at Dorking on Sept. 17 both a charge of cruelty up to Aug. 29 and a charge of desertion from Sept. 4. Would the Dorking justices, having found that the charge of cruelty had not been proved, have been bound to dismiss the charge of desertion because it was an attempt to build up a charge of constructive desertion by what was really a case of unproved cruelty? In my opinion, they would not, because of the evidence which, I am assuming for the purposes of the argument, the wife would have given, as she gave at Sutton, about the husband telling her that he had finished with her . . . ”

Mutatis mutandis, those observations, even if obiter in relation to *Foster v. Foster* (4), though I think, in fact, that they went to the root of that decision, apply a fortiori to the present case, because on Apr. 23, 1954, the wife did give the evidence about these expulsive notes, and in particular the one dated Mar. 27, which was five or six days before she left, and the repetition of it which she expressed in the words:

“ He kept on saying ‘ pack your bags and get out ’ I thought it was not any good going on like this so I left.”

It is said that the fact that that evidence was given on the first occasion [Apr. 23, 1954] operates as an estoppel per rem judicatam on the charge of constructive desertion. In my opinion that evidence was given as part of the background, and, in so far as it was specifically directed to any issue, was directed to the possible effect on her health. It is said that because the justices dismissed her case [on Apr. 23, 1954], they must have rejected that evidence. I am unable to agree. The fact that the notes were in the husband’s own writing was never challenged, so that it was impossible for the justices to have rejected that evidence. Furthermore, it does not in the least follow from their rejection of her charge of persistent cruelty in which these notes were put in incidentally, or even with reference to the aspect of health, that they disbelieved her evidence on this point. That would be sheer speculation. The way to test that was to let the charge of desertion be heard and await their finding about these notes in connection with that charge. The present is one of those unfortunate cases where both the advocates and the court struck too soon, with the result that the case was never heard.

It is said that *Foster v. Foster* (4) has been distinguished and criticised by WILLMER, J., in *Bright v. Bright* (2). I venture to observe that in so far as there is a difference between the two cases, and the principles on which they are decided, this court, as, indeed, WILLMER, J., is bound by the decision in *Foster v. Foster* (4) if it is applicable. I do not propose to go in detail through the matters which were used in connection with the charge of cruelty in *Bright v. Bright* (2) which had been dismissed by Mr. Commissioner BUSH JAMES, Q.C., and the particulars which were given in support of the charge of desertion, save one only.

It appears that one of the new allegations which had not been included in the dismissed petition for cruelty was an allegation in para. 13:

"That between the years 1927 and 1930 at the White House, Freetown . . . the [husband] frequently told the [wife] that he no longer wanted her and wished that she would go."

If that allegation had been dealt with on the ground that it could not fairly be taken to be expulsive conduct, that would be one thing; ruling it out as inadmissible, in spite of the fact that it had not been, though it ought to have been, put before the court on the charge of cruelty, is another thing. WILLMER, J., said ([1953] 2 All E.R. at p. 949):

"In the result, I hold that so far as this petition raises the same allegations as those put forward in the previous petition for cruelty the wife is estopped from reiterating those allegations in support of her plea of constructive desertion. That decision covers para. 14, para. 15 and para. 17, which, as I pointed out, are paragraphs reiterating matters which formed the subject of specific allegations and specific findings in the previous case. With regard to . . . para. 13, which raise[s] matters not specifically raised in the previous proceedings, it is clear to me that these allegations are all allegations which could well have been made as part of the cruelty case which was then sought to be set up; indeed, one could go further, and say, from experience of this court, that each of them is of the type commonly raised in almost every cruelty case that comes before this court."

And then the learned judge says that that brings it within the passage in LORD SHAW's opinion in *Hogstead v. Taxation Comr.* (5) ([1926] A.C. at p. 170) which had been cited in full in support of the proposition that estoppel relates not only to acts which actually were raised and decided, but to anything which ought to have been raised and was not raised, deliberately or otherwise, on the occasion before. In so far as that lays down that because, in the course of the hearing of a charge of cruelty, matters may emerge or even be particularised suggesting that the husband wishes or has plainly told the wife to clear out, the dismissal of the cruelty charge operates as an estoppel from using that class of evidence in support of a charge of constructive desertion, I respectfully disagree. If that is the purport of that paragraph, as I think it is, I think that it conflicts essentially, though the details of the cases are different, from the decision of this court in *Foster v. Foster* (4), and I am not prepared to accept it.

We have been referred to the decision of DAVIES, J., in *Hill v. Hill* (3), which it was suggested showed that in similar circumstances a spouse in answer to a charge of constructive desertion or desertion was not allowed to plead as justification matters which had been dismissed on a substantive charge of cruelty, and it was attempted to suggest that that excluded and prevented the respondent, so to speak, from saying that the spouse making the charge of desertion had consented to the separation. In fact, the case did nothing of the sort, because it is clear from the concluding passage of the judgment that so far from the issue being regarded as inadmissible the learned judge very rightly admitted it, heard it, and decided that there was no evidence to support the allegation of consent. For those reasons, whatever the merits of this charge of desertion may be, I think it must be tried, and that this appeal must be allowed.

KARMINSKI, J.: I agree. The principle established by this court in *Foster v. Foster* (4) is binding on us, and the only difficulty which I have encountered has been caused by some observations made by WILLMER, J., in *Bright v. Bright* (2) to which LORD MERRIMAN, P., has already referred. I do not desire to read again the passage in *Foster v. Foster* (4) ([1953] 2 All E.R. at p. 522). COLLINGWOOD, J., said (*ibid.*, at p. 524):

"I agree with LORD MERRIMAN, P., that this is not a question of res

judicata. It is not estoppel, because the issue before the Sutton justices was an issue different from that before the Dorking justices."

A The facts which this court had to consider in *Foster v. Foster* (4) were, of course, different from those in the present case, but the principle, as I understand it, is common to both. In *Bright v. Bright* (2) WILLMER, J., was dealing with different and, indeed, unusual circumstances. In that case there had been a long history of litigation between the parties, and the first complaint of cruelty made by the wife went back as far as 1913, almost precisely forty years before WILLMER, J., had to deal with what I may colloquially call the last round in the litigation. In the course of his judgment on the wife's case of simple desertion the learned judge pointed out that the petition was launched some twenty-two years after some of the events complained of. LORD MERRIMAN, P., has referred to the difficulties which may have been caused by some of the language used by WILLMER, J. ([1953] 2 All E.R. at p. 949). I do not desire to read the passage again, and I would say at once that I agree with my Lord that if WILLMER, J., meant that the dismissal of a cruelty charge in effect operated to estop the wife from using any of the same facts as evidence of desertion, then that is in flat contradiction of the decision of this court in *Foster v. Foster* (4). I agree with my Lord that that is a possible construction of what WILLMER, J., said. I do not think, however, it is necessarily the only construction. I observe with interest, and, if I may say so, with sympathy, that the judgment of WILLMER, J., came, after a hearing of several days, on July 31, 1953. As he pointed out in his judgment, he was naturally anxious to dispose of a matter in which a number of witnesses had been brought from West Africa, and one can well understand that however he might have preferred to reserve his judgment he felt himself unable to do so over the long vacation. I think a possible explanation is that the passage which my Lord has read does not necessarily express exactly what the learned judge had in mind. However, I am satisfied, as I have already said, that the principle applicable here is precisely that laid down by this court in *Foster v. Foster* (4). In the present case the justices, on a submission made by counsel for the husband, ruled against evidence of the wife being admitted, and, as they put it:

"Upon the wife tendering such evidence in her examination in chief the husband objected and we upheld the objection."

The precise reason for the justices upholding the objection is not very apparent, since they go on to say:

"In view of our ruling, the wife was not in a position to give any evidence which could be accepted as admissible to support her contention, and we therefore dismissed the summons."

That last sentence, as I understand it, is a reiteration of, if not a reason for, their rejection of the wife's tendered evidence.

G In the result, I think the position in the present case is that the wife has not been able to put forward her complaint of desertion or, with it, a complaint of wilful neglect to provide reasonable maintenance, but that the justices shut her out on the threshold of the hearing of her complaint. What her merits are I do not know and cannot tell, but I agree that they must at least be investigated and that this case must be remitted for a re-hearing.

H *Appeal allowed. Case remitted for re-hearing.*

Solicitors: *R. Crane* (for the wife); *Craigie Hicks & Co.* (for the husband).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

CHANCERY DIVISION.

PRACTICE DIRECTIONS.

Practice—Chancery proceedings—Affidavits—Office copies—Ex parte applications without summons—Mortgages—Orders nisi for foreclosure or redemption. Mortgage—Foreclosure—Redemption—Orders nisi—Notice of intention to redeem—Place of redemption.

With a view to carrying out certain recommendations of the Committee on Supreme Court Practice and Procedure, the Judges of the Chancery Division have directed as follows:—

1. EX PARTE APPLICATIONS. Where, by any rule or practice, Orders or Directions may be sought in chambers ex parte supported by affidavit, it shall not be necessary to issue a summons for such purpose unless required by the rule under which the application is made or the judge shall otherwise direct.

EXAMPLES.

- (1) Garnishee order nisi.
- (2) Change of parties upon devolution of interest.
- (3) Appointment of next friend or guardian-ad-litem of an infant or person under disability in the stead of such a person who has died.
- (4) Substituted service of writ and other process.

2. OFFICE COPIES OF AFFIDAVITS. Unless the court or a judge in any particular instance shall otherwise direct, it shall not be necessary to bespeak for the use of the court or judge office copies of affidavits intended to be filed in connection with interlocutory or procedural matters as distinct from affidavits forming part of the evidence in a suit or dealing with the merits of the case; as to which latter the existing practice shall continue.

EXAMPLES where office copies will NOT usually be required:—

- (1) Of fitness to act as receiver, manager, next friend or guardian-ad-litem or guardian of an infant.
- (2) Verifying the security of a surety or a receiver's, manager's or guardian's account.
- (3) Proving service of process (including notices to prove a claim or the allowance thereof).
- (4) In support of applications under Ord. 7, r. 4; Ord. 14; Ord. 18, r. 2; Ord. 31, r. 19A (3) and Ord. 57, etc.

NOTE. A more extensive list can be inspected in the Masters' Summons Rooms.

3. REDEMPTION AND FORECLOSURE OF MORTGAGED PROPERTY.

(1) All orders nisi for redemption or foreclosure of mortgaged property shall provide that unless the mortgagor or other the person who is required to pay the redemption money shall, at least seven days prior to the date fixed for redemption by the order or the master's certificate pursuant thereto, give to the mortgagee's solicitor a written notice of his intention to redeem at the appointed time and place, attendance made for the purpose of redemption at the appointed time and place shall be treated as a notice of intention to attend at the same place and time on the corresponding day of the week then following and the period allowed for redemption shall be treated as enlarged accordingly.

(2) The master's certificate pursuant to an order nisi (or the order itself if thereby a certificate is avoided) shall nominate as the place of redemption the office of the mortgagee's solicitors if it be within five miles of the Royal Courts of Justice, Strand, or such other place as may be agreed between the parties and recorded in the order or certificate. In all other cases the place for redemption shall be recorded as Room 138 of the Royal Courts of Justice, Strand, W.C.2.

M. G. WILLMOTT,

Chief Master.

November 3, 1954.

BUTE (MARQUESS) v. BARCLAYS BANK, LTD.

[QUEEN'S BENCH DIVISION (McNair, J.), October 18, 19, 20, 28, 1954.]

*Bank—Crossed warrant for payment—Conversion—Order to “Pay A for B”
 —“True owner” of warrant—No estoppel—Duty of bank to make inquiry
 —Bills of Exchange Act, 1882 (c. 61), s. 82.*

- A In August, 1948, M. was appointed manager of three sheep farms in the Island of Bute, belonging to the plaintiff. It was part of the terms of M.'s employment that all sums received by him in respect of these farms should be brought to the plaintiff's estate office (i.e. the office of the factor and assistant factor) for payment by the factor into the plaintiff's home farm account. It was also M.'s duty to apply for hill sheep subsidies. The plaintiff's factor knew that the warrants for hill sheep subsidies were drawn in M.'s favour with the addition of the words “for Marquess of Bute” (the plaintiff) and were sent direct to M. by the Department of Agriculture. In January, 1949, M. forwarded three applications for subsidy payments. On Apr. 1, 1949, M. resigned his post as manager and in May of that year left the plaintiff's service. Between Aug. 31 and Sept. 27, 1949, three warrants in satisfaction of the applications made in January, 1949, were delivered to M.
- C On Sept. 27, 1949, M., opened a personal account at the defendants' Barnsley branch with the three warrants which were credited to the account. The warrants were specially crossed by a rubber stamp bearing the defendants' name and were forwarded for payment. On or about Sept. 30 the proceeds of the warrants were credited to the defendants. The warrants were headed “Department of Agriculture for Scotland (Food Production Services) Vote”
- D and were to the following effect: “If this form, duly receipted, is presented through a bank within one month, the King's and Lord Treasurer's Remembrancer will pay: Mr. [M.], Kerrylamont, Rothesay, Bute £133 10s. [or other the amount of the warrant] in respect of Hill Sheep Subsidy, 1949”. M.'s name and address was within a printed rectangle. Immediately opposite the name of M., but outside the printed rectangle, appeared the words in brackets “for Marquess of Bute” (i.e. the plaintiff). The warrants were signed by the secretary. At the foot of the form was the following note “The receipt must be signed with exactly the same name as is shown in the address.” The warrants bore in print the crossing “Not Negotiable . . . & Co.” In an action to recover a sum equal to the total amount of the warrants as damages for conversion or, alternatively, as moneys had and received by the defendants to the use of the plaintiff,

- E
 F
 G
- HELD: (i) that to enable a plaintiff to sue for conversion it is sufficient if he is entitled to immediate possession of the property converted, but it is not necessary for him to be the true owner of the property; and, as the plaintiff was at the material time entitled to require M., whose employment by the plaintiff had ended, to deliver the warrants to the plaintiff as and when M. received them, the plaintiff was entitled to recover their amount from the defendants with interest at four per cent. per annum from the date of the conversion.

- H
- Per curiam: as the warrants contained, in effect, a promise “to pay M. for B.,” and were warrants for hill sheep subsidy, the plaintiff, not M., was on the construction of the warrants their “true owner” within the meaning of that term in the Bills of Exchange Act, 1882 (see p. 369, letter E, post).

(ii) the plaintiff was not estopped from alleging as against the defendants that M. was not entitled to receive the proceeds of the warrants for his own account, as the warrants clearly indicated that M. was to receive the money as agent or in a fiduciary capacity; accordingly the defendants should not have credited the proceeds of the warrants to M.'s personal account without making inquiry.

(iii) the defendants had not discharged the onus of proving that they had

acted without negligence and were not entitled to the protection of s. 82 of the Bills of Exchange Act, 1882.

AS TO CONVERSION OF ORDERS FOR PAYMENT, see HALSBURY, Simonds Edn., Vol. 2, p. 187, para 354; and FOR CASES, see DIGEST, Vol. 3, p. 243, Nos. 693, 694.

AS TO BANKERS' DUTY TO INQUIRE, see HALSBURY, Simonds Edn., Vol. 2, p. 182, para. 345; and FOR CASES, see DIGEST, Vol. 3, p. 242, No. 687, and Digest Supp., Bankers, Nos. 691a-691e.

Cases referred to:

- (1) *Midland Bank, Ltd. v. Reckitt*, [1933] A.C. 1; 102 L.J.K.B. 297; 148 L.T. 374; Digest Supp.
- (2) *Great Western Ry. Co. v. London & County Banking Co., Ltd.*, [1901] A.C. 414; 70 L.J.K.B. 915; 85 L.T. 152; 3 Digest 172, 292.
- (3) *Morison v. London County & Westminster Bank, Ltd.*, [1914] 3 K.B. 356; 83 L.J.K.B. 1202; 111 L.T. 114; 3 Digest 230, 631.
- (4) *Lloyds Bank, Ltd. v. Chartered Bank of India, Australia & China*, [1929] 1 K.B. 40; 97 L.J.K.B. 609; 139 L.T. 126; Digest Supp.
- (5) *Slingsby v. District Bank, Ltd.*, [1932] 1 K.B. 544; 101 L.J.K.B. 281; 146 L.T. 377; Digest Supp.
- (6) *Goodwin v. Roberts*, (1876), 1 App. Cas. 476; 45 L.J.Q.B. 748; 35 L.T. 179; 3 Digest 272, 849.
- (7) *Bloomenthal v. Ford*, [1897] A.C. 156; 66 L.J.Ch. 253; 76 L.T. 205; 21 Digest 291, 1039.
- (8) *Freeman v. Cooke*, (1848), 2 Exch. 654; 18 L.J.Ex. 114; 12 L.T.O.S. 66; 154 E.R. 652; 21 Digest 287, 1019.
- (9) *Lloyds Bank, Ltd. v. Savory (E.B.) & Co.*, [1933] A.C. 201; 102 L.J.K.B. 224; sub nom. *Savory & Co. v. Lloyds Bank, Ltd.*, 148 L.T. 291; Digest Supp.

ACTION for damages for conversion, alternatively for moneys had and received for the plaintiff's use.

The facts are set out in the judgment.

J. M. Holden and J. E. Artro-Morris for the plaintiff.

Maurice Lyell, Q.C., and *B. J. Brooke-Smith* for the defendants.

Cur. adv. vult.

Oct. 28. **McNAIR, J.**, read the following judgment: In this case the plaintiff claims the sum of £546 plus interest from the defendants as damages for conversion of three warrants issued by the Department of Agriculture for Scotland or, alternatively, the like sum as moneys had and received by the defendants for the plaintiff's use.

In the years 1948 and 1949 the plaintiff owned, inter alia, three sheep farms named Glenmore, Plan and Kelshore, and Kerrylamont in the Island of Bute, in respect of which he was entitled to claim the benefit of the Hill Farming Act, 1946. Under this Act, subject to certain conditions, a hill sheep subsidy was payable* by the Department of Agriculture for Scotland. From early in 1945 until the spring of 1949 a Colonel Beach acted as the plaintiff's factor for these properties, with a Mr. Goodechild as assistant factor, and at all material times after the spring of 1949 Mr. Goodechild held the position of acting factor. In August, 1948, a Mr. McGaw was appointed the manager of these three farms. Part of the terms of the farm manager's employment was that all sums received by him in respect of these farms should be brought by him to the estate office for payment by the factor into the plaintiff's home farm account which was kept at the Royal Bank of Scotland and later at the Clydesdale Bank, both at Rothesay. This account could be drawn on only by the plaintiff, the factor or the acting factor.

* By s. 13 (1) (a) of the Hill Farming Act, 1946, 1 HALSBURY'S STATUTES (2nd edn.) 141, the Secretary of State for Scotland, being the appropriate Minister (see *ibid.*, s. 38) was empowered to pay a hill sheep subsidy in accordance with a scheme.

The farm manager's duties also included the duty of making applications to the Department of Agriculture for the relevant hill sheep subsidies. At the end of January, 1949, in pursuance of his duty as farm manager, McGaw completed and forwarded three applications for subsidy payments in respect of sheep maintained on these farms on Dec. 4, 1948. Though in the body of the application form, under the heading "Name of applicant", the name of the plaintiff is inserted, in section "D", in which the formal application is made, the signature is that of McGaw. It was established in evidence that in fact the estate office, that is to say, the factor or assistant factor, knew that the warrants for the hill sheep subsidy were in practice sent direct to the farm manager (who at the material time was McGaw); that the warrants were drawn in favour of the farm manager, with the addition of the words "for Marquess of Bute", and that it was the duty of the farm manager, on receipt of the warrants, to hand them to the estate office for payment into the plaintiff's account. On Apr. 1, 1949, McGaw tendered his resignation as manager, and subsequently left the service of the plaintiff. No direction was sent by the estate office to the Department of Agriculture requiring any alteration in the form of the warrant. Sometime between Aug. 31 and Sept. 27, 1949, the Department of Agriculture forwarded three warrants, in satisfaction of the three applications mentioned, to McGaw, addressed to him in accordance with the request contained in the application forms at Kerryllamont, Rothesay, Bute, which was the farm at which he had resided while in the plaintiff's service. These warrants, pursuant to general instructions given by McGaw to the local post office as to the redirection of letters, were readdressed to him at another address and so came into his possession. The warrants, which were substantially in the form of the usual payable orders commonly used by government departments, were headed:

"Department of Agriculture for Scotland (Food Production Services)
Vote",

and provided as follows:

"If this form, duly receipted, is presented through a bank within one month, the King's and Lord Treasurer's Remembrancer will pay: Mr. D. McGaw, Kerryllamont, Rothesay, Bute . . ."

(this name and address being contained in a printed rectangle or box)

" . . . £133 10s.* in respect of Hill Sheep Subsidy, 1949."

The warrants were signed by the secretary. Immediately opposite the name "Mr. D. McGaw", but outside the box, there appeared the words in brackets "for Marquess of Bute". At the foot of the form there appeared the following note:

"The receipt must be signed with exactly the same name as is shown in the address. In the case of a joint stock company or corporation the person signing must state the capacity in which he acts."

The warrants bore in print the crossing "Not Negotiable . . . & Co."

On or about Sept. 27, 1949, McGaw, who was then living at Cannon Hall Farm, Barnsley, applied to Mr. Laughton, one of the three cashiers of the defendants' Barnsley branch, for permission to open, with these three warrants, a personal account of his own at that branch. Up to that date McGaw was unknown to the defendants. He was asked by Mr. Laughton for references, and was told that the account could not be opened until the references had been taken up. Nevertheless, on the same day, before the references were taken up, he, in the presence and with the assistance of Mr. Laughton, signed the receipts on the forms, entered their amounts on a paying-in slip, and handed the warrants over to Mr. Laughton. The total amount of these three warrants (namely, £546) was the same day credited to an account in McGaw's name with the defendants,

*The amount specified is that contained in one of the warrants, all of which were in like form, but for different amounts.

and the warrants themselves, after being specially crossed by a rubber stamp bearing the defendants' name, were forwarded for collection to the Exchequer, Edinburgh. Their proceeds were in due course, on or about Sept. 30, credited to the defendants. The defendants, having received satisfactory replies from two of the references provided by McGaw, but not having communicated in any way with the plaintiff, on Oct. 12 issued a cheque book to McGaw and permitted him to draw on the account.

Subsequently, investigation by the police into McGaw's activities led to his appearance at the Sheriff's Court of Rothesay, where, on his own confession, he was found guilty on four counts of uttering forged documents (namely, warrants for subsidy payments in the name of the previous manager MacMillan) and one count of embezzlement of the plaintiff's money, and sentenced to a term of eighteen months' imprisonment.

In these circumstances, the plaintiff seeks to recover a sum equal to the total amount of the warrants as damages for conversion or, alternatively, the like sum as moneys had and received by the defendants to the use of the plaintiff.

In substance, three grounds of defence were taken by the bank. First, it was said that McGaw was at all material times the true owner of the warrants and their proceeds, though he was accountable to the plaintiff, that the plaintiff was not the true owner and that, accordingly, the plaintiff is not entitled to sue either in conversion or for money had and received.

Secondly, it was said that the plaintiff, knowing that any sums payable in respect of hill sheep subsidy would be paid by means of warrants payable to McGaw, represented to any banker receiving the warrants that McGaw was entitled to receive and hold the warrants and their proceeds for his personal account; and that, accordingly, the plaintiff is estopped against the defendants from denying that McGaw was so entitled.

Thirdly, the defendants alleged that they received payment of the warrants in good faith and without negligence, and, accordingly, were entitled to the protection of s. 82 of the Bills of Exchange Act, 1882, as applied to these warrants by s. 17 of the Revenue Act, 1883.

As to the first ground, the short answer, in my judgment, is that, in order to claim in conversion, it is not necessary for the plaintiff to establish that he is the true owner of the property alleged to have been converted. It is sufficient if he can prove that at the time of the alleged conversion he was entitled to immediate possession. McGaw's employment was terminated not later than May 9, 1949, and thereafter the plaintiff was clearly entitled, if he so wished, to require McGaw to deliver the warrants to him when they were received, since McGaw's only title to receive them stemmed from his appointment as manager; and thus, I think, it is clear that at the date of the alleged conversion in September, 1949, the plaintiff was entitled to immediate possession and, accordingly, was entitled to sue in conversion. I have no doubt that, if the plaintiff had known the true facts in September, 1949, before McGaw approached the bank, he could successfully have applied for an injunction to restrain McGaw from dealing with the warrants otherwise than by handing them over to him. Such an injunction could properly have been granted since McGaw's right to receive and retain the warrants or their proceeds had lapsed when his employment ceased.

Out of deference, however, to the careful and helpful arguments that were addressed to me by counsel on either side, it is right that I should express my view on the question whether or not the plaintiff was at the material time the "true owner" of the warrants. The expression "true owner" is nowhere defined in the Bills of Exchange Act, 1882. It appears in s. 79 (2), s. 80 and s. 82 of the Act and presumably has the same meaning in each section. On behalf of the plaintiff, reliance was placed on such cases as *Midland Bank, Ltd. v. Reckitt* (1), and in particular on LORD ATKIN'S speech ([1933] A.C. at p. 14), *Great Western Ry. Co. v. London & County Banking Co., Ltd.* (2), *Morison v. London County &*

Westminster Bank, Ltd. (3) and *Lloyds Bank, Ltd. v. Chartered Bank of India, Australia & China* (4), as establishing that the innocent principal and not the fraudulent agent was the true owner in such circumstances. In each of these cases, however, there was fraud in the drawing or in obtaining the drawing of the cheque; and, in my judgment, they do not assist in the solution of the present case, in which the fraud consisted in the dealing with warrants properly drawn in accordance with instructions of which the principal (the plaintiff) must be taken to have knowledge.

Counsel for the defendants, rightly as I consider, submitted that the test in this case was to be found in the intention of the drawer as expressed in the document. Though it was argued that, as a matter of construction, the words "for Marquess of Bute" were merely inserted for the information of McGaw, I consider that these words, particularly having regard to their position on the warrants, form an essential part of the description of the drawee. On this view, the warrants contain a promise to pay A for B. Admittedly this formula is different from "Pay B through A"; as to which see *Slingsby v. District Bank, Ltd.* (5) and in particular the judgment of SCRUTTON, L.J. ([1932] 1 K.B. at p. 557). Having regard, however, to the fact that the warrants on their face purported to be payments in respect of hill sheep subsidy, which, to the knowledge of the drawers, was due to the plaintiff and not to McGaw, it seems to me to be plain that the intention of the drawers, as evidenced by the warrants, must be taken to have been that the plaintiff should be the true owner of the warrants and their proceeds and not that the true owner should be McGaw, and that McGaw should be merely accountable to the plaintiff. Furthermore, I can see no valid distinction between "Pay A for account of B" and "Pay A for B"; and I am fortified in my belief that the former phrase connotes that B is to be the true owner by the opinion of the late SIR JOHN PAGET, K.C., given in an answer to question No. 326 in *QUESTIONS ON BANKING PRACTICE* (1930 edn.). Accordingly, quite apart from the fact that at the material time McGaw's authority had been terminated, I consider that at all times, including the date of the conversion, the plaintiff was the true owner and not McGaw.

I turn next to the question of estoppel. For the purpose of this point, I accept, first, that McGaw was authorised to make application for hill sheep subsidy in the way he did; and secondly that the plaintiff, through his estate office, must be taken to have known that the warrants would be sent to McGaw in the form "Pay McGaw for the Marquess of Bute".

On this state of facts, it was argued that an estoppel against the plaintiff was established by the application of the principles (i) that an estoppel by representation may arise from A putting into the possession of B, or allowing B to obtain possession of, a document containing a representation that the payment may be made to B personally; and (ii) that, if the document contains such a representation or is reasonably understood by the person to whom it is presented to contain such a representation, the person to whom it is presented can safely pay B and is under no obligation to make investigation or inquiry to ascertain whether this representation is true. Authority for both these principles is, in my judgment, to be found in *Goodwin v. Roberts* (6) (1 App. Cas. at p. 489), *Bloomenthal v. Ford* (7) ([1897] A.C. at p. 168) and *Freeman v. Cooke* (8). The representation, however, must be clear and unequivocal or at least reasonably be understood to be clear and unequivocal. I have already stated my conclusion that, as a matter of construction, the warrants do not contain a representation that payments may be made to McGaw personally; but, for the purpose of the principles above stated, the crucial question on the facts of this case is whether they could reasonably be understood to contain such a representation. Mr. Laughton, the cashier (the honesty of whose evidence I accept) stated that, though he had dealt with payable orders issued by government departments before, he had never dealt with warrants in this form, that he did not connect

the reference to the Marquess with the payee's name at all, and that he regarded the words "for the Marquess of Bute" as no more than a note or memorandum for McGaw intended to indicate to him the source from which the money was coming.

In my judgment, there was no reasonable justification either in the form of the documents or in the circumstances in which they were produced to Mr. Laughton, for such belief. It seems to me that no reasonable cashier in Barnsley to whom a complete stranger presented warrants in this form, which, on the face of them, bore a clear indication that they were payments in respect of hill sheep subsidy payable by the Department of Agriculture for Scotland and an address in Rothesay, Bute, could have read them as containing a representation that payment could safely be made to the personal account of McGaw without any inquiry. They bore clear indication at least that McGaw was to receive the money as agent or in a fiduciary capacity, and it is elementary banking practice that such documents should not be credited to a personal account of the named payee without inquiry. In my judgment, this plea of estoppel fails.

As to the third ground (i.e., the plea based on s. 82 of the Bills of Exchange Act, 1882) it seems to me that the conclusion stated above, if correct, is fatal to any defence under this section. The standard of care required of a banker in such a case is stated by LORD WARRINGTON OF CLYFFE in *Lloyds Bank, Ltd. v. E. B. Savory & Co.* (9) ([1933] A.C. at p. 221) as being ascertained

"by reference to the practice of reasonable men carrying on the business of bankers, and endeavouring to do so in such a manner as may be calculated to protect themselves and others against fraud."

A somewhat lower test was stated by SANKEY, L.J., in *Lloyds Bank, Ltd. v. Chartered Bank of India, Australia & China* (4) ([1929] 1 K.B. at p. 69). Whichever test is applied, I consider that the defendants have not discharged the onus of proving that they acted without negligence.

[His LORDSHIP directed judgment to be entered for the plaintiff for £546 with interest at four per cent. per annum from Sept. 30, 1949, which by consent was taken as the date of conversion].

Judgment for the plaintiff.

Solicitors: *Murray, Hutchins & Co.* (for the plaintiff); *Durrant Cooper & Hambling* (for the defendants).

[Reported by MICHAEL MALONEY, ESQ., Barrister-at-Law.]

HERSOM v. BERNETT.

[QUEEN'S BENCH DIVISION (Roxburgh, J., sitting as a judge of the Division), May 24, 25, 26, October 21, 22, 1954.]

Agent—Liability as principal—Undisclosed principal—Action for return of purchase money—Principal named in defence—Rejection of evidence as to identity of principal.

A purchased goods for £824 7s. 6d. from B, on the footing that B was an agent for a principal whose name was not disclosed. A paid the purchase price and took delivery, but the goods were stolen goods and the plaintiff had to surrender them to the true owner. A sued B for the amount of the purchase money, and B pleaded that he had been acting as agent for C. The court, having rejected B's evidence and found that C was not his principal,

HELD: B could not be heard to say that someone other than C was his principal, and, therefore, as his evidence with regard to C had been rejected as false, B must himself be treated as principal; accordingly the plaintiff was entitled to recover the £824 7s. 6d. from the defendant.

AS TO LIABILITIES OF AGENT, see HALSBURY, Simonds Edn., Vol. 1, p. 228, para. 517; and FOR CASES, see DIGEST, Vol. 1, pp. 624, 625, Nos. 2494-2496.

Cases referred to:

(1) *Owen v. Gooch*, (1797), 2 Esp. 567; 1 Digest 623, 2480.

(2) *Hutchinson v. Tatham*, (1873), L.R. 8 C.P. 482; 42 L.J.Q.P. 260; 29 L.T. 103; 1 Digest 635, 2576.

(3) *Sebright v. Hambury*, [1916] 2 Ch. 245; 85 L.J.Ch. 748; 115 L.T. 75; 18 Digest 219, 1674.

A ACTION. The plaintiff claimed £824 7s. 6d. being money paid by him to the defendant in respect of a consideration which wholly failed. The facts appear from the judgment.

B *Elson Rees* for the plaintiff.

Leonard Caplan, Q.C., for the defendant.

C ROXBURGH, J.: Twelve cases of peppermint oil were stolen by a person unknown. On or about Sept. 18, 1951, the plaintiff contracted to buy the oil from the defendant, into whose possession it had come. The plaintiff paid the price, which was £824 7s. 6d., to the defendant, and obtained delivery of the goods. The goods had to be surrendered to the true owner, as the plaintiff had no title to them, and he then sued the defendant to recover the price, on the footing of a total failure of consideration. The defendant was prosecuted for receiving stolen goods but was acquitted.

D In his defence to this present action, the defendant alleged in substance that he contracted not as principal, but as agent for a vendor, whose name was not disclosed at the time of the contract. I have already held that the plaintiff did contract with him on that footing. If the further defence that the vendor was one Williams had been made good, this action would have failed; but I have held that the principal was not Williams and that the defendant's story of his business relationship with Williams was false from start to finish. On the other hand, I cannot hold as a fact that the defendant was himself the principal, though E he may have been. More probably the thief was the principal, though it may have been the purchaser from the thief. The defendant says that, by the common law of England, he can now turn round and say: "Well, if I have lied and if Williams was not my principal, still the plaintiff has not proved that I had no principal and he cannot make me disclose his name, so I, or the principal, will keep the plaintiff's money, though, if the plaintiff were to find the principal, F he could get his money back from him and, if the principal never existed, he could get his money back from me, the defendant." I was not surprised to learn that counsel for the defendant has been unable to find any decision or even dictum to this effect. I was more surprised to learn that counsel for the plaintiff could find no decision to the contrary (but I am now satisfied that there is none) and only one dictum. The dictum is very old and is to be found in *Owen v. Gooch* G (1). In that case LORD KENYON said (2 Esp. at p. 568):

"If goods are ordered to be delivered on account of another, and after delivery the person who gave the order refuses to inform the tradesman who the person is, in order that he may sue him, under such circumstances he is himself liable."

H Counsel for the defendant has drawn my attention to unfavourable comments by high judicial authority on the series of reports in which that case appears, but none the less it is, in my view, strange that nobody, neither a text writer nor a judge, has ever made any comment on that case, which is referred to in STOREY'S LAW OF AGENCY (1839), p. 249 note. I do not propose to lay too much stress on that dictum, especially as there really are three distinct stages to be considered, and I am not directly concerned with the first two stages. It will be observed that LORD KENYON refers to disclosing the name "in order

that he may sue him". That limitation is, of course, important and it appears to me, whether the dictum is right or wrong, that it disposes of a criticism of it which counsel for the defendant made. He said that, if that were the law, there would be no need for such cases as *Hutchinson v. Tatham* (2), in which a duty to disclose the name of the principal was imported into the contract by custom on the footing that, unless imported by custom, there could be no such duty. But the two propositions are not co-terminous. The custom alleged in *Hutchinson v. Tatham* (2) was to disclose the principal's name within a reasonable time after the signing of the charterparty. That, of course, does not necessarily bear any relation to a moment of time at which somebody wants to start proceedings. Therefore, it does not seem to me that, even if I accepted the dictum of LORD KENYON without qualification, I should be doing violence to anything implicit in *Hutchinson v. Tatham* (2). However, I do not propose to embark on the question whether LORD KENYON's dictum is wholly right, partly right, or altogether wrong. It may be that there is no right to obtain the name of the principal in order that an action may be brought (that is irrelevant in this case); or, again, it may be that there is such a right. That is the first stage.

The second stage is when the defence in an action has been delivered. It so happens in this case that the defence states the name of the alleged principal, so that again is not strictly relevant, but is, I think, none the less of collateral importance. What would be the position if the defence merely said that the defendant was an agent without disclosing the name of his principal? Is the plaintiff entitled then to interrogate in order to find out the name of the principal or not? Again, strangely enough, there seems to be no direct authority on this point. I do not accept the submission of counsel for the defendant that *Sebright v. Hanbury* (3), a decision of YOUNGER, J., directly or indirectly shows that he is not. It is quite plain to my mind that YOUNGER, J., was not within measurable distance of considering the sort of problem with which I am today concerned. On the other hand, it is very strange that there is no direct authority on the point, and I propose to say nothing more about it, because in this case the defendant did disclose the name of the alleged principal. He was asked for particulars of "the said alleged Williams," who was the alleged principal, "stating his full names, his business address and/or his place of residence and his telephone number or numbers (if any)"; and the answer was:

"the said Williams was known to the defendant only by that name, and the defendant therefore, cannot particularise his name more fully. The rest of the matters requested are interrogatories and not further and better particulars."

Whether or not the defendant was bound to disclose the name of the alleged principal, once he had made the disclosure he had, in my judgment, made the representation to the plaintiff that his case at the trial would be that Williams was his principal; and I have no doubt (and in fact it was so) that the plaintiff believed that representation. On the faith of that representation, the plaintiff prepared his case in a particular manner and, indeed, did it so effectively that, by cross-examination and otherwise, he completely demolished the representation. It is equally obvious that, if the defendant had said that his principal was somebody else and had given some other description of him, the plaintiff would have prepared his case differently in the sense that he would have made researches in different quarters and would have asked different questions in cross-examination, and might or might not have succeeded in demolishing that gentleman as well. Therefore, it seems to me to be impossible to say that there was not a representation of the manner in which he was going to conduct his case, a representation on which the plaintiff relied, and, if the defendant is allowed to withdraw that representation, the plaintiff necessarily suffers detriment. In this case, however, I need not stop to decide whether that state of affairs per se would raise a case of estoppel or not, because it has gone far

beyond that. There was no question of the defendant seeking at the trial to substitute some other principal for Williams. The case was fought out. He swore that Williams was the principal; and I decided that his evidence was false.

I cannot deny that I appear to be breaking new ground. It does not seem to me that this point was under consideration, even indirectly, in any of the cases to which I have been referred; but I feel satisfied that there is no principle and no authority which precludes me from breaking this ground in the manner in which I propose to break it. It seems to me that a fundamental principle of justice requires that a defendant who has given false evidence that his principal was X should not be heard to say through his counsel in argument that his principal may have been somebody else, but he must thereafter be treated as having no principal, or, in other words, as being himself the principal. I need only add that this sort of estoppel, if that is a correct description of this fundamental principle (and I am by no means sure that it is) could not, by reason of its very nature, be pleaded, because it only arises during the course of the trial in consequence of the finding of the judge that the evidence of the defendant that X was the principal was false.

Therefore, in my judgment, this action succeeds and the plaintiff must have judgment for £824 7s. 6d. and costs.

Judgment for the plaintiff.

Solicitors: Warmingtons & Trevor Jones, agents for Partridge, Moss & Co., Twickenham (for the plaintiff); Victor Mishcon & Co. (for the defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

KING v. TAYLOR.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Hodson and Romer, L.J.J.), October 14, 15, 1954.]

Rent Restriction—Possession—Hardship—Comparative hardship—Finality of decision of county court judge—Change of circumstances pending appeal—Whether taken into consideration—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 3 (1), sched. I, para. (h), proviso.

A landlord owned two houses, one at Mitcham and the other at Shrewsbury. The house at Mitcham, which was subject to the Rent Restrictions Acts, was let, and the landlord lived with his wife in the house at Shrewsbury. Wishing to live in the house at Mitcham so as to be nearer to a married daughter who lived in London, the landlord applied to the county court for an order for possession of the house, under para. (h) of sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. At the time of the application the landlord was nearly seventy years of age and his wife was over seventy. Evidence was given on behalf of the landlord that he was in bad health, that his wife was an invalid, that he was unable to look after her, and that, if they lived at Mitcham, their daughter would be able to visit them more often and help to look after them. Evidence was given on behalf of the tenant that he was unable to find alternative accommodation. The county court judge refused to make an order for possession, on the ground that greater hardship would be caused by granting the order than by refusing to grant it. The landlord appealed. Before the hearing of the appeal, the landlord's wife died.

HELD: there being some evidence before the county court of hardship on the tenant, the refusal of the county court judge to make an order for possession was conclusive.

Coplans v. King ([1947] 2 All E.R. 393), followed.

Per curiam: a court which is asked to make an order for possession under s. 3 of and sched. I, para. (h) to the Act of 1933 on the ground of the

greater hardship being on the landlord should take into consideration all the circumstances which are before it at the hearing whether at first instance or on appeal; accordingly, on appeal from the refusal of a county court judge to make an order for possession, the Court of Appeal can take into consideration a change of circumstances which occurred while the appeal was pending, but, if the appeal were from an order for possession the Court of Appeal should consider the circumstances as they existed at the time of the hearing before the county court judge (see, e.g., p. 376, letter H, post).

Goldthorpe v. Bain ([1952] 2 All E.R. 23), distinguished.

Appeal dismissed.

AS TO RESTRICTIONS ON THE LANDLORD'S RIGHT TO POSSESSION, see HALSBURY, Halsham Edn., Vol. 20, pp. 329-334, paras. 392-399; and FOR CASES, see DIGEST, Replacement Vol. 31, pp. 708-710, Nos. 7959-7969.

Cases referred to:

- (1) *Copmans v. King*, [1947] 2 All E.R. 393; 31 Digest, Replacement, 710, 7968.
- (2) *Goldthorpe v. Bain*, [1952] 2 All E.R. 23; [1952] 2 Q.B. 455; 3rd Digest Supp.

APPEAL by the plaintiff, the landlord, from an order of His Honour JUDGE RICE-JONES, made at Croydon County Court on July 9, 1954, on the hearing of the landlord's action for possession of a dwelling-house, dismissing the action on the ground that greater hardship would be caused by granting an order for possession than by refusing to grant it. The facts are summarised in the headnote.

A. M. Hughes-Chamberlain for the landlord.

W. D. M. Sumner for the tenant.

SIR RAYMOND EVERSLED, M.R.: In my opinion it is not possible for this court to interfere with the judgment given in this case. It is a case which falls within the scope of para. (h) of sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. Cases falling within para. (h) are sometimes compendiously referred to as cases of comparative hardship. The terms of para. (h) of sched. I to the Act of 1933 are well known, but in view of certain observations which I wish to make later I will read the proviso to the paragraph. The proviso reads:

" Provided that an order or judgment shall not be made or given on any ground specified in para. (h) . . . if the court is satisfied that having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by granting the order or judgment than by refusing to grant it."

I add, again by way of reminder and in view of what I shall say hereafter, that s. 3 (1) of the same Act reads:

" No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply . . . shall be made or given unless the court considers it reasonable to make such an order or give such a judgment, and either—(a) the court has power so to do under the provisions set out in sched. I to this Act; or (b) the court is satisfied that suitable alternative accommodation is available for the tenant . . . "

It is not in doubt that, where the other conditions have been satisfied, as they were in this case, so that the only matter remaining is for the court to form a view, under the proviso to sched. I, as to the comparative hardship, then the onus is shifted to the tenant, and it is for the tenant to show that greater hardship would be caused by making the order than by declining to make it.

In *Copmans v. King* (1), this court laid it down, that, save in most exceptional circumstances, the question of comparative hardship is essentially one for the

county court judge. I think that the headnote to the case accurately states the conclusion. It reads ([1947] 2 All E.R. 393):

"The decision of the county court judge, when considering whether or not to make an order for the possession of a house within the Rent Restrictions Acts, with regard to the balance of hardship under the proviso to sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, is final and cannot be made the subject of appeal to the Court of Appeal."

At the end of his judgment LORD GREENE, M.R., said (*ibid.*, at p. 394):

"Of course, if in a case there is evidence of hardship on one side and none on the other, the county court judge can come to only one conclusion, and if he finds hardship where the facts are not sufficient to constitute hardship in law—for example, something trivial, like the absence of a view of a neighbouring hill, river, tree, or something pleasant of that kind—he makes an error in law, but, once there is evidence which in law can amount to hardship on two sides, Parliament has deliberately made the county court judge the conclusive judge of the fact which is the greater hardship."

In the present case counsel for the landlord quite properly, and also necessarily, contended that there was no evidence whatever of any hardship on the side of the tenant. I do not propose to take up time by a full recital of the facts. The landlord is, undoubtedly, a man who deserves a good deal of sympathy, and, indeed, a good deal more sympathy now than he did when the case was before the county court judge. He is approaching the age of seventy, and at the time when the matter was heard his wife (who has since died) was over seventy. They were both, as shown by doctors' evidence, in a relatively fragile state of health. The landlord lived, and still lives, in Shrewsbury, and the house where he seeks to make his home—his other house, which is now occupied by the tenant—is at Mitcham. As was pointed out on behalf of the landlord, one of the great advantages for the landlord in making the change was that one of his two daughters, a Mrs. Vogle, lives in London. Mrs. Vogle, in her evidence, said that she went once a month to see her father at Shrewsbury, which meant a long journey, and that, if her father came to live at Mitcham, the journey from her home to his would take only an hour and a half, and, therefore, she would be able to go and visit him and her mother, who was then alive, much more often. That was, obviously, a point of force and substance. On the other side, the tenant is a much younger man, and, as far as I can tell, relatively robust. He has a wife and two grown-up sons living with him, and he works in or near Mitcham. The evidence on his side was that he had not been able to find alternative accommodation. Counsel for the landlord, very naturally and properly, challenged that evidence and said that, on any kind of analysis, it was shown really to amount to nothing more than that the most casual inquiries had been made and those inquiries seemed to have been directed to furnished lodgings.

From the proviso to para. (h) of sched. I to the Act of 1933, it is plain that the question whether other accommodation is available is a relevant circumstance in considering the balance of hardship. Notwithstanding the challenge of counsel for the landlord, and notwithstanding that I am disposed with him to think that the evidence of attempts to find fresh accommodation is of a slight character, nevertheless there was some such evidence, and the county court judge would be entitled, in my view, to make use of his experience as a judge sitting in that part of London in coming to a conclusion whether the evidence given on the tenant's side of the difficulty in obtaining other accommodation was likely to be correct. The learned judge concluded his judgment by the observation:

"Great moral obligation on defendant to find another house."

Counsel for the landlord said that, unless there really was a chance of finding another house, there could be no such moral obligation. As I have said, however, I think it impossible to deny that there was evidence of a material circumstance

of hardship of some sort on the tenant's side, and, that being so, the language of the judgment of LORD GREENE, M.R., in *Coplans v. King* (1) seems to me to conclude the matter.

There is, however, another consideration, no less significant, which, in my judgment, emphasises that this court must make no order on the present appeal, except to dismiss it. Unhappily for the landlord, between the hearing in the county court and the hearing in this court his wife died and he is, therefore, left alone. It is quite plain that that circumstance must vitally affect any consideration of what the landlord's future should be, where he should live, and so forth. It must be a matter to which Mrs. Vogle, his daughter, will have given or will give most careful consideration.

Counsel for the landlord submitted that, according to MEGARRY ON THE RENT ACTS (7th edn.), p. 270, this court must consider the question in a case of this kind on the facts as they were in the county court. The passage which he relied on is as follows:

"The circumstances to be considered are those existing at the times of the hearing, and the subsequent disappearance of the predominant hardship (e.g., between the hearing and an appeal) does not affect the position."

The case cited in support of that proposition is *Goldthorpe v. Bain* (2) in this court. That was a case in which an order for possession had been made in favour of a landlord who had later died. There was no appeal, as I follow the case, from the order giving possession, but after the death of the successful plaintiff, the tenant having remained in possession, the former landlord's daughter, who succeeded her mother as landlord, proceeded to apply to enforce the judgment. The county court judge dismissed the application, holding that the order for possession was personal to the particular landlord in whose favour it had been given. On an appeal by the daughter, this court held that the order for possession was not merely personal, but enured for the benefit of the person entitled, as personal representative, heir, or beneficiary, to the estate of the former landlord. It was, however, pointed out by SOMERVELL, L.J., that, although the daughter was entitled to enforce the order, that right would be subject to the corresponding right of the tenant to apply to the judge under s. 5 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, to extend the time for giving up possession.

In so far, therefore, as it was submitted that the passage which I have read from MEGARRY ON THE RENT ACTS (7th edn.), p. 270, meant that, when the county court judge had dismissed a landlord's claim for possession and the landlord appealed, events which had occurred after the hearing in the county court were irrelevant in the Court of Appeal, *Goldthorpe v. Bain* (2) plainly does not support any such proposition. It is, strictly, unnecessary for me, in the present case, to express a final opinion about it, but, as at present advised, and having regard to the imperative language of s. 3 (1) of the Act of 1933 and the proviso to para. (h) of sched. I to the Act, it seems to me that, if in such a case as this it is shown to the court that the circumstances have changed materially (and I mean by "materially" in a way which is material in the consideration and enforcement of the provisions of the Act) since the date of the hearing before the county court, it does not by any means follow that this court is entitled to ignore that change of circumstances. In my judgment, the proper course is for the court which is asked to make an order for possession to take into consideration all the circumstances which are then before it. In the converse case, where the county court has made an order for possession, then, no doubt, the function of this court on an appeal is, prima facie, at any rate, to consider whether the order was rightly made, having regard to the facts and circumstances which were before the county court. As it seems to me, however, the situation is not the same when this court is asked to make an order for possession on the landlord's appeal; for I

take the words "the court", in s. 3 (1) of the Act of 1933 and in the proviso to sched. I. to mean "the court which is being asked to make the order."

The landlord in the present case having, unhappily, become a widower since the hearing in the county court, he and his daughter will, no doubt, consider what in his and her interests it will be best for them both to do. I think that, when they have considered the matter, there may well be a case for another application to the court, particularly if their view is that the landlord should come to live nearer to his children. If the landlord makes another application and it then transpires that the tenant, in spite of the "great moral obligation" which the county court judge thought lay on him, has, in effect, done nothing, or nothing very much, in the way of seeking other accommodation, it may be—though I will say no more—that the tenant will not be so favourably received on the future occasion as he was on the past. Subject to those more general observations, I think that we cannot interfere in the present case and that the appeal must fail.

HODSON, L.J.: I agree. The question for consideration by the learned county court judge was what is called the balance of hardship; and, there being evidence of hardship on the tenant, this appeal must necessarily fail. This court has dealt with that situation and made the position very clear by the judgment of LORD GREENE, M.R., in *Coplans v. King* (1), to which reference has already been made by SIR RAYMOND EVERSLED, M.R. I share my Lord's view as to the position of this court where a change of circumstances has to be considered. It is, of course, true that, where an order has been made for possession, the circumstances to be considered are those existing at the time of the hearing and the subsequent disappearance of the predominant hardship does not affect the position. The authority for that, if authority were necessary, is *Goldthorpe v. Bain* (2). It does not, however, follow from that, as counsel for the landlord sought to argue, that the converse is true, for in my view no court could consider the making of an order to operate in futuro without considering the changed circumstances after an application had been made before the county court judge and had failed. I agree that this appeal must be dismissed.

ROMER, L.J.: I also agree and have nothing to add on the question of the conclusive character of the decision of the county court judge on issues of comparative hardship, having regard to the decision of this court in *Coplans v. King* (1). I desire to express my concurrence with what SIR RAYMOND EVERSLED, M.R., and HODSON, L.J., have said on the second point. It is true that, if the predominant hardship lies with the landlord at the hearing before the county court judge and he obtains an order for possession, he would not lose his order merely because the predominance had shifted to the tenant before the case was heard by the Court of Appeal. Where, however, at the original hearing, the county court judge has refused an order on the ground that the predominant hardship would lie with the tenant, then, even if the Court of Appeal thought that the judge was wrong, it would not, I think, make an order for possession if it appeared that the grounds of hardship on which the landlord had originally relied had disappeared or substantially changed since the hearing; because no court, whether the county court or this court, can make an order for possession under para. (h) of sched. I to the Act of 1933 unless the conditions of the provision with regard to hardship in the proviso to the schedule are satisfied at the date when the order is made. I agree that this appeal fails.

Appeal dismissed.

Solicitors: *Perkins & Co.* (for the landlord); *W. T. Donovan* (for the tenant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

NOTE.

MORLEY AND ANOTHER *v.* WOOLFSON AND ANOTHER.

[CHANCERY DIVISION (Harman, J.), October 22, 1954.]

Practice—Chancery proceedings—Witness action in witness list—Interlocutory applications to master.

An action having been set down for trial on July 2, 1954, appeared in the list on July 26, and was fixed for hearing on Oct. 28. On Oct. 20, a summons taken out by one of the defendants asking for particulars of the statement of claim came before the master and was dismissed on the grounds (a) that para. 6 of the *Practice Direction (Witness List)* dated Apr. 2, 1954 ([1954] 1 All E.R. 946), which stated that "All applications with regard to cases appearing in the witness list are to be made to . . . the judge in charge of the list" deprived the master of jurisdiction to hear the application, and (b) that all necessary parties had not been made respondents to the application. On an application by the second defendant that the trial of the action might be postponed to enable the application for particulars to be dealt with,

HARMAN, J., said that the intention of para. 6 of the *Practice Direction* of Apr. 2, was that applications as to the hearing of cases appearing in the witness list were to be made to an indicated judge; it did not affect the ordinary practice with regard to interlocutory applications which should, as hitherto, normally be made by summons returnable before a master. In the case before him His LORDSHIP refused to postpone the hearing of the action and directed that the application for particulars should be adjourned into court to come on with the trial of the action. If the judge then thought that further particulars should be given he would so order.

Application refused.

J. G. Strangman, Q.C., and G. B. H. Dillon for the plaintiff.

Raymond Walton for the first defendant.

G. H. Crispin for the second defendant.

Solicitors: *Zeffertt, Heard & Morley Lawson* (for the plaintiff); *Miller, Clayton & Co.* (for the first defendant); *Saunders, Sobell, Greenbury & Leigh* (for the second defendant).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

HEELEX INVESTMENTS, LTD. v. INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Upjohn, J.), October 20, 21, 1954.]

Profits Tax—Exemption—Principal company subject to surtax direction—Notice requiring profits of subsidiary to be treated as profits of principal company—Exemption of subsidiary company—Finance Act, 1937 (c. 54), s. 22 (1) (2).

In 1948 a principal company gave notice to the Commissioners of Inland Revenue under s. 22 (1) of the Finance Act, 1937, requiring the profits or losses of a subsidiary company, in so far as material, in respect of chargeable accounting periods for 1947-48 and 1948-49 to be treated for the purposes of profits tax as profits or losses of the principal company in the corresponding chargeable accounting period, under s. 22 (2). Thereafter assessments to profits tax were made on the principal company in respect of the profits of the subsidiary company and of the principal company. In 1952 the Special Commissioners of Income Tax by notice under s. 21 (1) of the Finance Act, 1922, directed that the income from all sources of the principal company for the years 1946-47, 1947-48 and 1948-49 should be deemed to be the income of its members, all of whom were individuals at that time and should be apportioned among them for surtax purposes. Thereupon, under s. 31 (2) of the Finance Act, 1947, profits tax ceased to be chargeable on the principal company and the profits tax for the years mentioned above, having been paid by the principal company, was repaid by the commissioners. The Commissioners of Inland Revenue having assessed the subsidiary company to profits tax in respect of the chargeable accounting periods 1947-48 and 1948-49, and the Special Commissioners having confirmed the assessments,

HELD: no condition should be imported into s. 22 (1) of the Finance Act, 1937, limiting the right of a principal company to give notice under that section to cases in which the principal company was liable to profits tax; and, the principal company having given notice under that sub-section and the profits of the subsidiary company for the relevant years being deemed accordingly to be profits of the principal company which was exempt from profits tax, the assessments of the subsidiary company to profits tax must be discharged.

Dicta of LORD WRENBURY and LORD WARRINGTON in *Inland Revenue Comrs. v. Birmingham District Power & Traction Co., Ltd.* (1928) (141 L.T. at pp. 4, 6), applied; dictum of LORD BUCKMASTER (*ibid.*, at p. 3), not applied.

FOR THE FINANCE ACT, 1922, s. 21 (1), the FINANCE ACT, 1937, s. 22 (1) (2) and the FINANCE ACT, 1947, s. 31 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 12, pp. 237, 238, 377 and 776.

Case referred to:

(1) *Inland Revenue Comrs. v. Birmingham District Power & Traction Co., Ltd.*, (1928), 141 L.T. 1.

CASE STATED by the Special Commissioners of Income Tax.

The taxpayer company appealed against assessments to profits tax for the accounting periods Feb. 1, 1947, to Jan. 31, 1948, and Feb. 1, 1948, to Jan. 31, 1949, in the respective sums of £12,903 16s. and £7,130 4s. It contended that it was not liable to profits tax. All its ordinary share capital was held by Sideup Investments, Ltd., the principal company, of which it was, therefore, a subsidiary company. On Sept. 28, 1948, the principal company gave a notice under s. 22 (1) of the Finance Act, 1937, requiring the provisions of s. 22 (2) to be applied to the taxpayer company as regards the accounting periods under appeal. On Sept. 29, 1952, the Special Commissioners of Income Tax, by notice to the principal company under s. 21 (1) of the Finance Act, 1922, directed that income from all sources of that company for each of the years 1946-47, 1947-48 and 1948-49, be deemed to be the income of its members and be apportioned

among them. The principal company was an investment company within s. 20 of the Finance Act, 1936, and under s. 14 of the Finance Act, 1939, the Special Commissioners were bound to make directions in respect of those years. It was contended by the taxpayer company that, by reason of the notice given under s. 22 (1) of the Finance Act, 1937, and by virtue of s. 22 (2), its profits were to be treated for the purposes of profits tax as if they were profits of the principal company and that, accordingly, there were no profits in its hands assessable to profits tax. It was contended by the Crown that, as a result of s. 31 (2) of the Finance Act, 1947, the principal company was not within the charge to profits tax for the periods for which the directions had been given under s. 21 (1) of the Act of 1922 and, accordingly, that s. 22 (2) of the Act of 1937 was inoperative for those periods, since a supposition was inherent in that sub-section that the principal company was liable to profits tax. The commissioners held that the effect of the directions of the Special Commissioners of Income Tax was to remove the trade or business of the principal company from the charge to profits tax imposed by s. 19 (1) of the Finance Act, 1937, that s. 22 (1) of that Act was, therefore, inoperative for the periods to which the directions applied, because a condition was to be implied for the operation of that provision that the principal company's trade was subject to profits tax. They dismissed the appeal and confirmed the assessments. The taxpayer company appealed.

L. C. Graham-Dixon, Q.C., and J. L. Creese for the company.
Geoffrey Cross, Q.C., and Sir Reginald Hills for the Crown.

UPJOHN, J. : This appeal relates to profits tax, and the case depends on a short point of construction of s. 22 of the Finance Act, 1937, which introduced the tax for the first time under its then name of national defence contribution. Section 19 of the Finance Act, 1937, introduced the charge of what is now called profits tax. That section has been amended several times. The name of the tax has been changed. Its duration has been extended. It was originally for five years but it is still with us. However, nothing here turns on those amendments, and s. 19 (1) in its original form reads:

"There shall be charged, on the profits arising in each chargeable accounting period falling within the five years beginning on Apr. 1, 1937, from any trade or business to which this section applies, a tax (to be called the 'national defence contribution') of an amount equal to five per cent. of those profits in a case where the trade or business is carried on by a body corporate and four per cent. of those profits in any other case."

Sub-section (2) provides that the trades and businesses to which the section applies are

"all trades or businesses of any description carried on in the United Kingdom, or carried on, whether personally or through an agent, by persons ordinarily resident in the United Kingdom."

Sub-section (3) exempted persons carrying on professional avocations, and sub-s. (5) statutory undertakers, i.e. those who performed the services of supplying water, gas, electricity or hydraulic power, or were engaged in the provision or maintenance of canals, waterways, harbours, docks, conservancy of rivers, the carriage of goods by railway, etc. In sub-s. (6) there is an express exemption of the British Broadcasting Corporation.

Section 20 laid down the principles concerning the computation of profits and the accounting periods. Unlike income tax, which is levied in respect of every financial year ending on Apr. 5, the relevant chargeable accounting period was, broadly speaking, the ordinary trading year of each particular company. Section 21 (1) provided:

"Where the profits arising in any chargeable accounting period from a trade or business do not exceed £2,000 . . .",

those profits were not chargeable to the profits tax. Section 22 provides:

A " (1) Where a body corporate resident in the United Kingdom is a subsidiary of another body corporate so resident (hereafter in this section referred to as 'the principal company') the principal company may, by notice in writing given to the Commissioners of Inland Revenue before the expiration of any chargeable accounting period of the subsidiary or within two months thereafter, require that the provisions of sub-s. (2) of this section shall apply to the subsidiary as respects that period and all subsequent chargeable accounting periods throughout which it continues to be a subsidiary of the principal company: Provided that, if the first chargeable accounting period of the subsidiary ended before the passing of this Act, a notice given as respects that period within two months from the passing of this Act shall have effect for the purposes of this section as if it had been given within two months from the end of that period. (2) Where such a notice is given, the profits or losses arising in any chargeable accounting period to which the notice relates from the trade or business carried on by the subsidiary shall be treated, for the purpose of the provisions of this Act relating to the national defence contribution . . . as if they were profits or losses arising in the corresponding chargeable accounting period from the trade or business carried on by the principal company."

Sub-section (3)* defined a "subsidiary company". It is admitted that the taxpayer company is and at all material times was a subsidiary of a company known as Sidcup Investments, Ltd.

D On Sept. 28, 1948, Sidcup Investments, Ltd. (to which I will refer as "Sidcup") gave a notice, under s. 22 (1), supra, requiring that the provisions of s. 22 (2) should apply to the taxpayer company for the relevant years. The notice was not given within the time prescribed by s. 22, but that section was amended to provide that notices could be given within six months instead of two months, or such longer time as the Commissioners of Inland Revenue might allow,† and I am told that in fact the period was extended in the present case. The notice given has been treated as a valid notice for the purposes of s. 22. When given, such a notice applies, not only in respect to the relevant period for which it is given, but to all subsequent chargeable accounting periods, and it comes to an end only when the taxpayer company ceases to be a subsidiary of Sidcup.‡ As a result of the giving of the notice, assessments to profits tax for the years 1946-47, 1947-48 and 1948-49, which I will call the relevant years, were made on E Sidcup in respect of the profits of both companies. There was no appeal, and tax was paid on those assessments.

Under the Finance Act, 1947, the scope of the profits tax was to some extent enlarged, in that different rates of tax were prescribed according as the profits were retained by the company or were distributed by it. In another way the scope of the tax was somewhat reduced, because, whereas under the original G Act individuals carrying on business, not being exempt as engaged in professional occupations, were equally liable with corporations carrying on business, although at a different rate, by s. 31 (1) individuals and partnerships were exempted from the profits tax. Down to that date a company might have been subject both to profits tax and to a direction under s. 21 (1) of the Finance Act, 1922, directing H that, in certain cases, its profits should be subjected to surtax as though it was an individual. But, when individuals ceased to be subject to profits tax, it appeared to the legislature that, if any direction was given under the Finance Act, 1922, treating the profits of the company as though they were those of an individual, the company should be exempt from profits tax. Section 31 (2) of

* Now replaced by s. 42 (1) of the Finance Act, 1938.

† Finance Act, 1938, s. 42 (4).

‡ Finance Act, 1938, sched. IV, Part II, para 6.

the Act of 1947 provided in relation to the principal charging section under the Finance Act, 1937:

"The said s. 19 shall not apply to any trade or business carried on by a body corporate during any chargeable accounting period if, for a year or period which includes, or for years or periods which together include, the whole of the chargeable accounting period, the actual income of the body corporate from all sources is apportioned under or for the purposes of s. 21 of the Finance Act, 1922, and all the persons to whom it is apportioned are individuals."

Pursuant to s. 21 (1) of the Finance Act, 1922, on Sept. 29, 1952, the Special Commissioners by notice to Sidcup directed that its income from all sources for the relevant years should be deemed to be the income of its members and the amount thereof should be apportioned among the members. It is common ground that all the members of Sidcup were individuals at that time. Accordingly, assuming that direction to become final and binding for the relevant years, Sidcup will be exempt from profits tax under and by virtue of s. 31 (2), *supra*.

Counsel for the company took a subsidiary point that the direction under the Finance Act, 1922, was under appeal and had not become final and binding, and that the assessments involved are, therefore, premature. However, I indicated that I would decide that point if it were pressed, but I should be disinclined to decide the main point if I decided the subsidiary point in the company's favour, for that would mean that the judgment on the important point would be obiter. Counsel therefore abandoned his subsidiary point, and this appeal has been argued on the footing that the direction under the Finance Act, 1922, has become final and binding.

In respect of the relevant years, on the footing that Sidcup was exempt from the payment of profits tax, the Commissioners of Inland Revenue have repaid to Sidcup the profits tax already paid by them, though counsel for the Crown concedes that they might not have been technically compellable to do so. However, they have raised separate assessments of profits tax on the company for two of the relevant years, and this appeal challenges the validity of those assessments. The Crown bases the assessments on the ground that, where the principal company, Sidcup in this case, is itself not liable to profits tax, then s. 22 (2) of the Finance Act, 1937, can during that period have no operation: Therefore, the profits of the company cannot be treated as profits of the principal company, but remain its own profits on which it is assessable to profits tax. That is the short point I have to determine.

Counsel for the Crown concedes that a notice may be given under s. 22 (1), although the principal company is exempt, e.g., because it is a statutory undertaking, or, as here, because a direction has been made on it under the Act of 1922. But although the notice applies during the period for which it is given, and during all subsequent chargeable accounting periods, he submits that it can have no operation during the period for which the company is exempt for whatever reason that may be. He submits that the words in s. 22 (2) of the Act of 1937

"the profits or losses arising in any chargeable accounting period . . . shall be treated, for the purpose of the provisions of this Act relating to the national defence contribution",

mean in effect for the purpose of charging those profits to profits tax, and it is inherent in that section, or there is an assumption underlying that section, that the principal company is itself to be liable in respect of the relevant period to profits tax for the section to operate. In other words, this is really a collection section, which assumes that the principal company is liable, and, if the principal company is not so liable, it can have no operation. That is the whole point.

The argument is supported by the decision of the House of Lords in *Inland Revenue Comrs. v. Birmingham District Power & Traction Co., Ltd.* (1). That case arose on a somewhat similar provision in the Finance Act, 1920, which

created the corporation profits tax. Under the provision in s. 53 (3) of the Act of 1920, verbally different, but in substance very much the same as that in s. 22 of the Act of 1937, a parent company could give a notice requiring the profits of a subsidiary company or companies to be assessed with those of the parent company for the purposes of that tax. The Birmingham District Power and Traction Co. was an exempt company for the period from Jan. 1, 1920, to Dec. 31, 1922. That appears from s. 52 (2) (b) (i) of the Finance Act, 1920. Therefore, it was exempt for the relevant period. It had three subsidiary companies which were not exempt. The parent company gave a notice which was accepted by the Inland Revenue. An attempt was made by assessment on the parent company to obtain tax on the profits of the subsidiary companies. Those assessments were upheld by the commissioners, and by ROWLATT, J., but were discharged by the Court of Appeal and the House of Lords on the simple ground that the company was exempt.

In the course of the speeches in the House of Lords the question was canvassed, although the matter was completely obiter, whether the notice given by the principal company was a valid notice having regard to the fact that the principal company was itself exempt. LORD BUCKMASTER said (141 L.T. at p. 3):

"The judgment of the Court of Appeal means that the profits which can properly be charged with tax in the hands of the company by whom those profits are earned are exempted from taxation by reason of the special character of the company which holds its ordinary shares. This position is of course due to the application of the respondents made under s. 53 (3) having been as I think erroneously granted by the commissioners."

That is not quite verbally accurate. What the learned Lord obviously means is the notice having been accepted as valid by the commissioners.

"It must be remembered that the respondent company had been expressly exempted from Jan. 1, 1920, to Dec. 31, 1922, but sub-s. (3) assumes that the company entitled to make the application is the company whose profits are subject to the provisions of the statute, for the profits of the subsidiary company are to be treated for the purposes of the Act as the profits of the principal company. The purposes of the Act do not in this case apply to the profits of the principal company at all and although there is underlying the sub-section the assumption that assessment is possible upon the company that makes the application this is impossible if the company satisfies the conditions mentioned in s. 52 (2) (b) (i). Further, the provisions at the end of sub-s. (3), providing that the subsidiary companies shall not be separately assessed, to my mind suggests that there is to be an assessment on the company that makes the application, while the concluding words of the sub-section, which relate to the amount of tax that is to be payable by the principal company, assume that the result of the application is that some tax at least must be levied from them. The application, however, having been made and granted and the assessments on the subsidiary companies discharged on that basis, it is necessary to consider what is the right conclusion upon the hypothesis that the application was rightly made."

That passage affords strong support for the view submitted by counsel for the Crown. LORD SUMNER delivered a speech of two words (*ibid.*, at p. 4) and LORD CARSON one of three words (*ibid.*) agreeing with LORD BUCKMASTER, but we do not know whether they also agreed with LORD BUCKMASTER's obiter dicta which I have just read.

LORD WRENBERY plainly did not accept LORD BUCKMASTER's view. He said (*ibid.*, at p. 4):

"In my opinion the appellants fail. The Finance Act, 1920, s. 52 (2) (b) (3), defines a company by words which include the Birmingham District Power Co. The company is therefore within the Act. The proviso con-

tained in s. 52 (2) (b) (i) enacts that 'this part of this Act shall not' during a relevant time apply to the profits of a company which carries on certain defined undertakings of which the undertaking of the Birmingham company is one. It results that the company is within the Act, but its profits are not. Being within the Act the company could and did make an application under s. 53 (3), the result of which was that the profits of the three subsidiary companies are to be treated 'for the purposes of this part of this Act as being the profits' of the Birmingham company as if the subsidiary companies were branches of the Birmingham company. The profits of the Birmingham company are not assessable under the Act. It follows that the profits of the subsidiary companies which are to be 'treated for the purposes of this part of this Act as being the profits of the principal company' are not assessable."

It is quite plain from that that LORD WRENBURY was giving a much more literal construction to the Act, and refused to import any underlying assumption such as the one LORD BUCKMASTER was prepared to introduce.

LORD WARRINGTON was of the same opinion as LORD WRENBURY although he put the matter in rather a different way. He said (*ibid.*, at p. 6):

"The only remaining point to consider is whether a company, the profits of which are exempt from taxation, is capable of making an application under the section in question. There is no exception in terms of such a company from the generality of the expression 'a company' and I cannot infer such an exception from the fact that its absence produces a result which may not have been foreseen."

Apart from the fact that all the expressions of opinion I have read were obiter, one cardinal distinction between that case and this is that, there, at the time the notice was given, everyone knew that the company was an exempt company. In the present case, at the time when the notice was given and acted on, everyone was bound to assume that Sidecup was not an exempt company. I do not know whether LORD BUCKMASTER would have expressed in a case such as this the views which have been quoted previously.

With all respect to the arguments addressed to me, and with all respect to the observations of LORD BUCKMASTER, it seems wrong in a taxing statute to introduce any underlying assumption, or any inherent idea, unless the words of the statute compel one to do so. It seems to me that the words here are quite plain. A notice can be given and will continue to operate for the stated period. Where the notice is given, then, for the purposes of the Act—not merely of s. 19 or anything of that sort—the profits of the subsidiary company must be treated as the profits of the principal company. To introduce any underlying assumption is to place a restriction on the meaning of the words "principal company", because the essential part of the argument is that it is only where the principal company is itself liable that this section operates. I see nothing whatever in the section to justify that construction. It seems to me that any company, provided it is resident in the United Kingdom, may give a notice. No other restriction is contained in s. 22 (1). Then, when the notice is given, it automatically follows that the profits of the subsidiary companies of that principal company must for the purposes of the Act be treated as the profits of the principal company. If, for example, the principal company is a statutory undertaker, or is subject to some direction under the Finance Act, 1922, it cannot itself be taxed because it is exempt.

In my judgment, the commissioners came to a wrong conclusion on the matter and these assessments were not properly made. Accordingly, the appeal will be allowed, the assessments to profits tax must be discharged, and the Crown must pay the costs of the appeal.

Appeal allowed.

Solicitors: *Titmuss, Sainer & Webb* (for the company); *Solicitor of Inland Revenue*.
[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

STEVENS v. BRITTEN.

COURT OF APPEAL (Sir Raymond Evershed, M.R., Hodson and Romer, L.J.J.),
October 15, 18, 1954.]

Partnership—Dissolution—Indemnity of outgoing partner—“Partnership debts and liabilities”—Income tax—Income Tax Act, 1952 (c. 10), s. 144 (1).

A The plaintiff and the defendant were formerly partners carrying on a business in the name of a firm. By a deed of dissolution dated Feb. 26, 1951, the partnership was dissolved with effect from Dec. 10, 1950, and the plaintiff, who retired from the partnership, assigned his interest in the business to the defendant. It was provided by cl. 4 of the deed of dissolution that: “The continuing partner [the defendant] hereby covenants with the retiring partner [the plaintiff] that he will (a) duly pay and satisfy all debts and liabilities of the said partnership and will at all times hereafter keep the retiring partner indemnified against the said debts and liabilities . . .”

B An assessment of sched. D tax for the year 1950/51 was made in the name of the firm and the plaintiff was required to pay £37 9s. 6d., i.e., half of the assessment. On Mar. 13, 1954, the plaintiff paid this sum to the collector of taxes and obtained a receipt for the payment. The plaintiff now sued to recover the sum from the defendant under cl. 4 (a) of the deed. The defendant

C denied liability.

HELD: the tax assessed in the name of the firm was a partnership debt or liability within the meaning of cl. 4 (a) of the deed of dissolution, and the plaintiff was entitled to recover the amount, i.e., £37 9s. 6d., from the defendant.

D Appeal allowed.

EDITORIAL NOTE. SIR RAYMOND EVERSLED, M.R., indicates in his judgment (at p. 386, letter A, post) that the position in law is the same, for the purposes of this case, whether the income tax legislation applicable to the tax in question was that enacted by the Income Tax Act, 1952, or the enactments which the Act of 1952 replaced. As the assessment to tax was for the tax year 1950/51 the earlier legislation (r. 10 of the Rules applicable to Cases I and II of sched. D to the Income Tax Act, 1918) applied to the tax assessed (see s. 527 of the Income Tax Act, 1952; 31 HALSBURY'S STATUTES (2nd edn.) 491), though the collection provisions of the Act of 1952 would apply to the collection of the tax which was paid in March, 1954 (see, *ibid.*, s. 528 (1) (a)). The decision is, however, authority in relation to the similar tax position under the Act of 1952, and s. 144 of that Act is the enactment principally considered in the judgments.

E AS TO THE EXTENT OF LIABILITY UNDER CONTRACTS OF INDEMNITY, see HALSBURY, Hailsham Edn., Vol. 16, p. 17, para. 14.

F FOR THE INCOME TAX ACT, 1952, s. 144 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 31, p. 141.

G FOR THE INCOME TAX ACT, 1918, sched. I, sched. D, r. 10 of the Rules applicable to Cases I and II, see *ibid.*, Vol. 12, p. 163.

Cases referred to:

- (1) *Income Tax Comrs. v. Gibbs*, [1942] 1 All E.R. 415; [1942] A.C. 402; 111 L.J.K.B. 301; sub nom. *Inland Revenue Comrs. v. Gibbs*, 166 L.T. 345; sub nom. *R. v. Income Tax General Comrs., Ex p. Gibbs*, 24 Tax Cas. 221; 2nd Digest Supp.

- H (2) *Watson & Everitt v. Blunden*, (1933), 18 Tax Cas. 402; Digest Supp.

APPEAL by the plaintiff against an order of His Honour JUDGE GORDON CLARK at Guildford County Court, made on July 8, 1954, whereby he dismissed the plaintiff's claim to recover £37 9s. 6d. under a covenant for indemnity against partnership debts. The facts appear in the headnote. The county court judge held that income tax was not a partnership debt, that the assessment in the name

of the partnership was only a piece of machinery and that income tax was a personal liability of the partners.

L. B. Schapiro for the plaintiff.

G. Ellenbogen for the defendant.

SIR RAYMOND EVERSHED, M.R., stated the facts and continued: We have been referred to sections of the Income Tax Act, 1952. Whether the provisions of that Act in strictness would be applicable to all the various problems which arise when the tax was assessed and eventually paid I do not think matters because it appears from what we have been told that s. 144 of the Income Tax Act, 1952, is a re-enactment of what previously was r. 10 of the Rules applicable to Cases I and II of sched. D of sched. I to the Income Tax Act, 1918; and if the case is not strictly within s. 144 of the Act of 1952 it would fall within r. 10. It seems plain from s. 144 that in the case of persons carrying on business in partnership it is an obligation of what is called in s. 144 (2) (c) "the precedent acting partner" to make a return of the income tax for which the firm is chargeable in respect of the firm's profits. Section 144 (1) reads:

"Where a trade or profession is carried on by two or more persons jointly, the tax in respect thereof shall be computed and stated jointly and in one sum, and shall be separate and distinct from any other tax chargeable on those persons or any of them, and a joint assessment shall be made in the partnership name."

From that it seems to follow as the night the day that the precedent partner having fulfilled his obligation of making his return there is then an assessment in the name of the partnership firm, a joint assessment for the tax chargeable in respect of the trading profits. By s. 223 of the Act of 1952 (formerly s. 20 of the Act of 1918) the partners in a firm may, if they so desire, for the purpose of their partnership assessment claim any relief to which they are entitled under any other parts of the income tax legislation in so far as those reliefs have not been already allowed to them under what I will call their private or individual assessments; and if that be done the result is to reduce by the total of the reliefs of all the partners the amount for which the partnership is chargeable. I have used the word "partnership" because that is the word which is to be found in s. 144, but it is axiomatic that generally speaking a partnership in English law is merely a compendious description of the individual persons who compose the firm.

In *Income Tax Comrs. v. Gibbs* (1) there was some discussion of the significance of the use of the word "partnership" in the Income Tax Acts. As LORD MACMILLAN observed, for example ([1942] 1 All E.R. at p. 425):

"Justification is thus not wanting for the view expressed by ROMER, L.J., in *Watson & Everitt v. Blunden* (2) (18 Tax Cas. at p. 409) that for taxing purposes: 'A partnership firm is treated as an entity distinct from the persons who constitute the firm'."

When, however, the question is one of liability, in the sense of liability at law for payment of the tax and for the penalties in the case of non-payment, it seems clear that the individuals are themselves liable for the "partnership" tax. It seems equally clear that their liability is joint, though not, be it observed, joint and several. I think the legal position which I have tried to state by reference to the sections of the Act of 1952 is correctly set out in SIMON'S INCOME TAX (2nd edn.), vol. 1, p. 337, where I find the following:

"The tax assessed in the firm name is a partnership debt for which all who were partners at the time when the debt was incurred, or who have held themselves out to the Revenue to be such, are jointly liable. This means that any or all of those persons may be sued for the whole of the tax due (when the assessment becomes final) without reference to their respective shares under the partnership agreement."

The effect of s. 223 in regard to reliefs is stated on p. 338 of the volume previously mentioned, and that statement is in accord with what I have already said on that section.

A I return, therefore, to the facts of the present case. It appears that the collector of taxes, as I dare say had been the practice, looked to each partner for half the sum comprised in the partnership assessment, and the receipt which the plaintiff has produced indicates that the plaintiff paid one half of the assessed amount and I assume the defendant paid the other half. In law, however, both partners were jointly liable for the whole and if the plaintiff had failed to pay this sum of £37 9s. 6d. the collector of taxes could have demanded and recovered it from the defendant, and, equally, if the defendant had failed to pay his share it could have been recovered from the plaintiff. In these circumstances was this sum which the plaintiff paid within the ambit of cl. 4 (a) of the deed? I find it impossible to come to any other conclusion than that it was; for the amount due to the Crown for income tax was a liability of the two partners jointly and as such it was a partnership debt in the ordinary usage of words. It seems to me, therefore, to follow that the phrase "all debts and liabilities of the said partnership" must comprehend a debt of this kind for which both partners were liable and which, let it be added, was a debt which owed its existence wholly and exclusively to the trading operations of the two partners without regard to what their private resources might have been.

B The learned county court judge took another view. In the brief note of the judgment, which we have, he said that in his view the argument that this was a partnership debt was not sustainable. He said: "I do not think it is a partnership debt in that sense of the word", and he was referring to the passage in SIMON'S INCOME TAX which I have already read. According to the note which he has D been good enough to give us, the county court judge said:

"VISCOUNT SIMON, L.C., went on [in *Income Tax Comrs. v. Gibbs* (1) ([1942] 1 All E.R. at p. 422)]: 'by r. 10 when a trade is carried on by two or more persons jointly . . . a joint assessment is made in the partnership name'. I agree with counsel for the defendant that this is a matter of machinery. E for the purposes of assessment only."

With all respect, I am unable to agree with that conclusion. In a sense you can say, I suppose, that it is a matter of machinery, but when you are considering the impost of taxes the distinction between machinery and liability is not always substantial. The question is: Who was liable for this tax? And the tax being a F tax due in respect of trading profits and nothing else it seems to me not only as a matter of machinery but also as a matter of substance that this was a partnership liability.

G I, therefore, have come to the conclusion that this appeal ought to be allowed. Whether the effect will be to re-open in any respect the accounts between the retiring and continuing partner I do not know. I can understand the point of view of the defendant that on this view he is paying the whole tax, whereas it might be that the profits had been shared on a different assumption. Whether, therefore, he can recover anything, I need not say, but I should observe that cl. 2* H may be a difficulty in his way. I am, however, satisfied in my mind that it is impossible, whatever may have been in the mind of the defendant, to read cl. 4 (a) so as not to include an indemnity for this sum. I think it could be done only by reading into the clause the words "other than income tax" and it need not be said that, according to ordinary principles of construction, only the most cogent and powerful reasons to be derived from an examination of other parts

* Clause 2 reads: "The retiring partner [the plaintiff] hereby releases the continuing partner [the defendant] and the continuing partner hereby releases the retiring partner from all actions claims and demands in relation to the said partnership and from all the covenants clauses and agreements matters and things in the said partnership deed contained."

of the deed and the surrounding circumstances could possibly justify such an insertion into the written terms of the document. I think there is no basis which would justify such a reading into the plain language. For these reasons I have come to the conclusion that the judgment below was wrong and that the plaintiff should have obtained judgment for £37 9s. 6d.

HODSON, L.J., stated the facts and continued: The only question which had to be considered and which was decided adversely to the plaintiff by the learned county court judge was whether the words "debts and liabilities" in cl. 4 (a) of the deed of dissolution include this sum of income tax payable by the partnership. That sum of income tax was, I think, clearly a debt due to the Crown and none the less a debt because the actual amount of tax for which the partners may be personally liable varies with the circumstances of each partner. To my mind it seems that there is no escape from that position and, accordingly, the plaintiff ought to have judgment for the sum claimed.

ROMER, L.J.: I agree. It seems to me that as a general proposition it is impossible to deny that a sum due for tax pursuant to an assessment made on a partnership under what is now s. 144 (1) of the Income Tax Act, 1952, constitutes a debt or liability of the partnership in whose name the assessment is made; because each partner is liable to pay the whole just as much as each partner is liable to pay the whole of any sum due for rates or any other debt which has been incurred in carrying on the business of the partnership. Indeed, counsel for the defendant himself was somewhat impressed, as the discussion proceeded, with that view and attempted to take the point that as a matter of construction of the dissolution agreement one could read the phrase "all debts and liabilities of the partnership" as being confined to ordinary trading debts and liabilities, or, at all events, such debts and liabilities as do not depend in any way in their ultimate evaluation on any personal characteristic or qualification of an individual partner. To do that, however, would be to take such liberties with the terms of the document as no canon of construction of which I have heard can justify. Where one finds language which is plain and unequivocal as, in my opinion, is cl. 4 (a), in relation to the debts and liabilities of the partnership, no court has any right to inject into the language used something which is not there merely because one of the partners against whom the clause according to its ordinary language operates thinks it operates harshly and unfairly. Whether it does so operate I express no opinion because I do not know what the facts were as between the parties themselves. I accordingly agree with my brethren that this appeal must be allowed.

Appeal allowed.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Gilbert H. White & Co.*, Guildford (for the plaintiff); *Gibson & Weldon*, agents for *Macpherson & Lawson*, Hindhead (for the defendant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

DEVERALL v. GRANT ADVERTISING, INCORPORATED.

[COURT OF APPEAL (Jenkins, Hodson and Romer, L.J.J.), October 21, 22, 25, 1954.]

Company—Foreign company—Service of writ on company—No place of business in Great Britain—Service at address alleged to be former place of business—

Validity of service—Companies Act, 1948 (c. 38), s. 412.

A The plaintiff commenced an action against a company which was incorporated and resident in the United States of America and purported to serve the writ on the company by leaving a copy of the writ at an address in London which was, he alleged, a "place of business established by the company in Great Britain" within s. 412 of the Companies Act, 1948.

B The allegation that the company had established a place of business in Great Britain rested on the plaintiff's own duties and operations as regional director of the company for the sterling area, a post from which he had resigned and which had ceased to exist before the alleged service of the writ. The defendant company having applied to set aside service of the writ on the ground that it had not been validly served,

C HELD: (i) on the facts, the plaintiff had failed to show that the defendant company had ever had a place of business in Great Britain and service of the writ must be set aside.

D (ii) in the proviso to s. 412 of the Companies Act, 1948, the words "place of business established . . . in Great Britain" referred to such a place so established at the time of the alleged service and, even if it were assumed that the company had formerly had such a place of business, the alleged service was ineffective because the company did not have a place of business in Great Britain at the time of the alleged service.

Sabatier v. Trading Co. ([1927] 1 Ch. 495) distinguished.

Appeal allowed.

E AS TO SERVICE OF PROCESS ON A FOREIGN COMPANY, see HALSBURY, Simonds Edn., Vol. 6, p. 842, para. 1726.

Cases referred to:

(1) *Sabatier v. Trading Co.*, [1927] 1 Ch. 495; 96 L.J.Ch. 211; 136 L.T. 574; Digest Supp.

F (2) *Employers' Liability Assurance Corpn. v. Sedgwick Collins & Co.*, [1927] A.C. 95; 95 L.J.K.B. 1015; sub nom. *Sedgwick Collins & Co., Ltd. v. Rossia Insurance Co. of Petrograd*, 136 L.T. 72; Digest Supp.

H (3) *Porter v. Freudenberg, Kreglinger v. Samuel (S.) & Rosenfeld, Re Morten's Patents*, [1915] 1 K.B. 857; 84 L.J.K.B. 1001; 112 L.T. 313; Digest, Practice, 329, 481.

G APPEAL by the defendant company, a company incorporated and domiciled in the United States of America, from an order of VAISEY, J., dated June 30, 1954, dismissing an application by the defendant company to set aside the purported service of the writ of summons in an action.

H The plaintiff had purported to serve the writ in accordance with s. 412 of the Companies Act, 1948, by delivering a copy of the writ at 36, Grosvenor Street, London, where, he alleged, the defendant company had formerly carried on business. The defendant company contended, inter alia, (a) that it was not an overseas company, within the meaning of the Companies Act, 1948, s. 406; (b) that 36, Grosvenor Street was not a place of business established by the company in Great Britain; and (c) that there had been no service on any officer of the defendant company in accordance with R.S.C., Ord. 9, r. 8. VAISEY, J., held (i) that the defendant company had, at some time, established a place of business at 36, Grosvenor Street, London, and (ii) that, for the purposes

of s. 412 of the Act of 1948, it was immaterial whether or not the defendant had a place of business at that address at the date of the service of the writ; and, accordingly, he held that the writ was validly served.

J. G. S. Hobson for the defendant company.

N. E. Wiggins for the plaintiff.

JENKINS, L.J.: This is an appeal by the defendant company, Grant Advertising, Incorporated, a company incorporated under the laws of the State of Texas in the United States of America, and resident in that country, from an order of VAISEY, J., dated June 30, 1954, refusing an application by the defendant company to set aside the service on the company of the writ in an action brought against the company by one Peter Edmund Deverall. A

The defendant company, which I shall for convenience call "the American company," carries on the business of practitioners in advertising, and carries on that business not only in the United States of America, but elsewhere, by means of a large number of subsidiary companies incorporated under the appropriate local laws or unincorporated branches in many parts of the world. The subsidiaries of the American company include a company called Grant Advertising, Ltd., an English company which carries on business here, and which has a place of business, or office, at 36, Grosvenor Street, London, W.1. C
The relief claimed by the writ in question concerns the amounts due, or alleged to be due, to the plaintiff, Peter Edmund Deverall, under an agreement dated Feb. 1, 1953, whereby, for the consideration therein mentioned, he agreed to resign the office, which he had theretofore held for a matter of six or seven months, of regional director of the American company in the sterling area, and also the offices, which he had concurrently held, of director and chairman of directors of the English company. D
The service of the writ relied on by the plaintiff consisted of leaving a copy of it at 36, Grosvenor Street, and that mode of service is sought to be justified, and was successfully justified before the learned judge, on the ground that 36, Grosvenor Street was, on the facts of the case, a place of business established by the American company in Great Britain within the provisions regarding overseas companies contained in Part X E of the Companies Act, 1948, and, in particular, s. 412 of that Act. Admittedly, if the service relied on could not be justified by reference to s. 412 of the Act, it must have been bad service.

I should at this point refer briefly to the sections in Part X of the Act dealing with service. Section 406 is in the following terms: F

"The next eight following sections shall apply to all overseas companies, that is to say, companies incorporated outside Great Britain which, after the commencement of this Act, establish a place of business within Great Britain, and companies incorporated outside Great Britain which have, before the commencement of this Act, established a place of business within Great Britain and continue to have an established place of business within Great Britain at the commencement of this Act." G

Section 407 (1) requires overseas companies to deliver to the registrar of companies for registration certain documents and particulars, the relevant requirement, in s. 407 (1) (c), being:

"the names and addresses of some one or more persons resident in Great Britain authorised to accept on behalf of the company service of process and any notices required to be served on the company." H

The next relevant section is s. 412, which provides:

"Any process or notice required to be served on an overseas company shall be sufficiently served if addressed to any person whose name has

been delivered to the registrar under the foregoing provisions of this Part of this Act and left at or sent by post to the address which has been so delivered: Provided that—(a) where any such company makes default in delivering to the registrar the name and address of a person resident in Great Britain who is authorised to accept on behalf of the company service of process or notices; or (b) if at any time all the persons whose names and addresses have been so delivered are dead or have ceased so to reside, or refuse to accept service on behalf of the company, or for any reason cannot be served;

a document may be served on the company by leaving it at or sending it by post to any place of business established by the company in Great Britain."

Section 414 makes it an offence for an overseas company not to comply, inter alia, with the provisions of s. 407:

"If any overseas company fails to comply with any of the foregoing provisions of this Part of this Act the company, and every officer or agent of the company who knowingly and wilfully authorises or permits the default, shall be liable to a fine not exceeding £50, or, in the case of a continuing offence, £5 for every day during which the default continues."

The American company did not comply with the provisions of s. 407 for the simple reason that, whether the company were right or wrong, it never occurred to the company that it had established a place of business in Great Britain. Accordingly, if the American company had established such a place of business, the appropriate mode of service was that indicated by the proviso to s. 412, that is to say, leaving the document in question at or sending it by post to any place of business established by the company in Great Britain. In these circumstances, two questions have been argued both before the learned judge and before us. The first question is whether the American company had at any time established a place of business in Great Britain, the place suggested, if there was one, where the company had so established a place of business being 36, Grosvenor Street. The second question arises in this way. Admittedly, the allegation that the American company had established a place of business at 36, Grosvenor Street depends entirely on the duties assigned to the plaintiff as director of the American company for the sterling area, and the activities he pursued as the holder of that office at 36, Grosvenor Street. As I have already mentioned, he resigned that office on Feb. 1, 1953. Thereafter, admittedly, nothing was going on at 36, Grosvenor Street, and there were no physical indications at that address, on the strength of which it could be claimed that it was a place of business established by the American company. The second question, therefore, is whether, even if the plaintiff were to succeed in showing that the American company had at any time established a place of business at 36, Grosvenor Street, the service relied on could be good inasmuch as, admittedly, 36, Grosvenor Street had ceased to be a place of business established by the American company before the date on which the writ was served.

I will deal with those questions in the order in which I have stated them. Had the American company at any time established a place of business in Great Britain? As I have stated, the allegation that it had done so depends entirely on the plaintiff's duties and operations as regional director of the American company for the sterling area. So far as the premises, 36, Grosvenor Street, themselves are concerned, there was never any visible sign or physical indication whatsoever that those premises were a place of business of the American company. I understand the premises to have been held by a Mr. Grant, the president of the American company, and let by him, the effect of the various lettings or sub-lettings being that parts of the building were let to

persons or firms who have nothing whatever to do with either company, and the remainder was occupied by the English company for the purposes of the English company's business. So far, then, there is nothing to suggest that this was a place of business of the American company. It was the place of business of the English company and nothing else, and it is not suggested that the English company was carrying on anything other than its own business. The plaintiff, however, claims that his presence on the premises, and his activities as regional director for the sterling area, did have the effect of establishing a place of business of the American company in Great Britain; and it is a somewhat unusual feature of this case that the question depends on the activities of the plaintiff himself. As I have said, the American company had many subsidiaries and branches. Those in the sterling area, of which the plaintiff was appointed regional director, comprised, or included, the English company, a South African limited company, and unincorporated branches in India, Hong Kong and Pakistan. It appears that the plaintiff was appointed to this office of regional director in, I think, June, 1952, and he held such office until Feb. 1, 1953, when he resigned. During that period he was absent from this country for a month or five weeks touring in the region for which he had been made director. In order to arrive at a conclusion on this first question, it is necessary to refer to some of the evidence as to the nature of the plaintiff's office as regional director, the duties it entailed and what, if anything, he did while holding the appointment. It appears that he was transferred to London from the post of regional manager of India and Pakistan, and he took up the combined offices of chairman and director of the English company and regional director of the American company at the same time.

[HIS LORDSHIP reviewed the evidence in regard to the plaintiff's duties as regional director of the American company, and continued:] Looking at the evidence as a whole, it seems to me that the functions of the plaintiff as regional director of the American company in the sterling area were, broadly speaking, those of a consultant and adviser, a co-ordinator, and perhaps one might also say a watch dog for the interests of the American company, and he may have done what he could, and I have no doubt that he probably did do all he could, to increase the business done not only by the English company, but also by the other subsidiaries and branches in the sterling area; but on the evidence before us, I am not prepared to assume that he in fact carried on, on behalf of the American company, at 36, Grosvenor Street any trading or business activities, or entered into any contract on their behalf, or did any other specific act of that sort at 36, Grosvenor Street, on the strength of which it could be said that the American company had established there a place of business within Great Britain. In considering the effect of the evidence itself, I think it is important to remember that 36, Grosvenor Street, or the part of it not let to outsiders, was the office of the English company, and, further, that the plaintiff would, in any case, have been there in the course of his duties as chairman and director of the English company; and it is right that one should remember, too, that there was nothing whatever in the way of a visible sign or physical indication that the American company was doing business at that address at all, or had any connection at all with those premises. Accordingly, in my view, the plaintiff on this evidence has wholly failed to show that the American company ever established a place of business in Great Britain.

That is sufficient to dispose of this case without considering the second question which I earlier stated, namely, whether, assuming that by reason of the plaintiff's employment and activities at 36, Grosvenor Street, the American company had established a place of business in Great Britain, service on the company at that place of business could be validly effected under s. 412 of the Companies Act, 1948, having regard to the fact that, admittedly, from and after the plaintiff's departure and resignation from the office of regional director

for the sterling area, no shadow of a ground remained for holding 36, Grosvenor Street a place of business established by the American company in the sense of a then existing place of business established by the company. This second question having been argued before us, however, and VAISEY, J., having expressed his view on it, I think it is right that I should briefly deal with it.

A The question is whether the words "any place of business established by the company in Great Britain" in s. 412 mean any existing place of business established by the company, or mean any place where the company has at any time established a place of business. In other words, in order to make the service in accordance with s. 412 good service, is it necessary to be able to say of the place where service is effected at the time when it is effected "this is a place of business established by the company in Great Britain", or is it enough if it can be shown of the place where service is effected at the time when it is effected "this was at one time a place of business of the company, although it is no longer such"?

B Some light on that question is, I think, thrown by the language of s. 406, which says:

"The next eight following sections shall apply to all overseas companies . . ."

C and then proceeds to define "overseas companies" as

D "companies incorporated outside Great Britain which, after the commencement of this Act, establish a place of business within Great Britain, and companies incorporated outside Great Britain which have, before the commencement of this Act, established a place of business within Great Britain and continue to have an established place of business within Great Britain at the commencement of this Act."

E A distinction is there indicated between companies which establish a place of business within Great Britain after the commencement of the Act and companies which have established a place of business within Great Britain before such commencement, in that the latter, in order to come within s. 406, must continue to have an established place of business within Great Britain at such commencement. That throws some light on the construction of s. 412, because it does not seem to me to accord with the view that, for the purposes of that section, once a company has established a place of business, that place must always remain a place of business established by the company.

F Apart from that indication, the grammatical meaning of the language of s. 412,

"by leaving it at or sending it by post to any place of business established by the company in Great Britain",

G requires that the place of service should be a place which is then established, which is at the time of the service established, as a place of business of the company. The other construction would lead to somewhat absurd results. A company might establish a place of business, carry on business there for a time and then leave it with no trace at all of any continued business connection with it. It could hardly have been intended that in such a case service could be effected at the former place of business of the company, although service at that place would not be in the least likely to bring the proceedings to the notice of the company. Again, an overseas company might over a period of time occupy successively a number of places of business, moving perhaps from Birmingham to Newcastle and thence to London. If s. 412 is construed as meaning service at any former place of business, then a person desirous of effecting service on a company in the case which I have supposed might effect good service by leaving the document at the premises in Birmingham or New-

castle without troubling about those in London, which would be the one place at which the company intended to be served was, in fact, carrying on business, and the one place at which a process could be served with reasonable certainty that it would be brought to the notice of the company.

VAISEY, J., took a different view, and he did so largely on the strength of *Sabatier v. Trading Co.* (1), which was a decision of CLAUSON, J. There is an essential and vital distinction between that case and the present case. That case was decided in 1927, when the relevant Act was the Companies (Consolidation) Act, 1908. That Act contained in s. 274 (1) provisions corresponding to those of s. 407 (1) of the Act of 1948; that is to say, there was a provision that every company incorporated outside the United Kingdom which established a place of business within the United Kingdom should file with the registrar of companies, amongst other things,

"(c) the names and addresses of some one or more persons resident in the United Kingdom authorised to accept on behalf of the company service of process and any notices required to be served on the company . . ."

There was, however, no provision comparable to s. 412 of the present Act, which provides a method of service which can be used in the case of a company which has not filed with the registrar of companies the names and addresses of persons authorised to accept service. The position in *Sabatier v. Trading Co.* (1) was that the company in question had filed with the registrar of companies the name of a person authorised to accept service, and it was held that service on that person was good, even if the company had ceased to carry on business in the United Kingdom before the date on which such service was effected. The conclusion reached by CLAUSON, J., is thus stated in the head-note. It was held:

"(1) that upon the evidence, the defendant company, at the date of the service of the writ upon A., had a place of business within the United Kingdom, within the meaning of s. 274 of the Companies (Consolidation) Act, 1908, and that service upon A. was effective service upon the company; and (2) . . ."

and this is the material part of the case—

"that, even if the company had not at the date aforesaid a place of business within the United Kingdom, yet upon the true construction of the section and applying the principles of the decision in *Employers' Liability Assurance Corp'n. v. Sedgwick Collins & Co.* (2) such service was effective upon the company."

In my view, the second decision in *Sabatier v. Trading Co.* (1) has no application to the present case. Where, in compliance with s. 407 of the Act of 1948 or its predecessor, the name and address of some person authorised to accept service on behalf of the company is delivered to the registrar of companies, then, by the Act, service on that person is made good service so long as his name continues on the file, and the person effecting service is in no way concerned with the question whether the company at that time any longer has a place of business in Great Britain. The service can be effected on the very person whose name has been filed as the name of the person authorised to accept service. Where s. 412 is in question, service must be effected at a place of business established by the company, and, if the company no longer has a place of business established at the place where service is sought to be effected, the language of the section is not complied with.

Counsel for the plaintiff contended that the principles of *Sabatier v. Trading Co.* (1) ought to be applied, as otherwise, he said, an oversea company which

failed to comply with the provisions of the Companies Act would get an advantage from its own wrong, inasmuch as if it had complied with the Act it could have been served by service on the person whose name was filed for that purpose. In my view, that argument carries little weight. The question is, what is the mode of service to be followed in order to satisfy s. 412 of the Act of 1948, and, as I have already said, I think it must, according to the terms of the section, be service at an existing place of business established by the company.

- A Whether the place at which service is sought to be effected is an existing place of business for that purpose must, no doubt, depend on the facts of any particular case. There might, for instance, be an oversea company which had traded at a particular place and had contracted and otherwise carried on business by correspondence on notepaper bearing the address of that place, or had allowed its name to appear in a telephone directory or in some other form of directory as carrying on business at that address. In such a case as that, where a company has held itself out as carrying on business at a given address, it may well be that, if it has done nothing in the way of giving notice to the contrary to persons dealing with it, any such person, for the purpose of service, might be entitled to assume that the place thus held out by the company as a place of business established by it was still such a place of business, even although the company had ceased actually to carry on business there. This is not a case of that sort, however, and, in my view, it cannot be said that at the time when service was effected there, 36, Grosvenor Street was a place of business established by the American company.

- D I have not referred to the various authorities which were quoted to us in the course of the argument on the first question. Those authorities show that the question whether a place of business has been established here or not is a question of fact to be determined on the evidence in each particular case, and on the evidence here the establishing of a place of business was not made out. On the second question also I feel obliged to differ from VAISEY, J., and hold that, even if I am wrong on the first question, the service effected at 36, Grosvenor Street was not good service under s. 412. For these reasons I would allow the appeal, and direct that an order should be made setting aside the service of the writ in this action.

HODSON, L.J.: I agree with the judgment which my Lord has delivered on both questions raised on this appeal, and, although we are differing from the judgment of the learned judge, I cannot usefully add anything.

- F **ROMER, L.J.:** I also agree with my Lord's judgment on both points which have been argued before us in this case. On the first point I have nothing to add to what my Lord has said beyond saying that it is plain to me that the plaintiff assumed the burden in this matter of showing that the defendant company did, at all events at one time, carry on business in this country, and, inasmuch as the only way in which the company ever carried on business, if it did so at all, depends on the plaintiff's own activities, the plaintiff's reticence on the question of what those activities were prevents him, in my opinion, from discharging the onus which he undertook.

- G On the question of s. 412 of the Companies Act, 1948, I would like just to say this. Taking the language of the proviso to that section by itself, there is, as my Lord has indicated, no warrant for including in the word "company" a company which had established a place of business at some previous time, but no longer had one at the date of the writ. It seems to me that the contrary argument involves reading the words at the end of the proviso to s. 412 as though they had read "a place of business established, or which had at any earlier time been established, by the company in Great Britain", and there appears to me to be no justification for reading into the proviso words which are not there. Moreover, the *prima facie* construction is supported by the language

of s. 406 to which my Lord has referred. The intention which underlies all procedure with regard to substituted service is that the defendant will probably get to hear of the proceedings. That was very clearly laid down by this court in the well-known case of *Porter v. Freudenberg*, *Kreglinger v. S. Samuel & Rosenfeld*, *Re Merten's Patents* (3). That case was one in which the full Court of Appeal dealt with proceedings against enemy aliens, and one of the points which LORD READING, C.J., who delivered the judgment of the court, dealt with was in regard to substituted service. In the course of his observations he said ([1915] 1 K.B. at p. 888):

"In order that substituted service may be permitted, it must be clearly shown that the plaintiff is in fact unable to effect personal service and that the writ is likely to reach the defendant or to come to his knowledge if the method of substituted service which is asked for by the plaintiff is adopted."

Later in the judgment LORD READING said (*ibid.*, at p. 889):

"Our English procedure has hitherto been laudably superior to the continental in not permitting that which may be called 'constructive service', such as, e.g., by public notices or advertisements, whereby a defendant may be condemned unheard because he has no knowledge of the proceedings against him."

If service of a writ or of some other document is effected at the place of business which a foreign corporation actually has in this country, or on a nominee whom it has registered, the probability is that service at such place of business, or on such nominee, will become known to the corporation; but service at a place which has ceased to be the place of business, and which may well have passed, and probably will have passed, into the ownership of some third person, would seldom come to the notice of the foreign corporation. It appears to me that this consideration, as against the general background of the substituted service procedure to which I have referred, supports the view, if any support be needed, that the proviso to s. 412 of the Act of 1948 must be given the meaning which its language naturally bears, and not the artificial meaning which the plaintiff sought to attribute to it in this case. I accordingly agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Waterhouse & Co.* (for the defendant company); *Parker, Sloan & Pinsent* (for the plaintiff).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

ADLER v. DICKSON AND ANOTHER.

[COURT OF APPEAL (Denning, Jenkins and Morris, L.JJ.), October 11, 12, 13, 29, 1954.]

Negligence—Exclusion of liability—Shipping—Passenger carriage—Passenger injured by fall of gangway—Action against captain and boatswain—Right of company's servants to claim exemption from personal liability.

A *Shipping—Carriage by sea—Negligence—Exclusion of liability in contract of carriage—Protection of independent contractors and others not parties to the contract—Distinction between carriage of goods and carriage of passenger.*

The plaintiff was a passenger in a vessel belonging to the P. & O. S. N. Co. and the defendants were the master and boatswain of the said vessel. On July 16, 1952, the plaintiff was ascending the gangway of the vessel when it moved and fell with the result that the plaintiff fell sixteen feet on to the wharf suffering severe injuries. The ticket issued to the plaintiff by the company stated that "passengers . . . are carried at passengers' entire risk" and contained the following conditions: "The company will not be responsible for and shall be exempt from all liability in respect of any . . . injury whatsoever of or to the person of any passenger . . . whether such injury . . . shall occur on land, on shipboard or elsewhere . . . and whether the same shall arise from or be occasioned by the negligence of the company's servants . . . in the discharge of their duties, or while the passenger is embarking or disembarking, or whether by the negligence of other persons directly or indirectly in the employment or service of the company, or otherwise, or by the act of God . . . dangers of the seas . . . or by accidents . . . or any acts, defaults or negligence of the . . . master, mariners . . . company's agents or servants of any kind under any circumstances whatsoever". It was not disputed that these conditions exempted the company from liability. In proceedings for negligence against the defendants the master directed that the issue whether the terms of the ticket afforded a defence against the plaintiff's claim should be tried as a preliminary point of law. On trial of the issue the court assumed that the defendants were guilty of negligence in the discharge of their duties as servants of the company.

HELD: in contracting with passengers for exemption from liability in respect of injuries the company were not contracting as agents for their servants, and the defendants could not claim the benefit of the exemption clause contained in the ticket, as they were not parties to the contract of carriage; moreover the company had not stipulated for exemption from liability for their servants, and a stipulation to that effect should not be implied; accordingly the defendants were not immune from the consequences of their personal negligence.

Cosgrove v. Horsfall (1945) (175 L.T. 334), followed.

G *Elder, Dempster & Co. v. Paterson, Zochonis & Co.* ([1924] A.C. 522), distinguished and explained.

Decision of PILCHER, J. (ante, p. 21), affirmed.

AS TO AGREEMENTS TO TRAVEL AT OWN RISK, see HALSBURY, Simonds Edn., Vol. 4, p. 186, para. 465; and FOR CASES, see DIGEST, Vol. 8, p. 102, H Nos. 680-682.

AS TO THE RIGHTS OF STRANGERS TO A CONTRACT, see HALSBURY, Simonds Edn., Vol. 8, p. 66, para. 110; and FOR CASES, see DIGEST, Replacement Vol. 12, pp. 45-53, Nos. 227-286.

Cases referred to:

(1) *Peck v. North Staffordshire Ry. Co.*, (1863), 10 H.L. Cas. 473; 32 L.J.Q.B. 241; 8 L.T. 768; 11 E.R. 1109; 8 Digest 57, 381.

- (2) *Ludditt v. Ginger Coote Airways, Ltd.*, [1947] 1 All E.R. 328; [1947] A.C. 232; [1947] L.J.R. 1067; 177 L.T. 334; 2nd Digest Supp.
- (3) *Beaumont-Thomas v. Blue Star Line, Ltd.*, [1939] 3 All E.R. 127; 64 Lloyd's Rep. 155; Digest Supp.
- (4) *Cosgrove v. Horsfall*, (1945), 175 L.T. 334; 2nd Digest Supp.
- (5) *Paterson, Zochonis & Co. v. Elder, Dempster & Co.*, [1923] 1 K.B. 420; 92 L.J.K.B. 524; 128 L.T. 577; *reversd.* H.L. sub nom. *Elder, Dempster & Co. v. Paterson, Zochonis & Co.*, *Griffiths Lewis Steam Navigation Co. v. Paterson, Zochonis & Co.*, [1924] A.C. 522; 93 L.J.K.B. 625; 131 L.T. 449; 41 Digest 478, 3118. A
- (6) *Gilbert Stokes v. Dalgety*, (1948), 81 Lloyd's Rep. 357; 48 S.R.N.S.W. 435; 65 W.N. 196.
- (7) *Waters Trading Co., Ltd. v. Dalgety & Co., Ltd.*, [1951] 2 Lloyd's Rep. 385; 52 S.R.N.S.W. 4; 69 W.N. 23. B
- (8) *Collins v. Panama*, (1952), 197 Federal Recorder 983.
- (9) *Ford v. Jarka*, [1954] American Maritime Cases, 1095.
- (10) *Smith v. River Douglas Catchment Board*, [1949] 2 All E.R. 179; 113 J.P. 388; sub nom. *Smith & Snipes Hall Farm, Ltd. v. River Douglas Catchment Board*, [1949] 2 K.B. 500; 2nd Digest Supp.
- (11) *Pyrene Co., Ltd. v. Scindia Steam Navigation Co., Ltd.*, [1954] 2 All E.R. 158. C
- (12) *Hall v. North Eastern Ry. Co.*, (1875), L.R. 10 Q.B. 437; 44 L.J.Q.B. 164; 33 L.T. 306; 39 J.P. 724; 8 Digest 106, 706.
- (13) *City of Lincoln (Master & Owners) v. Smith*, [1904] A.C. 250; 73 L.J.P.C. 45; 91 L.T. 206; 41 Digest 428, 2690.
- (14) *United Australia, Ltd. v. Barclays Bank, Ltd.*, [1940] 4 All E.R. 20; [1941] A.C. 1; 109 L.J.K.B. 919; 164 L.T. 139; 2nd Digest Supp. D
- (15) *Omoa Coal & Iron Co. v. Huntley*, (1877), 2 C.P.D. 464; 37 L.T. 184; 41 Digest 355, 2043.
- (16) *Mersey Shipping & Transport Co., Ltd. v. Roa, Ltd.*, (1925), 21 Lloyd's Rep. 375.

APPEAL by the defendants from an order of PILCHER, J., dated July 30, 1954, and reported ante, p. 21. E

On July 16, 1952, the plaintiff was a passenger in the Peninsular and Oriental Steam Navigation Co.'s vessel *Himalaya*. On that day the vessel was berthed in Trieste and the plaintiff went ashore. On her return to the ship she mounted the gangway and while she was on it the gangway moved and fell with the result that the plaintiff was thrown to the wharf from a height of sixteen feet and sustained serious injuries. The plaintiff then brought an action for negligence against the defendants, the master and boatswain of the vessel. At the material time the plaintiff was travelling on a first class ticket issued by the P. & O. S. N. Co. which contained a number of conditions, and which, it was not disputed, absolved the company from liability. On the first page of the ticket were the words: F

"passengers . . . are carried at passengers' entire risk." G

On the next page there were the following words:

"This ticket is issued by the company and accepted by the passenger subject to the following conditions and regulations",

the material part being set out in the following terms: H

"The company will not be responsible for and shall be exempt from all liability in respect of any . . . injury whatsoever of or to the person of any passenger . . . whether such injury of or to the person of any passenger . . . shall occur on land, on shipboard or elsewhere . . . and whether the same shall arise from or be occasioned by the negligence of the company's servants on board the ship or on land in the discharge

of their duties, or while the passenger is embarking or disembarking, or whether by the negligence of other persons directly or indirectly in the employment or service of the company, or otherwise, or by the act of God . . . dangers of the seas . . . or by accidents . . . or any acts, defaults or negligence of the . . . master, mariners, company's agents or servants of any kind under any circumstances whatsoever . . ."

Paragraph 3 of the defendants' defence to the plaintiff's claim in negligence was in the following terms:

"The accident to the plaintiff . . . occurred while the plaintiff was a passenger on the *Himalaya* upon the terms of the said ticket. If (which is denied) either of the defendants was personally responsible for the safety of the gangway . . . then the defendants' acts or omissions (if any) in relation to the said gangway and any other material acts or omissions on the part of either of the defendants took place in pursuance or performance of the contract between the plaintiff and the [P. & O. S. N. Co.] . . . as contained in or evidenced by the plaintiff's said ticket and/or subject to the terms of the said ticket and the defendants are in the premises entitled to rely upon the terms of the said ticket. Further or alternatively any such acts or omissions on the part of either of the defendants occurred while the defendants were acting as the servants or agents of the company and the defendants are accordingly entitled to the same protection as that afforded to the company by the terms of the said ticket. Further or alternatively in contracting with the plaintiff upon the terms of the said ticket the company acted in all material respects as the agent of its servants and agents (including the defendants) and thereby exempted the defendants from any liability such as is referred to in the statement of claim. The said agency arises by implication of law. Further or alternatively by reason of her acceptance of the ticket and of the terms thereof the plaintiff expressly or impliedly agreed to travel in all respects at her own risk and/or impliedly agreed with the company's servants and agents (including the defendants) that they should be under no liability to the plaintiff in connection with any injury sustained by her as a passenger on the *Himalaya*."

By an order under R.S.C., Ord. 25, r. 2, the master directed that the issues raised by para. 3 of the defence, viz., whether the terms of the ticket held by the plaintiff at the time of the accident afforded a defence to the defendants against the plaintiff's claim, should be tried as a preliminary point of law. It was assumed by PILCHER, J., and by the Court of Appeal, for the purpose of deciding this point, that the plaintiff's accident was caused by the negligence of one or both of the defendants and that any acts of negligence were performed by them in the ordinary course of their duties of their respective offices on board the *Himalaya* as servants of the company. PILCHER, J., gave judgment for the plaintiff, holding that in contracting with passengers for exemption from liability in respect of injuries the company were not acting under any implied agency on behalf of the defendants who, accordingly, were not entitled in an action against them for negligence to the protection of the exemption clause in the ticket. He further held that as the contract of carriage of the plaintiff as a passenger contained no exemption clause expressly extending to the defendants' negligence, the defendants, for this reason also, were not exempted thereby from liability to the plaintiff for their negligence.

A. A. Mocatta, Q.C., and *M. R. E. Kerr* for the defendants.
J. G. Le Quesne for the plaintiff.

Cur. adv. vult.

Oct. 29. The following judgments were read.

DENNING, L.J., stated the facts and continued: This [i.e., the question

whether the master and boatswain were protected by the exemption clause raises a point of law which the court has ordered to be tried first before the facts are gone into. We must assume for the purposes of the argument that the master and the boatswain were personally guilty of negligence and are *prima facie* liable in tort for their wrongdoing. The question is whether they are protected by the exemption clause. It is an important question, because the steamship company say that, as good employers, they will stand behind the master and boatswain and meet any damages or costs that may be awarded against them. They say that if the plaintiff's claim is admissible, it means that a way has been found of getting round the exemption clause which no one has ever thought of before.

I pause to say that, if a way round has been found, it would not shock me in the least. I am much more shocked by the extreme width of this exemption clause which exempts the company from all liability whatsoever to the passenger. It exempts the company from liability for any acts, default or negligence of their servants in any circumstances whatsoever, which includes, I suppose, their wilful misconduct. And this exemption is imposed on the passenger by a ticket which is said to constitute a contract but which she has no real opportunity of accepting or rejecting. It is a standard printed form on which the company insist and from which they would not depart, I suppose, in favour of any individual passenger. The effect of it is that, if the passenger is to travel at all, she must travel at her own risk. She is not even given the option of travelling at the company's risk on paying a higher fare. She pays the highest fare, first class, and yet has no remedy against the company for negligence. Nearly one hundred years ago BLACKBURN, J., in a memorable judgment, said that a condition exempting a carrier wholly from liability for the neglect and default of their servants was unreasonable: see *Peck v. North Staffordshire Ry. Co.* (1) (10 H.L.Cas. at p. 511). I think so too. Nevertheless, no matter how unreasonable it is, the law permits a carrier by special contract to impose such a condition; see *Ludditt v. Ginger Coote Airways, Ltd.* (2); except in those cases where Parliament has intervened to prevent it. Parliament has not so intervened in the case of carriers by sea. The steamship company are, therefore, entitled to the protection of these clauses, as indeed this court held in *Beaumont-Thomas v. Blue Star Line, Ltd.* (3). The question is whether the master and the boatswain—the actual wrongdoers—are entitled also to the protection of them.

I can imagine that some lawyers would decide in the plaintiff's favour out of hand: and for a reason which appears at first sight both simple and sufficient. It is this: the master and boatswain were not parties to the contract of carriage and cannot, therefore, claim the benefit of the exemption clause in it, because no one can enforce a contract to which he was not a party. It was reasoning on those lines which appealed to the court in *Cosgrove v. Horsfall* (4): and if that decision was right, it concludes the case in the plaintiff's favour. Leading counsel for the defendants has, however, urged us to say that that decision was wrong. It is, he says, inconsistent with the decision of the House of Lords in *Elder, Dempster & Co. v. Paterson, Zochonis & Co.* (5) which was not cited to the court. He says further that, in the case of carriage of goods by sea, it is well established that the master and crew are entitled to the protection of the exemption clauses: and that there is no reason why they should not also be so entitled in the carriage of passengers. This is a serious argument which makes it necessary for us to consider the cases on carriage of goods. They undoubtedly show that, when a carrier issues a bill of lading for goods, the exemption clauses therein enure for the benefit, not only of the carrier himself, but also for the benefit of the shipowner, the master, the stevedores and any other persons who may be engaged in carrying out the services provided for by the contract. Such persons are not parties to the contract of carriage, but nevertheless when they are rendering their services, they are protected by the exceptions contained

therein; and this is so, even though the clauses are not expressed to be made for their benefit, at any rate, not in so many words. It follows that if they are guilty of negligence in rendering their services and are sued in tort, they can nevertheless rely on the exceptions to relieve them from liability. These propositions have been established in England by *Elder, Dempster v. Paterson* (5), in Australia by *Gilbert Stokes v. Dalgety* (6) and *Waters Trading Co., Ltd. v. Dalgety & Co., Ltd.* (7), and in the United States of America by *Collins v. Panama* (8) and *Ford v. Jarka* (9). The propositions are further supported by the Rules in the Carriage of Goods by Sea Act, 1924. Article IV (2) exempts "the carrier" and "the ship" from divers responsibilities and art. IV (5) limits their liability in any event to £100 per package. Neither the master nor the crew nor the stevedores are expressly given the benefit of these exceptions and limitations but Parliament must have intended that they should have the benefit of them.

There was much discussion before us as to the true principle underlying these propositions. No one doubted their correctness but the difficulty is to reconcile them with the proposition that no one can claim the benefit of a contract except a party to it. The speeches in the House of Lords in the *Elder, Dempster* case (5) are so compressed on this point that we have a variety of reasons to choose from. One suggestion which was much canvassed was that, in addition to the contract

of carriage between the goods owner and the carrier (which was evidenced by the bill of lading), there were a number of collateral contracts between the goods owner and all the various persons concerned in the carriage. Take, for instance, the stevedores. It was said that there was a collateral contract between the goods owner and the stevedores whereby the goods owner agreed that the stevedores should have the benefit of the exceptions. This collateral contract

was said to be made by the carriers either as agents for the goods owner or as agents for the stevedores or alternatively to arise out of a bailment on terms. Take next the crew. It was said that there were collateral contracts with each of them, although there was clearly no bailment to each one. This suggestion

of a large number of collateral contracts does not appeal to me, for the simple reason that there are never any such contracts in fact. The goods owner makes one contract only, namely, his contract with the carrier. He makes no contract with anyone else. In particular he makes no contract with the stevedores, or with the master or the crew. It seems to me that these supposed collateral contracts are nothing but a legal fiction devised to give the stevedores and the others protection under a contract to which they were not parties. The truth is there was only one contract, namely, the contract evidenced by the

bill of lading: and the reason why the stevedores and others are protected is because, although they were not parties to the contract, nevertheless they participated in the performance of it, and the exception clause was made for their benefit whilst they were so performing it. The clause was not made expressly for their benefit, it is true, but nevertheless it was by necessary implication which is just as good: and they have a sufficient interest to entitle them to enforce it. Their interest lies in this: they participated in so far as it affected them and can take those benefits of it which appertain to their interest therein. It is one of those cases—by no means rare—where a third person is entitled to

enforce a contract made for his benefit. I referred to some of these cases in *Smith v. River Douglas Catchment Board* (10) ([1949] 2 All E.R. at p. 188), and DEVLIN, J., has recently mentioned some more in his illuminating judgment in *Pyrene Co., Ltd. v. Scindia Steam Navigation Co., Ltd.* (11) ([1954] 2 All E.R. at p. 165).

Such being the rule in respect of goods, the question is whether a similar rule applies to the carriage of passengers? In principle it clearly does. A good instance is *Hall v. North Eastern Ry. Co.* (12), which was decided eighty years ago. A drover was given a free pass to take some sheep on the railway from Scotland to England. The North British Company gave him a ticket which

said that, as he travelled free, he travelled at his own risk. His journey took him over an English line, the North Eastern Railway, and he was injured by the negligence of the servants of the English company, not by the servants of the Scottish company. It was admitted that there was only one contract, namely, the contract with the Scottish company. The English company was not a party to that contract but, nevertheless, it was entitled to the benefit of the exception which it contained. The reason was, in the words of BLACKBURN, J. (L.R. 10 Q.B. at p. 442), that the drover

"... must be taken to have assented that the ticket should protect the North Eastern Company just as much as the North British . . ."

In short it was a necessary implication that the English company should be protected. I should add that in the judgment of BLACKBURN, J., as reported in the LAW REPORTS there are some words which suggest a contract between the drover and the English company (*ibid.*) but the suggestion seems to me unreal as I notice that the LAW JOURNAL (44 L.J.Q.B. at p. 166) does not contain those words. In further support of the rule in respect of passengers, I would refer to the Carriage by Air Act, 1932. The provisions under that Act contain certain exemptions and limitations in favour of the "carrier". The pilot of the aircraft is not expressly given the benefit of them, but Parliament must have intended that he should have the same protection as the carrier.

My conclusion, therefore, is that, in the carriage of passengers as well as of goods, the law permits a carrier to stipulate for exemption from liability not only for himself but also for those whom he engages to carry out the contract: and this can be done by necessary implication as well as by express words. When such a stipulation is made, it is effective to protect those who render services under the contract, although they were not parties to it, subject, however, to this important qualification: The injured party must assent to the exemption of those persons. His assent may be given expressly or by necessary implication, but assent he must before he is bound: for it is clear law that an injured party is not to be deprived of his rights at common law except by a contract freely and deliberately entered into by him; and all the more so when the wrongdoer was not a party to the contract, but only participated in the performance of it. In all cases where the wrongdoer has escaped it will be found that the injured party assented expressly or by necessary implication to forgo his remedy against him. In the case of goods it is not difficult to infer an assent because the owner of the goods habitually insures them against loss or damage in transit. If the carrier is protected by an exemption clause, so should his servants be, leaving the owner to recover against the insurance company. As SCRUTTON, L.J., said in the *Elder, Dempster* case (5) ([1923] 1 K.B. at p. 441):

"Were it otherwise there would be an easy way round the bill of lading"; and as VISCOUNT FINLAY said ([1924] A.C. at p. 548):

"It would be absurd that the owner of the goods could get rid of the protective clauses of the bill of lading . . . by suing . . . in tort".

In the case of passengers, however, it is not so easy to infer an assent. It was inferred in *Hall v. North Eastern Ry. Co.* (12) but not in *Cosgrove v. Horsfall* (4) even though the clause there purported expressly to exempt the servant. At least, that seems to me the correct explanation of those cases.

Applying those principles to the present case, the important thing to notice is that the steamship company only stipulated for exemption from liability for themselves. They did not in terms stipulate for exemption for their servants or agents, and I see no reason to imply any such exemption. The servants or agents are, therefore, not excused from the consequences of their personal negligence; see *City of Lincoln (Master & Owners) v. Smith* (13). In any case, even if the company intended that the stipulation should cover their servants, nevertheless I see nothing whatever to suggest that the plaintiff knew of their

intention or assented to it. If she read the conditions of the ticket (which she probably did not) and considered the possibility of being injured by the negligence or default of the company's servants (which I trust she thought unlikely) she might well think that her remedy against the company was barred, but she would not think her remedy against the servants was also barred. Suppose a steward on a liner were to strike a passenger or falsely to imprison her, or injure her by some wilful misconduct, then albeit it was done in the course of his employment, he could not claim the protection of the clause, for the simple reason that the passenger never agreed to his being exempted. She could sue the steward personally, even though her remedy against the company was barred. So also if the steward is negligent in the course of his employment, for there is no difference in principle between the cases. The passenger has not agreed to forgo his remedy against the actual wrongdoer and can still pursue it.

The result, in my opinion, is that the plaintiff can pursue her claim against the master and the boatswain without being defeated by the exemption clause. I think the appeal should be dismissed.

JENKINS, L.J., stated the facts and continued: If the matter were free from authority I would have little hesitation in agreeing with the learned judge's conclusion. For the present purpose it must be assumed that the defendants were in fact guilty of the negligence alleged against them in the statement of claim in the shape of the various wrongful acts or omissions particularised under para. 6, and the defendants must show that even on that assumption the action must fail by reason of the exempting provisions of the ticket. On this assumption, the plaintiff, while lawfully using the gangway, was injured by the tortious acts or omissions of the defendants who were servants of the company which had contracted with the plaintiff to carry her as a passenger. If her contract with the company had contained no exempting provisions, the plaintiff would, as I understand the law, have had separate and distinct rights of action (a) against the company for breach of contract or alternatively, in tort on the principle of *respondet superior*, and (b) against the defendants as the persons actually guilty of the tortious acts or omissions which caused the damage. The plaintiff's right of action against the company is clearly taken away by the exempting provisions of the contract, but I fail to see how that can have the effect of depriving her also of her separate and distinct right of action against the defendants as the actual tortfeasors. There is certainly no express provision purporting so to deprive her, and in the absence of any express provision to that effect I see no justification for implying one. The exempting provisions in terms apply only to the liability of the company, without any reference to the liability of servants of the company for the consequences of their own tortious acts. Even if these provisions had contained words purporting to exclude the liability of the company's servants, non constat that the company's servants could successfully rely on that exclusion in proceedings brought against them by some party injured by their tortious conduct, for the company's servants are not parties to the contract. But as it is, not only are the company's servants not parties to the contract, but the contract does not even mention their liability. I find it quite impossible to accept the suggestion that the contract between the company and the plaintiff must be taken to have been entered into by the company not only on its own behalf but also on behalf of all its servants. There is nothing whatever in the terms of the contract to support this theory, and even if it were tenable I do not see how it would assist the defendants, inasmuch as the only liability it excludes is the liability of the company. Finally, I take it to be the law that a defendant sued in tort who claims that the plaintiff has by some contract with the defendant deprived himself in advance of his right of action in respect of the wrong done him must show that the contract relied on does either expressly or by necessary implication clearly deprive the plaintiff of such

right. The contract here relied on to my mind falls far short of this test so far as the plaintiff's right of action against the defendants is concerned.

A good deal was said in the course of the argument before us about the absurdity of a stipulation relieving an employer of his liability for the negligence of his servant while leaving untouched the servant's liability for that same negligence. I do not follow this. If there is no exempting stipulation at all, then both master and servant are liable, and either can be sued at the option of the injured party. If there is a contract exempting the master but not the servant then the servant's liability remains as it was. The master may find this result inconvenient if he feels impelled either from motives of expediency or from a sense of moral obligation to indemnify the servant. If so, the answer is simple. He should have seen that the contract was so framed as to exempt his servant from liability as well as himself. To my mind it is far more absurd to impute to a passenger on a ship who has contracted with a shipowner for a given voyage in terms which exempt the shipowner from liability for his servants' negligence an intention thereby to deprive himself of all right to redress against the servants of the shipowner for any and every negligent act or omission which may be committed by such servants in the course of their duties, however gross the negligence and however grave the resulting damage to the passenger may be. Accordingly, if left free to do so by the authorities, I would dismiss the appeal.

The conclusion which I have thus provisionally reached accords with the decision of this court in *Cosgrove v. Horsfall* (4). In that case the plaintiff, Cosgrove, an omnibus driver employed by the London Passenger Transport Board, was provided by the board with a free pass which allowed him to travel on the board's omnibuses subject to the condition that, except when he was travelling on the board's business, neither the board nor their servants would be liable to him or his representatives "for loss of life, injury or delay, or . . . damage to property, however caused". While the plaintiff was travelling otherwise than on the business of the board on one of the board's omnibuses it came into collision with another of the board's omnibuses and the plaintiff was injured, through the negligence of the driver of one of the omnibuses. The plaintiff sued the two drivers in the county court. The county court judge held that one of the two drivers, the defendant Horsfall, was to blame for the accident and awarded the plaintiff £20 damages against that defendant, who appealed unsuccessfully to this court. It is, I think, right to quote at some length from the judgment of *DU PARCQ, L.J.*, with which the other members of the court (*SCOTT and MORTON, L.J.J.*) expressed their concurrence. *DU PARCQ, L.J.*, said this (175 L.T. at p. 335):

"The plaintiff has suffered injury and damage by reason of the negligence of the defendant Horsfall. Why, then, should he not recover damages against that defendant? The only answer is that the plaintiff is bound by contract, or, alternatively, by a condition attached to a licence, not to hold the defendant liable. The judge held that this defence could not avail the defendant Horsfall, since he was not a party to the contract and did not grant the licence or impose the condition. At first sight this decision seems to be plainly right, and to be founded on an elementary principle of our law. It has, however, been criticised on diverse grounds and with much ingenuity. In my opinion, the attack on it wholly failed. It was said that, in making the contract, or imposing the condition, the London Passenger Transport Board were acting as agents for Horsfall, so that he could take advantage of the condition and rely on it. There was no evidence before the judge on which he could have found that the board acted as agents for Horsfall, and, of course, he did not so find. It was not even proved that Horsfall was in the employment of the board when the pass, on which the condition is indorsed, was issued to the plaintiff. If I assume that Horsfall was then in the board's employment, it remains true that there is no evidence from which

agency ought to be inferred. I agree with the judge that Horsfall 'was not a party to and has no right by virtue of the licence or contract'. It was further argued for Horsfall that the plaintiff was bound to produce and rely on his pass in order to show that he was lawfully in the omnibus when he was injured, and that, having once produced it and relied on it, he must be held bound by all its terms, so that he could not ask the court to hold any servant of the board liable in respect of his injury or damage. Thus, it was said, Horsfall must escape. We heard much of 'blowing hot and cold' and of 'approbating and reprobating' and it would seem that the latter expression is not yet as out-moded as in 1940 LORD ATKIN supposed it would become: see *United Australia, Ltd. v. Barclays Bank, Ltd.* (14) ([1940] 4 All E.R. at p. 39). In the end it appeared (if I rightly understood the argument) that the submission was founded on the equitable doctrine of election. In my opinion, Horsfall cannot rely on any such doctrine here. In order to show that the driver of the omnibus was under a duty to the plaintiff to take reasonable care for his safety, all that the plaintiff had to prove was that at the time of the accident he was lawfully in the omnibus. It may be that it was necessary to produce the pass in order to show that he was in the omnibus with the consent of the board, and, no doubt, its production reveals the fact that after the accident had happened the plaintiff broke one of the conditions by which, as between the board and himself, he was bound. But this cannot retrospectively make him a trespasser, or invalidate his claim to have been a passenger with the consent of the board. There is, in my opinion, nothing in the point."

I understand DU PARCQ, L.J.'s reference to the plaintiff's breach of one of the conditions by which as between the board and himself he was bound to be directed to the fact that the condition there in question stipulated that neither the board *nor their servants* should be liable, an element in the case then before the court which has no counterpart here, as in the present case the exemption is in terms accorded only to the company itself. *Cosgrove v. Horsfall* (4) seems to me to be directly in point and, *prima facie*, it must be our duty to follow that decision as a decision of this court which is binding on us, with the result that the present appeal must fail.

It was, however, strenuously argued on behalf of the defendants that *Cosgrove v. Horsfall* (4) is in conflict with the earlier decision of the House of Lords in *Elder, Dempster & Co. v. Paterson, Zochonis & Co.* (5), which apparently was not cited in *Cosgrove v. Horsfall* (4), and which is relied on for the defendants as establishing the general proposition that where A contracts to render services to B on terms that A is not liable to B for damage caused by the negligence of A's servants or agents, and in the course of the performance of the contract A's servant or agent is guilty of negligence causing damage to B, A's servant or agent is entitled to the same immunity from suit as is accorded to A, his master or principal, by the exempting condition, and this notwithstanding that the negligence of the servant or agent is such as would clearly have entitled B to maintain an action against him in tort apart from the exempting condition. It would seem that the only limit to be placed on this sweeping proposition is that the negligence of the servant or agent must consist in something done or omitted by him in the course of the performance of the contract, a limit the precise scope of which is by no means easy of definition. If *Cosgrove v. Horsfall* (4) does, indeed, conflict with the *Elder, Dempster* case (5), and if the *Elder, Dempster* case (5) does, indeed, establish the general proposition stated above, then it must be our duty to reject *Cosgrove v. Horsfall* (4) as of no authority, to follow the *Elder, Dempster* case (5), and accordingly to allow this appeal.

It is, therefore, necessary to examine the *Elder, Dempster* case (5) in some detail. The facts were somewhat complicated and unusual. The defendants, *Elder, Dempster & Co.*, employed a number of ships in the West African trade,

which included the carriage of palm oil in casks from West African ports to this country. They hired the use of the steamship *Grelwen* on time charter from her owners, the defendants, Griffiths Lewis Steam Navigation Co., in order to run her as one of their line of steamships engaged in this trade. The plaintiff, Paterson Zochonis & Co., were the owners of a quantity of casks of palm oil which were taken on board the *Grelwen* at two West African ports for carriage to Hull under bills of lading issued in the names of "The African Steamship Company and the British and African Steam Navigation Co. Managers Elder Dempster & Co." The bills of lading contained clauses which provided that "the shipowners hereinafter called the company", should not be liable for loss or damage arising from a variety of happenings, which for the present purpose I need not particularise beyond saying that they had the effect of exempting "the company" (i.e., by definition "the shipowners") from liability for damage due to the negligent stowage of the goods by the servants or agents of "the company". The bills were signed by the master of the *Grelwen* as "agent of the company". Large quantities of palm kernels in bags were stowed above the casks of oil, and as there were no 'tween decks to take the weight of these bags, it bore directly on the casks with the result that many of the casks were crushed and, in consequence, much of the oil escaped and was lost. It appears that ships regularly engaged in the West African trade were usually fitted with 'tween decks for the very purpose of relieving any casks of palm oil carried from the weight of super-incumbered cargo. In these circumstances, Paterson Zochonis & Co. (whom I will call "the shippers") sued Elder, Dempster & Co., the African Steamship Co., and the British & African Steam Navigation Co. (whom I will call collectively "the charterers") and also the Griffiths Lewis Steam Navigation Co., Ltd. (whom I will call the *Grelwen*'s owners) for damage in respect of the loss of the oil.

The claim was based, in effect, on two grounds, viz.: (a) that the defendants had been negligent in stowing the plaintiffs' oil, and (b) that the ship was unseaworthy, in that it was structurally unfit for the carriage of the plaintiffs' oil. ROWLATT, J., held that the ship was unseaworthy for the carriage of this cargo, and that none of the exceptions in the bills of lading covered a claim based on unseaworthiness, and gave judgment for the plaintiffs accordingly. On appeal to the Court of Appeal, the court, by a majority (BANKES, L.J., and EVE, J., SCRUTTON, L.J., dissenting) upheld the decision of ROWLATT, J. In his dissenting judgment SCRUTTON, L.J., after rejecting the shippers' claim so far as based on unseaworthiness, dealt with their contention that the loss was due to bad stowage. On this part of their case the shippers admitted that the charterers were protected from liability by the exceptions in the bills of lading, but contended that the *Grelwen*'s owners were liable in tort on the ground that the master and crew were in the service of the *Grelwen*'s owners as owners of the ship, that their conduct in putting an excessive weight on the palm oil barrels amounted to a tort for which the *Grelwen*'s owners were liable as having been committed by their servants and that the *Grelwen*'s owners, not being parties to the bills of lading, could not claim the benefit of the exceptions contained in them. In dealing with this contention SCRUTTON, L.J., said ([1923] 1 K.B. at p. 441):

"To this counsel for the owner made reply that the owner in the case of a time charter like the present one was not in possession of the goods. This in my opinion is contrary to all the authorities, of which *Omoa Coal & Iron Co. v. Huntley* (15) is a type. The real answer to the claim is in my view that the shipowner is not in possession as a bailee, but as the agent of a person, the charterer, with whom the owner of the goods has made a contract defining his liability, and that the owner as servant or agent of the charterer can claim the same protection as the charterer. Were it otherwise there would be an easy way round the bill of lading in the case of every chartered ship; the owner of the goods would simply sue the owner of the ship and ignore the bill of lading exceptions, though he had contracted with the

charterer for carriage on those terms and the owner had only received the goods as agent for the charterer."

On appeal to the House of Lords, the House by a majority (VISCOUNT CAVE, LORD DUNEDIN, LORD SUMNER and LORD CARSON; VISCOUNT FINLAY dissenting) reversed the decision of the Court of Appeal, holding that the loss was due to bad stowage and not to unseaworthiness, and that the claim in tort against the Grelwen's owners failed because they were (as SCRUTTON, L.J., had held) entitled to the benefit of the exception of liability contained in the bills of lading. So far as this claim in tort was concerned, VISCOUNT FINLAY agreed with the rest of their Lordships, so that the decision may be said to have been unanimous as to the result on that part of the case, although there were differences of some importance in the reasoning by which they severally arrived at their conclusion. VISCOUNT CAVE said ([1924] A.C. at p. 533):

"I do not think that this argument should prevail. It was stipulated in the bills of lading that 'the shipowner' should not be liable for any damage arising from other goods by stowage or contact with the goods shipped under the bills of lading; and it appears to me that this was intended to be a stipulation on behalf of all the persons interested in the ship, that is to say, charterers and owners alike. It may be that the owners were not directly parties to the contract; but they took possession of the goods (as SCRUTTON, L.J., says) on behalf of and as the agents of the charterers, and so can claim the same protection as their principals."

VISCOUNT FINLAY said (*ibid.*, at p. 547):

"It appears to me that if the plaintiffs are to succeed it must be upon the bill of lading. The owners of the goods put them on board the Grelwen to be carried on the terms of the bill of lading. It is said that the imposition of the weight of the kernels on the top of the palm oil barrels was a wrongful act, resulting in the destruction of the barrels and the loss of the oil, and that for this wrongful act, committed by their servants, the shipowners are liable, apart from contract altogether, so that the plaintiffs, in claiming from the shipowners, would not be hampered by the conditions of the bill of lading. This contention seems to me to overlook the fact that the act complained of was done in the course of the stowage under the bill of lading, and that the bill of lading provided that the owners are not to be liable for bad stowage. If the act complained of had been an independent tort unconnected with the performance of the contract evidenced by the bill of lading, the case would have been different. But when the act is done in the course of rendering the very services provided for in the bill of lading, the limitation on liability therein contained must attach, whatever the form of the action and whether owner or charterer be sued. It would be absurd that the owner of the goods could get rid of the protective clauses of the bill of lading, in respect of all stowage, by suing the owner of the ship in tort. The Court of Appeal were, in my opinion, right in rejecting this contention, which would lead to results so extraordinary as those referred to by SCRUTTON, L.J., in his judgment."

LORD SUMNER (with whom LORD DUNEDIN concurred) said (*ibid.*, at p. 564):

"It may be, that in the circumstances of this case the obligations to be inferred from the reception of the cargo for carriage to the United Kingdom amount to a bailment upon terms, which include the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading. It may be, that the vessel being placed in the Elder, Dempster & Co.'s line, the captain signs the bills of lading and takes possession of the cargo only as agent for the charterers, though the time charter recognises the ship's possessory lien for hire. The former I regard as the preferable view, but, be this as it may, I cannot find here any such bald bailment with

unrestricted liability, or such tortious handling entirely independent of contract, as would be necessary to support the contention."

LORD CARSON expressed his concurrence in the opinions of LORD CAVE and LORD SUMNER.

It will be seen that LORD CAVE based himself (*ibid.*, at p. 533) in part at all events on the view that the stipulation that "the shipowners" should not be liable for (to put it shortly) bad stowage was intended to be a stipulation on behalf of all the persons interested in the ship, that is to say both the charterers and the Grelwen's owners; and while he added that the Grelwen's owners took possession of the goods (as SCRUTTON, L.J., had said) on behalf of and as the agents of the charterers and so could claim the same protection as their principals, he prefaced this by the words

"It may be that the owners [*i.e.*, the Grelwen's owners] were not directly parties to the contract",

which suggest that in his view the Grelwen's owners by taking possession of the goods on the charterers' behalf became indirectly parties to the contract and, therefore, entitled to the benefit of the exceptions contained in it. LORD FINLAY founded himself on the view that the shippers put the goods on board the Grelwen to be carried on the terms of the bills of lading; that the act complained of was done in the course of stowage under the bills of lading which provided against liability for bad stowage; and that there was no independent tort unconnected with the performance of the contract. Finally, LORD SUMNER based his conclusion either on the ground that the reception of the cargo amounted to a bailment on terms which included the exceptions stipulated in the bill of lading, or on the ground that the captain of the Grelwen took possession of the cargo only as agent for the charterers, expressing a preference for the former view. To my mind these passages from their Lordships' speeches fall far short of establishing the general proposition contended for by the defendants in the present case.

It is, to my mind, clear that the words "the company will not be responsible" in the conditions of the plaintiff's ticket cannot be extended so as to include the defendants in the way in which LORD CAVE thought the somewhat ambiguous expression "the shipowners" in the bills of lading should be construed as including the Grelwen's owners as persons interested in the ship. Again, it is to my mind clear that the defendants cannot be said to have become parties to a contract with the plaintiff in the terms of the plaintiff's ticket on the plaintiff going on board the Himalaya as a passenger. Moreover, in the *Elder, Dempster* case (5) it was not sought to make the Grelwen's owners liable for any tortious act committed by them personally, but to make them vicariously liable for the negligence of the master and crew on the principle of respondeat superior. It is by no means to be assumed that the result would have been the same if one of the Grelwen's crew had been sued for a tortious act committed by him personally in the course of the stowage of the goods. In the present case, the plaintiff, just as the plaintiff in *Cosgrove v. Horsfall* (4) had only to prove that he was lawfully on the omnibus, can maintain her action merely by showing that she was a lawful user of the gangway whom the defendants knew or ought to have known to be likely to use it; and this being so, I think the negligence of which she complains has a sufficient independence from the contract to fall within LORD FINLAY's reservation with respect to the case of an independent tort. In sum, the facts in the *Elder, Dempster* case (5) were entirely different from those in the present case, not least in the respect that it was a case of the carriage of goods in a chartered vessel whereas this is a case of the carriage of a passenger in a vessel belonging to the carriers; and that it was a case where it was sought to make the owners of a chartered vessel vicariously responsible for the tortious acts of the master and crew of that vessel when acting under the orders of the

charterers, whereas this is a case where there is a direct claim in tort against the master and boatswain of a ship by a passenger travelling in the ship. The *Elder Dempster* case (5) can well be explained by reference to its own facts without ascribing to their Lordships any intention to lay down any such general principle as the defendants here contend for, nor do I think that their Lordships' language, carefully directed as it was to the particular facts of the case then before the House, can fairly be construed as doing so.

A It is interesting to note that in *Mersey Shipping & Transport Co., Ltd. v. Rea, Ltd.* (16) BANKES and SCRUTTON, L.J.J., sitting in a Divisional Court as additional judges of the King's Bench Division, expressed divergent views as to the effect of the *Elder, Dempster* case (5). BANKES, L.J., said (21 Lloyd's Rep. at p. 377):

B "But the court there held that under the circumstances of the vessel being chartered to form one of the owners' regular line, the proper inference to draw was that the goods were shipped under conditions which could cover both charterer and shipowner."

SCRUTTON, L.J., said (*ibid.*, at p. 378):

C "I think that the reasoning of the House of Lords in the *Elder Dempster* case (5) shows that, where there is a contract which contains an exemption clause, the servants or agents who act under that contract have the benefit of the exemption clause. They cannot be sued in tort as independent people, but they can claim the protection of the contract made with their employers on whose behalf they are acting. I think that is the result of the second point in the judgments of LORD CAVE and of LORD SUMNER, with whom LORD DUNEDIN concurs, in the *Elder, Dempster* case (5)."

D I prefer the view of BANKES, L.J., to that of SCRUTTON, L.J., which, if accepted, would go far to make good the defendants' contention here. I should add that SCRUTTON, L.J., seems to have misapprehended LORD SUMNER's second point which, as I understand it, was that the *captain* of the *Grelwen* should be regarded as acting as agent for the *charterers* and not as agent for the *Grelwen's* owners whom it was sought to make liable for the captain's default.

E For the reasons I have endeavoured to state I cannot accept the view that *Cosgrove v. Horsfall* (4) is inconsistent with the *Elder, Dempster* case (5), and I am, accordingly, of opinion that we must follow *Cosgrove v. Horsfall* (4) as a decision of this court directly in point. Many other cases of varying degrees of relevance were cited to us and to the learned judge. I do not find it necessary to refer to these, for there is nothing in any of them which can be held to destroy the authority of *Cosgrove v. Horsfall* (4) once that case is absolved of inconsistency with the *Elder, Dempster* case (5). Accordingly, I would dismiss this appeal.

F MORRIS, L.J. : If the plaintiff has suffered injury and damage by reason of the personal negligence or breach of duty of the defendants or one of them it is said that the defendants are absolved from liability because the plaintiff contracted with their employers, the Peninsular and Oriental Steam Navigation Company, that the company would in such contingency not be responsible. The plaintiff did not, however, make a contract with the company that the servants of the company would not be responsible to the plaintiff. Even had there been such a contract, then, unless the company contracted as agents for their servants, the latter could not claim immunity for their personal torts if the decision of this court in *Cosgrove v. Horsfall* (4) is of binding validity.

H The point of law which has been set down for hearing is whether the terms of the ticket held by the plaintiff afford a defence to the defendants against the claim of the plaintiff. On the ticket issued to the plaintiff it was stated:

"Your attention is specially directed to the conditions of transportation on the covers containing this ticket."

It was also stated that:

"passengers and their baggage are carried at passengers' entire risk."

This must, I think, have reference to and be deemed to be a summary of "the condition of transportation" to which attention is specially directed. It is to such "conditions" that reference must be made in order to ascertain the terms on which a passenger is carried. The condition which is relied on by the defendants begins with the words:

"The company will not be responsible for and shall be exempt from all liability in respect of . . ."

There is nothing which states that individual tortfeasors are to be free and exempt from liability. The immunity of the company is secured by phraseology which is designed to cover every contingency. There is no parsimony in the use of words and the first sentence contains over three hundred of them. It would have been easy to include a few extra words in an attempt to give immunity to the servants or agents of the company: the absence of such words rather suggest that the scope and design of the condition have reference to securing the immunity of the company.

From the multifarious provisions of the protective condition it can be gleaned that:

"The company will not be responsible for and shall be exempt from all liability in respect of any . . . loss damage or injury whatsoever of or to the person of any passenger . . . and whether such . . . injury . . . shall occur on land, on shipboard or elsewhere . . . and whether the same shall arise from . . . or by accidents . . . or any acts defaults or negligence of . . . passengers . . . of any kind under any circumstances whatsoever."

If one passenger caused injury to another by a tortious act it could hardly be said that the words I have quoted give immunity to the former. There are, of course, in addition many words making the company immune from the consequences of any negligence of the company's servants or agents, and it is said that for any tort of a servant or agent for which the company would apart from the condition be answerable in law a like measure of immunity may be asserted by the servant or agent as that which by contract has been conceded to the company. The contention is advanced in various ways. It is said that

"in contracting with the plaintiff upon the terms of the said ticket the company acted in all material respects as the agent of its servants and agents (including the defendants) and thereby exempted the defendants from any liability"

such as is referred to in the statement of claim. The said agency is said to arise by implication of law. But I can see nothing to suggest that the company acted as the agent of its servants. The company did not purport to contract on their behalf and there is nothing which as a matter of law suggests that the plaintiff made a contract with each and every servant of the company or with those who were likely to sail on the ship on the projected voyage or, indeed, with any person who might later become a servant and join the ship or with any servant or agent whose conduct might in any way affect the plaintiff.

Alternatively it is urged that the plaintiff "agreed to travel in all respects at her own risk", and impliedly agreed with the company's servants and agents that they should be under no liability to the plaintiff in connection with any injury sustained by her as a passenger. But the agreement made by the plaintiff was on the terms of the express conditions and it is to them that reference must be made. I can see nothing in them which makes any implication necessary and nothing to suggest that at some time or at various times and in some manner there came into existence a number of contracts between the plaintiff and various servants or agents of the defendants who either on the ship or elsewhere might by their conduct in any way affect the plaintiff. This contention appears to me to be both vague and unreal. The argument mainly pressed on behalf of the defendants is that in reference to any acts or omissions occurring while

servants or agents of the company are acting as such servants or agents, reliance may be placed on the terms of the ticket and that the servants or agents are "entitled to the same protection as that afforded to the company by the terms of"

the ticket.

There are clearly many circumstances which may be imagined in which it would be fair and reasonable that the servants or agents of the company should be as immune as the company. Equally there are many circumstances in which such a result would be unfair and unreasonable. Servants might claim civil protection against the consequences of wanton or wicked or criminal acts. The issue must be resolved, however, not by balancing considerations of convenience but by the application of principle. If a servant of the company seeks to protect himself from the consequences of a wrongful act he must show that he has made or can claim to be a party to a contract not objectionable on any grounds of public policy by which he is given immunity. In the present case the defendants can point to no such contract.

It is submitted that the binding effect of *Cosgrove v. Horsfall* (4) can be challenged because no consideration was given to the decision of the House of Lords in *Elder, Dempster & Co. v. Paterson, Zochonis & Co.* (5). That was a somewhat special case and in my judgment the reasoning in the speeches in the House of Lords did not direct any different conclusion from that which was reached in *Cosgrove v. Horsfall* (4). The House of Lords case has been much mentioned in judicial utterances but it is from the authority of the pronouncements in the House of Lords that throughout guidance must be obtained. LORD SUMNER was definitely of the opinion in that case that there was no bailment of the goods to the Griffiths Lewis Steam Navigation Co. with unrestricted liability. The view of the matter which he preferred was that the obligations to be inferred from the reception by the Griffiths Lewis Co. of cargo for carriage to the United Kingdom amounted to a bailment on terms which included

"the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading."

LORD DUNEDIN found that the opinion of LORD SUMNER expressed fully and conclusively the result at which he himself had arrived. LORD CARSON also agreed with LORD SUMNER and the fact that he also agreed with LORD CAVE showed that he did not consider that there was serious divergence between the reasoning of LORD CAVE and LORD SUMNER. LORD CAVE pointed out that it was stipulated in the bills of lading that "the shipowners" should not be liable for any damage arising from other goods by stowage or contact with the goods shipped under the bills of lading and he considered ([1924] A.C. at p. 534) that

"this was intended to be a stipulation on behalf of all the persons interested in the ship, that is to say, charterers and owners alike."

LORD CAVE added (*ibid.*):

"It may be that the owners were not directly parties to the contract; but they took possession of the goods (as SCRUTTON, L.J. says) on behalf of and as the agents of the charterers, and so can claim the same protection as their principals."

It seems to me that if, when Paterson, Zochonis & Co. handed over the goods to the owners (Griffiths Lewis Steam Navigation Co.) the latter had said to Paterson, Zochonis & Co.: "Whether we are to be deemed to be taking possession of these goods on behalf of and as the agents of the charterers or on some other footing we take it that both you and we intend that the stipulations in the bills of lading are to protect us as well as the charterers?", the answer would unquestionably have been: "Of course".

In the circumstances existing at the time that the goods were placed on board there was occasion for an implied contract between those who delivered and those who received. I do not read the decision in the *Elder Dempster* case (5) as laying it down that if A makes a contract with B by which he agrees not to hold B answerable for the tort of his servant C, that C is thereby automatically given immunity if he commits a tort against A. Many situations may arise in which a term in a contract between A and B can come into play so as to affect C. I do not seek to enumerate these situations but merely to illustrate some of them. Thus there may be a separate contract between A and C which impliedly incorporates the term in the contract between A and B. Also there may arise dealings between A and C which are in some way related to or connected with the contract between A and B so that the term existing in that contract forms one of the circumstances to be taken into account when defining the duty owed by C to A. These are apart from cases where C might be the unnamed principal of B. Further, there may be cases in which A has expressly or impliedly authorised B to make on A's behalf a new contract with C which contains a term similar to that in the contract between A and B. *Hall v. North Eastern Ry. Co.* (12) may be regarded as an illustration of this. The plaintiff made a contract with the North British Company by which as a drover accompanying sheep that were to be carried he was entitled to be carried at his own risk from Angerton to Newcastle, N.E. The North British Company did not operate beyond Morpeth; at Morpeth the plaintiff's carriage was attached to a train of the North Eastern Railway Company and after the train left Morpeth it was run into by another train of the North Eastern Company whose servants were negligent. BLACKBURN, J., on those facts said (L.R.10 Q.B. at p. 441):

"When the plaintiff went to the North British Company and took a ticket, under which he was to be carried from Angerton to Newcastle, he, in effect, agreed that the North British Company should secure that the North Eastern Company should carry him on from Morpeth to Newcastle; and when he engaged to travel at his own risk, he engaged with the North British Company that they should agree with the North Eastern Company that he should be carried on to Newcastle exactly on the same terms as if the North British line extended to Newcastle. It is clear that this is the true construction of the ticket: 'In consideration of my being carried the whole way free of charge I agree that I shall be travelling the whole way at my own risk'; and it seems to me that the plaintiff did authorise the North British Company to contract for him with the North Eastern Company, and what he authorised was that he should travel at his own risk."

Many variations of facts may be imagined in which the question arises whether a party is affected by a term in a contract. A recent illustration may be found in *Pyrene Co., Ltd. v. Scindia Steam Navigation Co., Ltd.* (11), where DEVLIN, J., said ([1954] 2 All E.R. at p. 168):

"... I think the inference irresistible that it was the intention of all three parties that the seller should participate in the contract of affreightment so far as it affected him."

In cases where goods are handed over from one person to another then, unless some express contract defines the position, there is often the necessity on a consideration of all the facts and circumstances to imply the basis or the terms which have effect. Each case must depend on its own facts. But whether in relation to goods or generally in all situations immunity from the consequences of some action which would normally in the circumstances give rise to liability at the suit of another must, unless given by law, be secured by contract. Such contract may be express and it may become effective by the operation of the principles of agency; or it may be implied in particular circumstances; but a

contract to which the party seeking immunity is a complete stranger will not avail.

For the reasons which I have indicated I do not consider that in the present case the shipping company was contracting as the agent of those whom it might employ and I see no reason to suppose that the plaintiff intended to give immunity in wider terms or to a greater extent than is provided for in the words set out on her ticket. In my judgment, the terms of the ticket held by the plaintiff do not afford a defence to the defendants and I would decide the preliminary point of law accordingly.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Ince & Co.* (for the defendants); *Neil Maclean & Co* (for the plaintiff).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

NOTE.

ROBERTSON v. ROBERTSON.

D [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), October 5, 1954.]

Divorce—Practice—Pleading—Answer—Amending answer by adding cross-petition alleging desertion—“Three years immediately preceding the presentation of the [cross-]petition”—Date of answer—Amendment by consent—Matrimonial Causes Act, 1950 (c. 25), s. 1 (1) (b).

E FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 1 (1) (b), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 389.

Case referred to:

(1) *Pickett v. Pickett* (or *se. Moss*), [1951] 1 All E.R. 614; [1951] P. 267; 27 Digest, Replacement, 484, 4233.

F PETITION by the wife for divorce.

By her petition dated Aug. 27, 1952, the wife alleged that the husband had since the celebration of the marriage treated her with cruelty, and prayed that the marriage might be dissolved. The allegations were in effect allegations of excessive drinking and of sexual malpractices on the part of the husband. By his answer dated Jan. 12, 1953, the husband alleged:

G “That he is not guilty of cruelty as alleged in the . . . petition or at all”,

and prayed that the prayer of the petition might be rejected. The suit came before BARNARD, J., on Oct. 5, 1954, when counsel for the husband applied for leave to amend the answer by adding a plea that if the husband had been guilty of the alleged or any cruelty the same had been condoned, and,

H “By way of cross-petition. 3. The [wife] has deserted the [husband] without cause for at least three years immediately preceding the presentation of this cross-petition, to wit since Apr. 6, 1950, when she left the matrimonial home with the intention of determining cohabitation with the [husband]. She has failed to resume cohabitation thereafter”;

and the husband cross-prayed that the marriage might be dissolved.

J. Sofer for the husband, submitted that the date of the answer, Jan. 12, 1953, was not a material date for the purpose of computing the period of desertion laid down in the Matrimonial Causes Act, 1950, s. 1 (1) (b) ("at least three years immediately preceding the presentation of the petition"), and continued: Where the answer, as in the present case, contains a mere denial and claims no relief by way of dissolution or judicial separation, or matters of that sort, in fact, as your Lordship knows, the answer does not even have to be put in at all. In the present case the answer was put in, it need not have been put in, and in my submission the date of that answer is not the effective date on any document claiming relief. A

BARNARD, J., referred to *Pickett v. Pickett (orse. Moss)* (1) and said: It seems to me somewhat theoretical that I should strike out that part of your amendment, which is a cross-petition, when you can file a separate document as a cross-petition with leave. B

J. Sofer for the husband: My main endeavour is to save costs. The husband is an assisted person and so is the wife and I could, of course, have filed, at public expense, a separate petition, moved to consolidate the two, and gone through all the motions of doing the thing in a different way at the taxpayers' expense, or, in an ordinary case at the litigant's expense, to achieve exactly the same result which I am now asking your Lordship to permit me to achieve. C

N. Lermont for the wife, stated that if his Lordship were minded to grant the amendment, the wife was not inclined to proceed with the petition; she was making no claim for maintenance, there were no children of the marriage, and the charges of cruelty would involve the investigation of unpleasant matters in respect of which there was in any event little corroboration. D

BARNARD, J.: By consent then I will give the husband leave to amend the answer without re-service.

[The husband then gave evidence, at the end of which HIS LORDSHIP said that he was satisfied that the wife had been guilty of desertion; accordingly he rejected the prayer of the petition and granted a decree nisi on the cross-prayer in the answer.] E

Order accordingly.

Solicitors: *John Jenkins & Son*, Catford (for the wife); *H. E. Thomas & Co.*, Woolwich (for the husband).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

COOPER v. COOPER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P. and Karminski, J.), October 18, 19, 20, 1954.]

Divorce—Cruelty—Sexual offences by husband against third parties—Indecent assault by him on child of marriage.

The parties were married in December, 1940, and there was one child of the marriage, a girl born in October, 1944. In 1947, after a serious quarrel in which, according to the wife, her thumb was dislocated, the parties separated. They resumed cohabitation in 1950, but after a month the husband, then in the army, was posted overseas. In July, 1953, they again resumed cohabitation. On Easter Monday, Apr. 19, 1954, the husband was, according to the wife, rude to some guests invited home by her. On Apr. 20, 1954, the husband indecently assaulted the child of the marriage (then eight and a half years of age). That evening there was a quarrel between the husband and the wife, in which, according to the wife, he struck her and knocked her down. The husband then left the matrimonial home and the parties never again resumed cohabitation. Later, as a result of a remark made to the wife by the child of the marriage, the wife informed the police who arrested the husband and charged him with indecently assaulting the child. He was remanded in custody and wrote to the wife letters from prison in which he stated, among other things, that he was very worried about her, and hoped that she would not have any illness or breakdown. The husband subsequently pleaded Guilty to the charge of indecent assault and was fined £20. On Apr. 28, 1954, the wife complained to the justices, inter alia, that the husband had been guilty of persistent cruelty towards her. The justices dismissed the complaint and the wife appealed.

HELD : in determining whether or not cruelty had been established it was essential to judge every act in relation to its attendant circumstances, the condition or susceptibilities of an innocent spouse, the intention of the offending spouse, and the offender's knowledge of the actual or probable effect of his conduct on the other's health ; although the assault on the child of the marriage did not take place in the wife's presence, it was an act which any man of ordinary intellectual capabilities must have realised would, assuming it became known to the wife, have caused her the gravest distress and possibly severe injury to her health; the two incidents on Apr. 20, 1954, together with the rudeness to the guests, must be taken together to form a composite picture for the purpose of ascertaining whether the acts amounted to cruelty, and the case would be remitted to the justices for re-consideration.

Observations of LORD TUCKER in *Jamieson v. Jamieson* ([1952] 1 All E.R. at pp. 887, 888) and of DENNING, L.J., in *Kaslefsky v. Kaslefsky* ([1950] 2 All E.R. at pp. 402, 403), applied.

Per LORD MERRIMAN, P.: The true effect of the decisions in *Thompson v. Thompson* (1901) (85 L.T. 172), in *Bosworthick v. Bosworthick* (1901) (86 L.T. 121), and in *Boyd v. Boyd* ([1938] 4 All E.R. 181) is to afford authority for the proposition that sexual offences against third parties which are directly relevant to the husband's conjugal obligations, may be cruelty to the wife (see pp. 426, 427, post).

AS TO CRUELTY BY CONDUCT CALCULATED TO AFFECT HEALTH, see HALSBURY, Hailsham Edn., Vol. 10, p. 651, para. 956; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 298-300, Nos. 2434-2455.

Cases referred to:

(1) *Thompson v. Thompson*, (1901), 85 L.T. 172; 27 Digest, Replacement, 306, 2534.

- (2) *Bosworthick v. Bosworthick*, (1901), 86 L.T. 121; 27 Digest, Replacement, 333, 2775.
- (3) *Bogel v. Bogel*, [1938] 4 All E.R. 181; 108 L.J.P. 25; 159 L.T. 522; 102 J.P. 525; 27 Digest, Replacement, 351, 2908.
- (4) *Kashfisky v. Kashfisky*, [1950] 2 All E.R. 398; [1951] P. 38; 114 J.P. 404; 27 Digest, Replacement, 296, 2413.
- (5) *Squire v. Square*, [1948] 2 All E.R. 51; [1949] P. 51; 112 J.P. 319; 27 Digest, Replacement, 296, 2415.
- (6) *Lauder v. Lauder*, [1949] 1 All E.R. 76; [1949] P. 277; 27 Digest, Replacement, 306, 2537.
- (7) *Usmar v. Usmar*, [1949] P. 1; [1948] L.J.R. 1418; 27 Digest, Replacement, 299, 2445.
- (8) *Cox v. Cox*, [1952] 2 T.L.R. 141; 3rd Digest Supp.
- (9) *Westall v. Westall*, (1949), 65 T.L.R. 337; 27 Digest, Replacement, 296, 2416.
- (10) *Warburton v. Warburton*, (1953), *The Times*, July 10.
- (11) *Jamieson v. Jamieson*, [1952] 1 All E.R. 875; [1952] A.C. 525; 1952 S.C. (H.L.) 44; 116 J.P. 226; 3rd Digest Supp.
- (12) *Mackenzie v. Mackenzie*, [1895] A.C. 384; 27 Digest, Replacement, 366, 3027.
- (13) *Kelly v. Kelly*, (1870), L.R. 2 P. & D. 59; 39 L.J.P. & M. 28; 22 L.T. 308; 27 Digest, Replacement, 298, 2434.
- (14) *Hadden v. Hadden*, (1919), *The Times*, Dec. 5.
- (15) *Simpson v. Simpson*, [1951] 1 All E.R. 955; [1951] P. 320; 115 J.P. 286; 27 Digest, Replacement, 299, 2447.
- (16) *Buchler v. Buchler*, [1947] 1 All E.R. 319; [1947] P. 25; [1947] L.J.R. 820; 176 L.T. 341; 111 J.P. 179; 27 Digest, Replacement, 350, 2899.
- (17) *Horton v. Horton*, [1940] 3 All E.R. 380; [1940] P. 187; 109 L.J.P. 108; 163 L.T. 314; 27 Digest, Replacement, 307, 2543.
- (18) *Bartholomew v. Bartholomew*, [1952] 2 All E.R. 1035; 117 J.P. 35; 3rd Digest Supp.
- (19) *Hosegood v. Hosegood*, (1950), 66 (pt. 1) T.L.R. 735; 27 Digest, Replacement, 336, 2798.
- (20) *King v. King*, [1952] 2 All E.R. 584; [1953] A.C. 124; 3rd Digest Supp.

APPEAL by the wife against orders of the Croydon justices dated May 25, 1954.

The parties were married in December, 1940, and there was one child of the marriage born on Oct. 25, 1944. The husband was in the army and in 1945 he was posted overseas. In December, 1947, the husband returned to England for a month's leave. There was a quarrel during which it was admitted that the husband struck her and, according to the wife, her thumb was dislocated. They thereupon agreed to separate. After the separation the wife committed adultery, and the child born as a result of that adultery was adopted. In May, 1950, the husband returned to England again on a month's leave and the parties were reconciled. The husband returned to England in October, 1952, and on July 4, 1953, the parties resumed cohabitation. On Easter Monday (Apr. 19), 1954, the husband was, according to the wife, rude to guests whom she had invited home. On Easter Tuesday (Apr. 20), 1954, the husband indecently assaulted the child of the marriage (then eight and a half years of age). The same evening there was a quarrel between the parties during which, according to the wife, "he gave me a good hiding and knocked me on the floor." The husband then left the matrimonial home. After a conversation with the child of the marriage the wife went to see the police, who arrested the husband and charged him with indecently assaulting the child. The husband was remanded in custody and wrote from prison two letters to the wife, in which he showed affection for the wife and child and regret for what he had done. In the first letter he stated, *inter alia*, that he realised forgiveness was now out of the question and asked

her to come and see him " then I'll know what you intend to do." In the second letter, dated Apr. 27, 1954, he stated, inter alia, that he did not think that they could ever live together again as man and wife " we do not suit ", and also wrote:

" I am very worried about you, and hope that you have been able to pull yourself together, let this thing be a passing memory, take real good care, no illness or breakdown, keep your health good and please write again."

The wife did not reply to either letter. On Apr. 28, 1954, a summons was issued against the husband on the wife's complaints that he had been guilty of persistent cruelty towards her and had deserted her on Apr. 20, 1954. On Apr. 29, 1954, the husband pleaded guilty to the charge of indecent assault and was fined £20. The parties never resumed cohabitation. On May 25, 1954, the justices having heard the evidence of the wife and the husband, dismissed both complaints, giving as their reasons:

" Having seen the parties and heard the evidence we prefer to believe the evidence of the husband rather than that of the wife. We were invited to say that certain acts by the husband towards the child, coupled with his actions towards his wife, constituted persistent cruelty towards his wife . . . So far as the husband's actions towards the child are concerned we find that they give very little support to the wife's allegation that he has been guilty of persistent cruelty towards her. The wife alleged that her husband had used physical violence to her on two occasions . . . The wife further alleged that she had lost weight, but no evidence was called to show the cause of such loss. The wife alleged that one of the acts of violence took place in 1947 and alleged no other for a period of seven years. The husband's version of what took place at Easter, 1954, differs greatly from that of the wife and we find that the wife has not established that her husband has been guilty of persistent cruelty towards her.

" The wife further alleged that her husband has deserted her on and from Apr. 20, 1954. The husband admitted having written a letter in April, 1954 . . . saying it was not possible for him to live with his wife again. The wife also says that she would not live with her husband again. We find, therefore, that the husband is not absent from his wife against her will. We do not consider that the evidence discloses matters of sufficient weight and gravity to give the wife just and reasonable cause for refusing to live with her husband. We were asked to give weight to the conviction of the husband for indecently assaulting the child; this is the kind of offence which can vary greatly in its degree of gravity, and no evidence was called before us to show the nature of this particular incident. We find, therefore, that the husband is not guilty of deserting his wife because the separation is consensual and she has no just and reasonable cause for refusing to live with him."

The wife now appealed.

Miss M. Morgan Gibbon for the wife.

J. F. Coplestone-Boughey for the husband.

LORD MERRIMAN, P.: I am asking KARMINSKI, J., to deliver the first judgment.

KARMINSKI, J., stated the facts and continued: As I am about to criticise some of the justices' reasons I cannot conceal the fact that I feel a great deal of sympathy with the justices. No doubt they received assistance from the wife's solicitor, but the husband appeared in person before them, and they had to deal with a matter which, in my view at any rate, raises difficult questions of law. The justices, in their reasons, say:

" Having seen the parties and heard their evidence we prefer to believe the

evidence of the husband rather than that of the wife. We were invited to say that certain acts by the husband towards the child, coupled with his actions towards his wife, constituted persistent cruelty towards his wife. The husband admits having been convicted of indecently assaulting the child, but there is no evidence to show that the assault was committed in the presence of his wife and with intention of causing his wife pain. So far as the husband's actions towards the child are concerned we find that they give very little support to the wife's allegation that he has been guilty of persistent cruelty towards her."

That goes to the root of one, at any rate, of the problems before us. The justices were right, I think, in saying that there was no evidence to show that the assault was committed in the presence of the wife. Indeed, I am prepared to assume that a man who does what this father did to this child might even go to some pains to make sure that the mother of the child, his wife, was not present at the time. So far as the intention of causing pain to the wife is concerned I propose to deal with that when I consider some of the authorities on this branch of the law. The justices deal with the evidence of injury to health. They say:

"The wife further alleged that she had lost weight, but no evidence was called to show the cause of such loss."

They would seem, as I think, to have overlooked other matters of which the wife complained, namely, that in 1947, on the occasion of the first assault her thumb was dislocated, and that on the last assault, on Easter Tuesday, Apr. 20, 1954, she was struck a blow which knocked her over. The justices then direct their attention to the gap between 1947 and 1954, namely, seven years in which no assault is alleged by the wife against the husband, and say:

"The husband's version of what took place at Easter, 1954, differs greatly from that of the wife, and we find that the wife has not established that her husband has been guilty of persistent cruelty towards her."

I am bound to say that I have had a little difficulty in understanding that wholly. It is true that the husband does not, I think, admit an assault in the ordinary sense of the word, but said there was something in the nature of a scuffle, which resulted in the wife falling over the bathroom mat. The wife, on the other hand, says the husband's blow was more serious, and knocked her over. Allowing for the probable fact that in the heat of the moment neither party was taking mental notes of what was happening, I do not regard the difference between the two versions as either great or surprising.

The justices then deal with the other branch of complaint, namely, that the husband had deserted the wife, and I would preface this part of the case by saying at once that if the husband had treated the wife with cruelty she would be, in effect, on the facts of the present case, driven from the home. It may well be that if the facts which she alleges fall short of cruelty she cannot now rely on them as conduct which caused her to leave home. On the other hand, if the wife establishes cruelty, her complaint of desertion assumes, to my mind, a somewhat academic nature. The justices recall that the husband admitted the letter "saying that it was not possible for him to live with his wife again" and that the wife said at the hearing that "she would not live with her husband again". Then they continue:

"We find, therefore, that the husband is not absent from his wife against her will. We do not consider that the evidence discloses matters of sufficient weight and gravity to give the wife just and reasonable cause for refusing to live with her husband. We were asked to give weight to the conviction of the husband for indecently assaulting the child; this is the kind of offence which can vary greatly in its degree of gravity, and no evidence was called before us to show the nature of this particular incident."

A So far as the evidence was concerned the justices were right. The wife stated that the husband had been charged with and convicted of an indecent assault on his own child, the husband admitted that he had pleaded guilty to that charge, and in those circumstances one can well imagine that the solicitor who appeared for the wife was by no means willing, if it could be avoided, to call the child, who was then about eight and a half years of age, to give evidence of these distressing and loathsome matters before the court. I am greatly puzzled by the justices' view that this kind of offence can vary greatly in its degree of gravity. So far as the relationship between the parents of the child is concerned, I would have thought that any indecent assault on a child, and in particular an indecent assault on a small girl who was, in fact, the daughter of the accused, must be an offence of at least some gravity, and must be, as is much more important for the purposes of the present case, an offence which by its nature goes to the very root of the married relationship between the parents of the child. The justices terminated by saying

B "that the husband is not guilty of deserting his wife because the separation is consensual and she has no just and reasonable cause for refusing to live with him."

C On those facts and those findings it has been argued that the decision of the justices was against the weight of the evidence, and, further, that their decision was wrong in law.

D I turn now to the law applicable to the facts of the present case. The proposition that acts of sexual perversion or sexual irregularity may, in certain circumstances, amount to cruelty to the innocent spouse, would appear to have been long established. In *Thompson v. Thompson* (1) SIR FRANCIS JEUNE, P., had before him the undefended petition of a wife on the grounds of the husband's cruelty and adultery. So far as the cruelty was concerned the wife complained that her health had been shattered because of her husband's conduct in respect of certain young women, two of whom, at least, he had taken into his house and nominally into his service; and in respect of one of whom he had been sentenced under the Criminal Law Amendment Act, 1885, s. 5 (1), to twelve months' hard labour. SIR FRANCIS JEUNE, P., held on those facts that the cruelty had been established, and pronounced a decree nisi accordingly. Shortly afterwards there was tried before BARNES, J., *Bosworthick v. Bosworthick* (2), in which the wife sought dissolution of her marriage from her husband on the ground of rape, and, alternatively, a judicial separation on the ground of his cruelty. The charges of rape and in the alternative cruelty related to the husband's conduct with young females. It was proved that some years before the break-up of the marriage he had indecently exposed himself to two small girls who were the guests of the family. The wife, however, forgave him, but after the resumption of cohabitation the husband respondent committed a series of indecent assaults on no fewer than six small girls all under the age of thirteen years, and for those offences he was sentenced to twenty months' imprisonment at the quarter sessions. The wife said that the husband's conduct had caused a breakdown in her health, and evidence was given that she had become what was described as an absolute wreck. BARNES, J., in the course of his judgment found that the charge of rape had been established, though it would appear there was some difficulty in ascertaining the fact, as there so often is in cases of that kind, from the girl who gave evidence, but he added that although it was not necessary for him so to do he had come to the conclusion that the charge of cruelty also had been established, and he referred to *Thompson v. Thompson* (1). I would point out that both *Thompson v. Thompson* (1) and *Bosworthick v. Bosworthick* (2), were undefended, but both the eminent judges who dealt with them had the advantage of very experienced practitioners in these courts, in the first case Mr. Priestley and in the second case Mr. Inderwick, K.C., and Mr. Harvey Murphy. Neither judge, so far as the reports go, expressed any

doubt or difficulty that the facts there set out could, and in those cases did, amount to cruelty in law.

Boyd v. Boyd (3) came before BUCKNILL, J., in the first instance as a wife's petition for divorce on the ground of desertion. On that allegation the learned judge felt himself in great difficulty, and decided that no case had been made out. His decision on that part of the case has been the subject of a great deal of discussion, some approving, some disapproving. At the conclusion of his judgment, BUCKNILL, J., gave leave to amend the petition by way of adding a charge of cruelty, and we are told, and I think it is agreed on both sides, that the subsequent history of the matter was this; the amended petition alleging cruelty was served on the husband, who did not contest it, and in due course BUCKNILL, J., pronounced a decree on the ground of cruelty. The facts of *Boyd v. Boyd* (3) were as follows: After the marriage the husband was convicted of the crime of incest with his daughter by an earlier marriage, and was sentenced to five years' penal servitude. On his discharge from prison the wife forgave him and resumed cohabitation with him, but some three years after the resumption of cohabitation he was convicted of indecently assaulting a girl aged twelve years, and again sent to prison. The point under examination was whether or not the conduct of the husband amounted to constructive desertion by him of the wife, and BUCKNILL, J., as I have already indicated, found that it did not. He did apparently find that those facts could, and in the circumstances of that case did, amount to cruelty. I arrive, therefore, at this position, that until, at any rate, the year 1938, no difficulty, so far as we know, had ever been expressed, or at least reported, in these courts, in finding cruelty when a husband has been guilty of sexual offences of the type set out in these reports, and the industry of counsel in the present case has not produced any authority or any decision which doubts the correctness of the decisions in *Thompson v. Thompson* (1), *Bosworthick v. Bosworthick* (2), or *Boyd v. Boyd* (3).

So far, the matter is without difficulty. Subsequent cases, though not referring in terms to these earlier cases, have raised doubts whether or not an indecent offence of the kind committed by the husband in the present case can be, either by itself or in conjunction with other conduct, a matter of cruelty committed against the wife. I do not propose to go in detail through all the authorities so carefully and fully examined by counsel, but I would turn for a moment to the decision of the Court of Appeal in *Kashfsky v. Kashfsky* (4). That was an appeal from His Honour JUDGE PUGH, sitting as a special commissioner, who had rejected an allegation by a husband against the wife of cruelty. The facts of that case were as different as it is possible to imagine from those of the present, since the husband there was complaining of a large number of acts of omission by the wife, which, he said, in the aggregate amounted to cruelty. The conduct of the wife was summarised, not, if I may say so, with undue harshness, by the learned commissioner in the single word "sluttish", and, on appeal from his refusal to grant a decree of dissolution, the Court of Appeal affirmed his decision. I mention the facts in *Kashfsky v. Kashfsky* (4) because it is clearly desirable, when reading passages from the judgments, that one should have in mind to what facts they were directed. DENNING, L.J., in the course of his judgment, said ([1950] 2 All E.R. at p. 402):

" . . . when the conduct consists of direct action by one against the other, it can then properly be said to be aimed at the other, even though there is no desire to injure the other or to inflict misery on him. Thus, it may consist of a display of temperament, emotion, or perversion whereby the one gives vent to his or her own feelings, not intending to injure the other, but making the other the object—the butt—at whose expense the emotion is relieved. The sick wife in *Squire v. Squire* (5) had no desire to injure her husband, but she was guilty of cruelty because she made her husband the butt of her inordinate demands. The moody husband in *Lauder v.*

Lawler (6) directed his sulkiness at his wife, although he had no wish to hurt her. So, also, the nagging wife in *Usmar v. Usmar* (7). Cases of this kind must, however, be carefully watched. When there is no intent to injure, they are not to be regarded as cruelty unless they are plainly and distinctly proved to cause injury to health . . . when the conduct does not consist of direct action against the other, but only of misconduct indirectly affecting him or her, such as drunkenness, gambling, or crime, then it can only properly be said to be aimed at the other when it is done, not only for the gratification of the selfish desires of the one who does it, but also in some part with an intention to injure the other or to inflict misery on him or her. Such an intention may readily be inferred from the fact that it is the natural consequence of his conduct, especially when the one spouse knows, or it has already been brought to his notice, what the consequences will be, and nevertheless he does it, careless and indifferent whether it distresses the other spouse or not. The court is, however, not bound to draw the inference. The presumption that a person intends the natural consequences of his acts is one that may—not must—be drawn. If in all the circumstances it is not the correct inference, then it should not be drawn. In cases of this kind, if there is no desire to injure or inflict misery on the other, the conduct only becomes cruelty when the justifiable remonstrances of the innocent party provoke resentment on the part of the other, which evinces itself in actions or words actually or physically directed at the innocent party.”

It was said in argument by counsel for the husband that that opinion is in some way inconsistent with that expressed by BUCKNILL, L.J., with whom SOMERVELL, L.J., agreed. I say at once that I cannot accept that criticism or that analysis of the judgment of DENNING, L.J. I think possibly he was adding something to the judgments of the other two members of the court. I do not think he was differing from them in any way. The importance of the observations of DENNING, L.J., lies, I think, in the words:

“Such an intention may readily be inferred from the fact that it is the natural consequence of his conduct, especially when the one spouse knows, or it has already been brought to his notice, what the consequences will be, and nevertheless he does it, careless and indifferent whether it distresses the other spouse or not.”

Applying that test to the present facts I have to ask myself whether a man of apparently normal intellectual powers should know the natural consequences on his wife of an indecent assault on the child of the marriage. There is nothing in this case to show that the wife was in any way hypersensitive in her feelings or abnormally slow in her reactions. I think, therefore, that one is justified in assuming her to be possessed of the normal feelings of an average mother, and cannot help but infer from that that a man in these circumstances who did what apparently he did to this small child must have assumed or known, if he thought about it, that it would cause the gravest distress and possibly severe injury to health to his wife, the mother of the child. Moreover, applying the second half of DENNING, L.J.’s test, if when he does it, he is careless and indifferent whether it distresses the wife or not, then the intention to injure may be inferred.

I pass to more recent cases which on the face of them may appear, until examined, to be inconsistent with the line of decisions terminating in *Boyd v. Boyd* (3). In *Cox v. Cox* (8), the Court of Appeal had to consider an allegation of cruelty which was based on a wife’s complaint that the husband’s action in associating with other women had injured her health. Her complaint had been dismissed by a special commissioner in Nottingham, and it would appear from the report that the complaints were limited to the husband’s conduct with other women, and with one named woman in particular, and DENNING, L.J., with whom SINGLETON and HODSON, L.JJ., agreed, said ([1952] 2 T.L.R. at p. 142):

“The judge [His Honour JUDGE CAPORN sitting as special commissioner]

summarised his view by saying: 'I think what happened in this case is that he presumably formed an attachment for this other girl, preferred her to his wife, and he was showing his preference, as men do, and neglecting his wife,' and he felt on the whole that the case fell short of cruelty. I agree with that view. In *Westall v. Westall* (9) and *Kaslefsky v. Kaslefsky* (4) this court pointed out that in many cases the intention of the party is of decisive importance. This is one of those cases. It depends on whether the husband had an intention to inflict misery on his wife or not. If he was simply in love with another woman, going about with her and associating with her, and that caused his wife to break down in health, then, in my view, his conduct cannot be properly treated as cruelty. There may be some other ground of relief, but it is not cruelty. I find myself unable to say that the judge was wrong here in finding that there was no cruelty."

Warburton v. Warburton (10) was an appeal from Mr. Commissioner LATEY, Q.C., who had granted the wife a decree on Mar. 11, 1953, on the ground of cruelty. In that case the wife's complaints seem to have changed, or, at any rate, developed during the course of the hearing. In the end they narrowed down to this, that the husband had injured the wife's health by his persistence in leading a criminal life. In fact, all that was found was that the husband had been convicted of dishonesty before marriage, as the wife knew. She had apparently married him in the face of family opposition, and the marriage had broken down because soon after the marriage the husband had been convicted again and sentenced to a term of imprisonment. His offence, as appears from the judgment, contained nothing of an indecent or sexual nature. He appears to have committed some offence of dishonesty, namely, stealing money. HOBSON, L.J., said:

"As I understand the law, there must be at least some evidence in considering cruelty either of an intention to injure the other spouse or of facts from which an intention can be inferred. I cannot infer, so far as I am concerned, any intention to injure the wife from the fact that this man was convicted. The intention was that he wished to get easy money, as the manner of his life showed in other ways. The learned commissioner found that during the marriage, while living in London, he had a job but he was supplementing his probably small wages by gambling. When he had money raised in this way he spent it freely and sometimes in the company of his wife. I am quite unable to draw any further inference from the fact that he was convicted which is relevant to the charge of cruelty other than that which I have already stated. I would respectfully repeat what my Lord has said about taking facts into the category of cruelty and the impossibility of doing so. Lord TUCKER, in *Jamieson v. Jamieson* (11) ([1952] 1 All E.R. at p. 888), agreed with what Lord KERR had said, 'that it is, generally speaking, not possible to compartmentalise acts for the purposes of relevance as being gross so as to constitute cruelty or less gross so as not to constitute cruelty'. I do not wish to be taken as saying that in no circumstances could persistence in a course of criminal conduct be a basis of a charge of cruelty where the necessary ingredients are present of physical injury or apprehension of the same. I agree therefore that the appeal should be allowed."

I return for a moment to the first sentence of the passage of the learned lord justice's judgment which I have just read in which he says,

"there must be at least some evidence in considering cruelty either of an intention to injure the other spouse or of facts from which an intention can be inferred."

It must be borne in mind that these were not apparently reserved judgments, and the form of the words used was not perhaps very carefully considered by the

learned lord justice. I have read that passage in an attempt to put, perhaps in a concise form, what had been said rather more fully in earlier cases, especially in the passage from the judgment of DENNING, L.J., in *Kaslefsky v. Kaslefsky* (4) ([1950] 2 All E.R. at p. 402).

I come last to the decision of the House of Lords in *Jamieson v. Jamieson* (11). That was a Scottish appeal, on what might have been called in earlier days in this country a demurrer. The ground of appeal was that the wife had raised a motion for divorce in Scotland on the ground of mental cruelty, which contained averments that the husband had been guilty of conduct which was calculated to hurt her and was deliberately persisted in with knowledge of the resulting injury to her health, and also that resumption of cohabitation would entail reasonable apprehension of danger to her health. It was held that the averments were relevant to go to proof. There are passages in the speeches of their Lordships, which I think require some careful examination, having regard to what had been said in various forms in earlier, and to some extent in later, cases. LORD NORMAND said ([1952] 1 All E.R. at p. 877):

" There was some difference of opinion between the Lord President and LORD CARMONT on the question whether a defender's conduct is to be judged by reference to its probable effect on the health of a pursuer of normal susceptibilities or whether it is relevant for a pursuer to aver that the conduct alleged did in fact cause him or her mental suffering and consequent injury to health. Neither of the learned judges proposed a dogmatic answer and for my part I am respectfully inclined to accept the Lord President's view that ' the conduct alleged must be judged *up to a point* by reference to the victim's capacity for endurance in so far as that capacity is or ought to be known to the other spouse.' There is the high authority of LORD WATSON in *Mackenzie v. Mackenzie* (12) ([1895] A.C. at p. 405) for the proposition that much depends in each case on its circumstances and, in particular, on the victim's capacity for endurance. That leaves it open to find, after evidence, that the pursuer was the victim of his or her own abnormal hypersensitiveness and not of cruelty inflicted by the defender. But the cases in which such a decision would be possible without evidence must be exceedingly rare, and this case is certainly not one of them. The Lord President, I think, reaches the crux of the case when he says that ' where the cruelty is of the type conveniently described as mental cruelty, the guilty spouse must either intend to hurt the victim or at least be unwarrantably indifferent as to the consequences to the victim.' There is room for differences of opinion about what kinds of case may be covered by the words ' unwarrantably indifferent.' I do not propose to go into that because I wish to avoid the discussion of hypothetical cases and because I am of opinion that actual intention to hurt may have in a doubtful case a decisive importance and that such an intention has been averred here. Actual intention to hurt is a circumstance of peculiar importance because conduct which is intended to hurt strikes with a sharper edge than conduct which is the consequence of mere obtuseness or indifference. My noble and learned friends have discussed the averments in the opinions which they will deliver and which I have had the advantage of reading, and they have shown that the appellant has averred a case of actual intention to hurt, wilfully persisted in after the injury to the appellant's health was apparent to the respondent. These averments are, in my opinion, relevant, and they are, I think, supported by sufficiently specific instances of the respondent's alleged cruelty. I, therefore, agree that the action should go to proof."

As I understand LORD NORMAND's opinion, he is saying, in effect, and indeed in terms, that the actual intention is, as he put it, a circumstance of peculiar importance because that which is intended hurts more, but that conduct which

is the consequence of mere obtuseness or indifference may none the less be cruelty. LORD MERRIMAN said ([1952] 1 All E.R. at p. 880):

"I fully agree with your Lordships that the averment of an intention on the part of the husband to impose his will on the pursuer, and the averment of persistence in his callous conduct, although aware of its effect on his wife's health, both of which are plainly made, are important averments in this case. In saying this, however, I must not be taken to suggest that either in England or in Scotland it is essential to impute to the wrongdoer a wilful intention to injure the aggrieved spouse in order to establish a charge of cruelty. In *Mackenzie v. Mackenzie* (12), LORD WATSON said ([1895] A.C. at p. 409): 'I do not impute to the appellant that his conduct, cruel and reprehensible though it was in my estimation, was dictated by a wilful intention to injure the respondent.' Likewise in *Kelly v. Kelly* (13), to which I shall recur later, because it is the leading case in England on the subject of cruelty without physical violence, LORD PENZANCE in his judgment in the full court said (L.R. 2 P. & D. at p. 72): 'He says that he does not desire to injure her, and it has never been asserted that he does'. So, also, in *Squire v. Squire* (5) TUCKER, L.J., said ([1948] 2 All E.R. at p. 54) that in his view the law on this point could not be more clearly expressed than in the brief statement quoted (*ibid.*, at p. 53) from the judgment of SHEARMAN, J., in *Hadden v. Hadden* (14): 'I do not question he had no intention of being cruel but his intentional acts amounted to cruelty.' During the argument, however, the question arose whether the averments of the husband's intention to impose his will on the wife and of persistence in his callous conduct although aware of its effect on her health could legitimately be supported at the proof merely by invoking the presumption that a person intends the natural and probable consequences of his acts. I deprecate the exclusion in advance of any particular method of proving an averment. I make this reservation because I am unable to agree with the Lord President's view that this presumption leads to the conclusion that if injury to health occurs 'any' conduct, however meritorious, which brings about that result would be cruelty. I have expressed my own views on this matter recently in *Simpson v. Simpson* (15) and I do not propose to repeat them, but I may, perhaps, be allowed to quote one sentence ([1951] 1 All E.R. at p. 962): 'Without going through the careful examination of the doctrine in *Squire v. Squire* (5) with which I respectfully agree, I venture to suggest that in this jurisdiction, at any rate, we may continue to use the time-honoured maxim provided always that we remember that it does not express an irrebuttable presumption of law and that it is only to be applied in connection with conduct which can fairly be described as ill-treatment'. I coupled with these views an observation of LORD GREENE, M.R., in *Buchler v. Buchler* (16) ([1947] 1 All E.R. at p. 325)."

LORD MERRIMAN then went to the question of desertion. I pause there for a moment to remind myself of the brief statement which LORD MERRIMAN quoted from the judgment of SHEARMAN, J., in *Hadden v. Hadden* (14), which met with approval in the Court of Appeal in *Squire v. Squire* (5):

"I do not question that he had no intention of being cruel, but his intentional acts amounted to cruelty",

which to my mind raises the same point as that which DENNING, L.J., put more fully a good many years later in the passage ([1950] 2 All E.R. at p. 402) in *Kaslefsky v. Kaslefsky* (4) to which I have already referred.

LORD REID, as I understand his speech, was not wholly agreed with the approach indicated by LORD NORMAND and by LORD MERRIMAN, and put one passage in a slightly more reserved or guarded form. He started in these terms ([1952] 1 All E.R. at p. 886):

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I read [the appellant's] averments as alleging a deliberate course of conduct intended to wound and humiliate the appellant and persisted in by the respondent although it was obvious that this was seriously affecting the appellant's mental and physical health. It is true that the appellant's case does not appear to have been presented in this light to the First Division. The argument there presented appears to have been that any conduct by one spouse which injures the health of the other is cruelty whatever may have been the intention of the defender. I am not surprised that the First Division rejected this argument. But there can hardly be a more grave matrimonial offence than to set out on a course of conduct with the deliberate intention of wounding and humiliating the other spouse and making his or her life a burden and then to continue in that course of conduct in the knowledge that it is seriously affecting his or her mental and physical health. Such conduct may consist of a number of acts each of which is serious in itself, but it may well be even more effective if it consists of a long continued series of minor acts no one of which could be regarded as serious if taken in isolation. Once it is established that physical violence is not a necessary ingredient of cruelty—and I think that that has long been recognised by the law of Scotland—then I can see no justification in principle for requiring that the deliberate acts of the defender must be of a certain character, and I know of no authority which requires me to make any such distinction. If a case is to be remitted for proof it is very undesirable to say anything which may embarrass the future conduct of the case. I do not think that it is necessary for the decision of this appeal to make a detailed examination of the authorities either in Scotland or in England, and I, therefore, refrain from doing so. But to avoid misunderstanding there are some observations of a general character which I think it necessary to make. What I have said is only intended to apply when a deliberate intention such as I have described was the cause of the defender's conduct. Such an intention need not be proved by direct evidence. It may be inferred from the whole facts and atmosphere disclosed by the proof. I do not doubt that there are many cases where cruelty can be established without it being necessary to be satisfied by evidence that the defender had such an intention, but I do not intend to decide anything about such cases. If the defender did not, in fact, intend to ill-treat the pursuer, I desire to reserve my opinion whether or to what extent it is necessary or proper to impute an intention which did not exist by invoking a legal presumption that everyone must be supposed to intend or foresee the natural and probable consequences of his acts, and I also wish to reserve my opinion on the question whether or in what circumstances it can be enough in such cases to prove that a series of comparatively minor incidents has caused injury to the health of the pursuer if the defender was not guilty of deliberately ill-treating the pursuer."

I would lay emphasis on the words used by LORD REID: "It may be inferred from the whole facts and atmosphere disclosed by the proof". That approach was emphasised in the last opinion, that of LORD TUCKER, who said ([1952] 1 All E.R. at p. 887):

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". . . judges have always carefully refrained from attempting a comprehensive definition of cruelty for the purposes of matrimonial suits and experience has shown the wisdom of this course. It is, in my view, equally undesirable—if not impossible—by judicial pronouncement to create certain categories of acts or conduct as having or lacking the nature or quality which render them capable or incapable in all circumstances of amounting to cruelty in cases where no physical violence is averred. Every such act must be judged in relation to its surrounding circumstances, and the physical or mental condition or susceptibilities of the innocent spouse, the intention

of the offending spouse, and the offender's knowledge of the actual or probable effect of his conduct on the other's health (to borrow from the language of LORD KEITH) are all matters which may be decisive in determining on which side of the line a particular act or course of conduct lies. For this reason I agree with LORD KERR that it is, generally speaking, not possible to compartment acts for the purposes of relevance as being gross so as to constitute cruelty or less gross so as not to constitute cruelty, though there may be extreme cases where the acts in themselves are so trivial as to justify dismissal of an action for lack of relevance without proof. It is with regard to the sufficiency of the facts and matters relied on as amounting in the aggregate to cruelty that I think consistorial causes are so different from many other types of action, though I agree with counsel for the respondent that it would be wrong to say that no such suit could ever fail for lack of relevance."

I should perhaps add that the observations which he borrowed from LORD KEITH were given by LORD KEITH in his dissenting judgment in the Inner House of Appeal in Scotland. It is, I think, vital in a case of this kind to try to escape from any tendency to do what LORD KEITH described as an attempt "to compartment acts for the purposes of relevance". One of the difficulties, as I understand the justices' reasons in the present case, is that in a praiseworthy effort to get to the bottom of the case they divided up, or detached from each other, the complaint by the wife of the indecent assault on the child from the two physical assaults, which were separated by seven years, perpetrated by the husband on the wife. Any such approach is, I think, dangerous and almost certainly wrong. It is essential, as LORD TRECKER pointed out, to judge every act in relation to its attendant circumstances, the condition or susceptibilities of an innocent spouse, the intention of the offending spouse, and no less the offender's knowledge of the actual or probable effect of his conduct on the other's health. I have already mentioned my own view as to the probability of an indecent assault on a child of the marriage outraging, to put it no higher, the normal instincts of a decent mother. I doubt not that any man of ordinary intellectual capabilities must have known, if he paused to reflect, that an act of that kind, assuming always it was discovered by the mother or brought to her notice, would be a dreadful blow to her normal susceptibilities. In the present case, however, the pattern is somewhat more complicated, because on the very day that the indecent assault took place, it was followed by what the wife complains of as a serious assault but which the justices have found was perhaps less serious than the wife made out. The two serious incidents, coming so close together, and following on the less serious matter concerning the rudeness to guests, must be taken together to form a composite picture from which alone it can be ascertained whether the acts of one spouse on another should, judged in relation to all the surrounding circumstances, be found to amount to cruelty.

I do not propose to say anything further on the question of cruelty. In my view this case must go back to a fresh panel of justices for a re-hearing in order that they may apply their minds afresh to what I think is the law. So far as the charge of desertion is concerned, I propose to say extremely little about it, because in my view, although the charges of cruelty and desertion may to some extent hang together, I think it is right that the charge of desertion should go back with the charge of cruelty and that they should be re-heard together before a fresh panel of justices.

LORD MERRIMAN, P.: I agree. It is not disputed that the true effect of the decisions in *Thompson v. Thompson* (1), in *Bosworthick v. Bosworthick* (2), and in *Boyd v. Boyd* (3), which KARMINSKI, J., has already summarised, is to afford authority for the proposition that sexual offences against third parties which, if I may borrow a phrase from my own judgment ([1951] 1 All E.R. at p. 962) in *Simpson v. Simpson* (15), are "directly relevant to [the husband's]

conjugal obligations", may be cruelty to the wife. It is perfectly true that *Thompson v. Thompson* (1) and *Bosworthick v. Bosworthick* (2) were decided long before the formula that conduct, in order to amount to cruelty, must be "aimed at" the petitioner, had apparently been reduced to an absolute rule of law to be applied in all circumstances. Nevertheless, as KARMINSKI, J., has pointed out, those cases, undefended as they were, were decided by very learned judges on a careful consideration of submissions by counsel of unrivalled experience in the divorce jurisdiction. *Boyd v. Boyd* (3), decided in 1938, does not have the same long standing, but it was a judgment of BUCKNILL, J., who has been one of the exponents of the doctrine to which I have just alluded, if, indeed, he was not the originator of it in *Horton v. Horton* (17).

Counsel for the husband in the present case, in his admirable argument, sought to distinguish those cases from the present on the ground that they all have a common feature which is not present to this case, namely, that the offences, or offences ejusdem generis, were repeated after the unfavourable reaction of the petitioner to the first offence was known to the respondent, and, therefore, that the later offence was "aimed at" the petitioner. However that may be, I venture to think that to hold that an indecent assault committed, in the matrimonial home, on the daughter of the marriage eight and a half years of age, is "aimed at" the wife, if that is the proper test, requires only the exercise of a little common sense, and I do not think that so to hold conflicts with what DENNING, L.J., is reported as saying ([1950] 2 All E.R. at p. 402) in *Kaslefsky v. Kaslefsky* (4), still less that it conflicts in any degree with what was said by more than one of the noble Lords who dealt with *Jamieson v. Jamieson* (11). Manifestly, as KARMINSKI, J., has already said, the point becomes even clearer when within a short space of time the offence in question is coupled with a physical assault on the wife herself. In the course of the argument we were referred to cases in which the propriety of the original decision in *Boyd v. Boyd* (3), when BUCKNILL, J., dismissed the charge of desertion, has been considered, including, amongst others, my own judgment in *Simpson v. Simpson* (15), a decision of this court composed as it now is. As I have expressly ([1952] 1 All E.R. at p. 881) adhered to that judgment when sitting in the House of Lords in *Jamieson v. Jamieson* (11) it is neither necessary, nor would it be becoming, to say more than that I repeat here my adherence to that judgment, and to add that the reasoning of that judgment is not answered, as it was in *Bartholomew v. Bartholomew* (18) decided in the Court of Appeal many months after the decision in *Jamieson v. Jamieson* (11), by the statement that BUCKNILL, J., had been a party to the decision in *Hosegood v. Hosegood* (19).

I am also entitled to point out, following what KARMINSKI, J., has said, that in more than one of the recent cases in which *Boyd v. Boyd* (3) has been followed, expressly or by implication the decision in *Jamieson v. Jamieson* (11) is treated as laying down that intention to injure is an essential averment in cruelty. That is not the case. It is true that in what LORD KEITH, who dissented in the Inner House, described as "perhaps thin averments" and LORD NORMAND described as a "doubtful case", all the noble Lords who decided *Jamieson v. Jamieson* (11) agreed with LORD KEITH that the averment that the course of conduct complained of was inspired by the intention on the part of the husband to impose his will on the wife without consideration for her feelings or health was an important averment in the circumstances of the case, but that is not the same thing as holding that it was an "essential" averment in a charge of cruelty generally, or even in the particular case. It is also true that in declining to discuss how that averment might be proved, LORD REID, in the passage which has been referred to ([1952] 1 All E.R. at pp. 886, 887), reserved his opinion whether reliance can be placed on any presumption of the husband being supposed to intend the natural and probable consequences of his own acts. He was alone in that reservation. Neither LORD NORMAND, nor LORD TUCKER who had

delivered the principal judgment in *Squire v. Squire* (5), dealt with the point at all, while, as I have already said, I adhered to my opinion, expressed in *Simpson v. Simpson* (15), that *Squire v. Squire* (5) was rightly decided. It is proper to add, however, that in *King v. King* (20), LORD REID repeated, in substance, the same reservation.

In the present case, the validity of the application of the presumption, which we all know is not irrebuttable, may be academic, for, as KARMINSKI, J., has already explained, in the letters which were written by the husband while awaiting trial for the indecent assault, in one view of them he appeared to recognise plainly that it was the natural if not the inevitable effect of his conduct that there could be no question of forgiveness on the part of the wife. It is right to say also that it is a possible view of those letters, from another aspect, that the husband, recognising the effect that his conduct had had on the wife, was offering her a consensual separation. If that view is correct, and the wife accepted the separation in that sense, there would be some evidence to support the justices' findings that there was a consensual separation. Let it be understood that I am not to be taken as expressing my opinion that that is the correct view. If I am right in thinking with KARMINSKI, J., that the husband has himself provided the evidence in those letters that the natural and inevitable effect of his conduct was to endanger the wife's mental health and if those words, in a letter which purports to express his feelings, really represent his view of the probable or the possible consequences of what has been done, on any view of the matter it would seem that there is no obstacle to a finding of cruelty with the implied intention of injuring the wife. However, I agree with KARMINSKI, J., that on either view of the correspondence it may well be that the issue of desertion is academic, because, as I have already said, I also agree that on the re-hearing, based on what I think is plain misdirection of themselves on the issue of cruelty, the whole case must be open on both complaints, persistent cruelty and desertion. The result is that the appeal will be allowed, the order dismissing the wife's complaints on both issues will be set aside, and her complaints remitted for a re-hearing by a fresh panel of the justices.

Appeal allowed.

Solicitors: *Copley Singleton & Billson*, Croydon (for the wife); *Sharpe, Pritchard & Co.*, agents for *E. C. Francis*, Chester (for the husband).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

RAZZEL v. SNOWBALL.

[COURT OF APPEAL (Denning, Birkett and Morris, L.J.J.), October 22, 25, 1954.]

Public Authority—Limitation of action—Action for negligence against specialist at hospital administered under the National Health Service—Limitation Act, 1939 (c. 21), s. 21 (1).

National Health Service—Duty of Minister to provide treatment—Position of consultants and specialists—National Health Service Act, 1946 (c. 81), s. 3 (1) (c).

In January, 1950, the defendant, an orthopaedic surgeon carrying on a consulting practice, was appointed by a regional hospital board as a part-time general and orthopaedic surgeon at a hospital administered by the board. The duties attached to the appointment were "the provision of hospital and specialist services under s. 3 of the National Health Service Act, 1946, within [the defendant's] appointment." On Nov. 23, 1950, in the course of his duty while holding that appointment, the defendant performed an operation on the plaintiff at the hospital. On Nov. 28, 1952, the plaintiff commenced an action against the defendant alleging that the defendant had operated on her negligently. In his defence the defendant denied negligence and pleaded that in performing the operation he was acting in execution or purported execution of a public duty or authority and pursuant to the provisions of the National Health Service Act, 1946, and that, therefore, the plaintiff's claim was barred by s. 21 (1) of the Limitation Act, 1939, as the action had not been commenced before the expiration of one year from the date on which the cause of action accrued. On the question of law raised by the plea of limitation,

HELD: the defendant, while performing the operation, was carrying out, as the agent of the Minister of Health, the Minister's duty under s. 3 (1) (c) of the National Health Service Act, 1946, which was a duty to provide treatment by means of the services of specialists, and not merely to provide the specialists: principle in *Gold v. Essex County Council* ([1942] 2 All E.R. 237), applied; and thus the defendant was acting in the execution or intended execution of an Act of Parliament within the meaning of s. 21 (1) of the Limitation Act, 1939, and was entitled to the protection of that enactment.

Nelson v. Cookson ([1939] 4 All E.R. 30) and *Higgins v. N.W. Metropolitan Hospital Board* ([1954] 1 All E.R. 414), approved.

PER DENNING, L.J.: "... whatever may have been the position of a consultant in former times, nowadays, since the National Health Service Act, 1946, the term 'consultant' does not denote a particular relationship between a doctor and a hospital. It is simply a title denoting his place in the hierarchy of the hospital staff. He is a senior member of the staff, and is just as much a member of the staff as the house surgeon is. Whether he is called specialist or consultant makes no difference. He, like the rest of the staff, is merely carrying out the duties of the Minister ..." (see p. 433, letter A, post).

PER MORRIS, L.J.: "It seems to me clear that the position in this case cannot be affected by the fact that the defendant was engaged only as to part of his time; nor can it in any way affect the position that he was exercising his skill in a matter for which he was specially qualified, so that it would be inappropriate for anyone to interfere whilst he was in the actual course of doing what he thought best in a particular case" (see p. 434, letter F, post).

Appeal dismissed.

EDITORIAL NOTE. Section 21 of the Limitation Act, 1939, was repealed by s. 1 (b) of the Law Reform (Limitation of Actions, etc.) Act, 1954, which

received the royal assent and came into force on June 4, 1954 (see HALSBURY'S STATUTES (2nd edn.), Interim Service (1954), p. 125). The view of the Court of Appeal in the present case that the duty of the Minister under the National Health Service Act, 1946, is to provide the treatment accords with that recently taken by the Lord President of the Court of Session in *Hayward v. Board of Management, Royal Infirmary of Edinburgh* ([1954] S.L.T. (Notes of Cases) 63).

The decision expressed above is that the defendant, a consultant, when he was performing an operation was within the scope and entitled to the protection of the Limitation Act, 1939, s. 21 (1); it is not a decision that the hospital authority is liable for the negligence of a part-time consultant (as distinct from a full-time member of the hospital staff), although the present case does proceed on the basis that the consultant was acting as agent of the Minister in providing the treatment: compare, on the question of the liability of the hospital authority, e.g., *Cassidy v. Ministry of Health* ([1951] 1 All E.R. 574).

FOR THE NATIONAL HEALTH SERVICE ACT, 1946, s. 3 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 15, p. 337; and FOR THE LIMITATION ACT, 1939, s. 21 (1), see *ibid.*, Vol. 13, p. 1180.

Cases referred to:

- (1) *Gold v. Essex County Council*, [1942] 2 All E.R. 237; [1942] 2 K.B. 293; 112 L.J.K.B. 1; 167 L.T. 166; 106 J.P. 242; 2nd Digest Supp.
- (2) *Nelson v. Cookson*, [1939] 4 All E.R. 30; [1940] 1 K.B. 100; 109 L.J.K.B. 154; 161 L.T. 346; 103 J.P. 363; 2nd Digest Supp.
- (3) *Higgins v. N.W. Metropolitan Hospital Board*, [1954] 1 All E.R. 414.
- (4) *Griffiths v. Smith*, [1941] 1 All E.R. 66; [1941] A.C. 170; 110 L.J.K.B. 156; 164 L.T. 386; 105 J.P. 63; 2nd Digest Supp.

APPEAL by the plaintiff from an order of LORD GODDARD, C.J., dated May 20, 1954.

On Nov. 28, 1952, the plaintiff issued the writ in an action for damages for negligence against the defendant, an orthopaedic surgeon employed as a part-time specialist at a hospital administered under the National Health Service Act, 1946. The negligence of which the plaintiff complained was alleged to have taken place at and after an operation performed by the defendant at the hospital on Nov. 23, 1950. By his defence the defendant denied negligence and, in para. 4, pleaded that the claim was barred by s. 21 (1) of the Limitation Act, 1939. On July 1, 1953, an order was made that the question of law raised by para. 4 of the defence be tried as a preliminary point of law. At the trial of the preliminary issue, LORD GODDARD, C.J., held that the defendant was acting as an agent of the Minister of Health and of the regional hospital board, and, being the agent of a public authority, was protected by s. 21 (1) of the Limitation Act, 1939.

S. N. Bernstein for the plaintiff.

J. R. Cumming-Bruce for the defendant.

DENNING, L.J.: On Nov. 23, 1950, the plaintiff, Mrs. Razzel, was operated on by the defendant, Mr. Snowball, a surgeon, at St. Mary's Hospital, Eastbourne. The plaintiff's toes were deformed and the defendant operated on them by breaking them and re-setting them. Two years later, on Nov. 28, 1952, the plaintiff commenced this action alleging negligence against the defendant in his conduct as a surgeon. In his defence, the defendant, through his legal advisers, took the point that the proceedings were out of time, as he was protected by s. 21 (1) of the Limitation Act, 1939, which lays down a time limit of one year for public authorities. The defendant says that he is protected by the one year limitation on the ground that he was

"acting in execution or purported execution of a public duty or authority and/or pursuant to the provisions of the National Health Service Act, 1946."

I am glad to say that since the Law Reform (Limitation of Actions, etc.) Act,

1954, the problems arising from the Public Authorities Protection Act, 1893, and s. 21 of the Limitation Act, 1939, will no longer trouble the courts. Since June, 1954, the period of limitation for actions for negligence is the same for all persons, whether they are public authorities or not, namely, three years. The present case, however, is not affected by the Act of 1954.

A The material facts are that the defendant was a part-time surgeon engaged as a specialist under the National Health Service. The terms of his engagement were contained in a letter of Jan. 5, 1950, which the secretary of the South-East Metropolitan Regional Hospital Board wrote to him in these terms :

B " I am instructed by the South-East Metropolitan Regional Hospital Board to offer you a part-time appointment as general and orthopaedic surgeon with effect from Jan. 1, 1950, to the staff of the hospitals maintained by the following hospital management committee(s): Eastbourne (General surgery—two notional half-days), (Orthopaedic surgery—two notional half-days)."

The letter said that the duties attached to the appointment were

C " the provision of hospital and specialist services under s. 3 of the National Health Service Act, 1946, within your appointment . . . The average number of hours per week for which, it is estimated, these duties and the travelling time necessary for the performance of these duties will require your attendance is fourteen and this number of hours represents four notional half-days."

D The letter went on to say that the defendant's salary would be £795 9s. 1d. for the part-time work which he would be doing. The appointment incorporated the Terms and Conditions of Service which were issued by the National Health Service in a pamphlet, to which we have been referred. On Jan. 11, 1950, the defendant accepted the terms of the appointment. It was whilst he held that appointment that he performed the operation of which complaint is made in this action: and it was in the course of his duty to perform it. The question is whether that brings
E him within the protection of the Limitation Act.

Section 21 (1) of the Limitation Act, 1939, protects the defendant if the act was done

F " in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority . . . "

G The defendant contends that he comes within that section because it was the duty of the Minister of Health under the National Health Service Act, 1946, to provide treatment by means of specialists; that the defendant, when he was operating on the plaintiff, was only an agent of the Minister carrying out the Minister's duty; and that the defendant is, therefore, protected by the Limitation Act. The
H plaintiff, on the other hand, contends that the Minister was under no such duty; that the Minister's duty was only to provide the specialists and not the treatment; and that when the defendant, the surgeon, performed the operation he was carrying out, not the Minister's duty, but only the surgeon's private duty. The first question, therefore, is, what is the Minister's duty under the National Health Service Act, 1946? Is it to provide treatment or merely to provide specialists? This depends, of course, on the true interpretation of the Act of 1946.

By s. 1 (1) of the Act of 1946 it is the duty of the Minister to

" promote the establishment in England and Wales of a comprehensive health service . . . and for that purpose to provide or secure the effective provision of services in accordance with the following provisions of this Act."

Under s. 3 (1) one of the services which the Minister has to provide is "hospital and specialist services". Section 3 (1) reads:

"... it shall be the duty of the Minister to provide throughout England and Wales, to such extent as he considers necessary to meet all reasonable requirements, accommodation and services of the following descriptions, that is to say: (a) hospital accommodation; (b) medical, nursing and other services required at or for the purposes of hospitals; (c) the services of specialists, whether at a hospital, a health centre provided under Part III of this Act or a clinic or, if necessary on medical grounds, at the home of the patient; and any accommodation and services provided under this section are in this Act referred to as 'hospital and specialist services'."

As I read s. 3 (1) in the light of the other sections of the Act and of the regulations made under the Act, it is the duty of the Minister to provide all necessary services at the hospitals. He is to do so by means of doctors and nurses under s. 3 (1) (b) and by means of specialists under s. 3 (1) (c). He does not discharge his duty merely by appointing competent doctors and nurses and competent specialists. He has not merely to provide the staff. He has to provide their services; and, inasmuch as their services consist of treating the sick, it is his duty to treat the sick by means of their services. An attempt was made to distinguish between doctors and nurses under s. 3 (1) (b) and specialists under s. 3 (1) (c). It was conceded that doctors and nurses were carrying out the duty of the Minister but it was said that specialists were not. I cannot see any justification for this distinction. All of them, doctors, nurses and specialists, are carrying out the Minister's duty to treat the sick.

Turning again to the contract by which the defendant was engaged, there can be no doubt that the regional hospital board appointed the defendant as a specialist to perform the duty which the National Health Service Act, 1946, laid on the Minister, namely, to treat the sick by means of specialist services; and, therefore, the defendant was simply carrying out the Minister's duty and is protected by s. 21 (1) of the Limitation Act, 1939. In support of this interpretation of the National Health Service Act I would refer to the observations which LORD GREENE, M.R., and GODDARD, L.J., made in *Gold v. Essex County Council* (1) ([1942] 2 All E.R. at pp. 243, 248). The terms of the Act then in question were those of the Public Health Act, 1936. They were not nearly so strong as the terms of the National Health Service Act, 1946, but nevertheless both LORD GREENE and GODDARD, L.J., were clearly of opinion that the effect was to impose a duty on the hospital authority not merely to provide staff but also to provide treatment. In short to treat the sick. It is no new thing to find the doctors and surgeons of public hospitals protected by the Limitation Act. In *Nelson v. Cookson* (2), ATRINSON, J., held that medical officers of the West Middlesex County Hospital were entitled to the protection of the Public Authorities Protection Act, 1893. In *Higgins v. N.W. Metropolitan Hospital Board* (3), PILCHER, J., held that a part-time specialist who was performing duties in the hospital was protected under s. 21 (1) of the Limitation Act, 1939. In the present case LORD GODDARD, C.J., followed these cases. He stated the true position when he said:

"I think that the surgeon is an agent, both of the Minister and of the hospital board, because the Minister and the hospital boards have specific duties to carry out; that is to say, to offer medical and surgical treatment."

As an agent of a public authority, he is entitled to the protection of the Limitation Act just as the public authority itself is.

Counsel for the plaintiff pressed us with some observations in the cases concerning consultants. He said that the defendant was a part time consultant, and that a consultant was in a different position from the staff of the hospital. I think that counsel for the defendant gave the correct answer when he said that,

whatever may have been the position of a consultant in former times, nowadays, since the National Health Service Act, 1946, the term "consultant" does not denote a particular relationship between a doctor and a hospital. It is simply a title denoting his place in the hierarchy of the hospital staff. He is a senior member of the staff, and is just as much a member of the staff as the house surgeon is. Whether he is called specialist or consultant makes no difference. He, like the rest of the staff, is merely carrying out the duties of the Minister and is entitled to the protection of s. 21 (1) of the Limitation Act, 1939. For these reasons, I am of opinion that the appeal should be dismissed.

BIRKETT, L.J.: I agree fully with the judgment which has been delivered and with the judgment of LORD GODDARD, C.J., in the court below. The point which we have to determine is whether the defendant, an orthopaedic surgeon, is entitled to the protection of s. 21 (1) of the Limitation Act, 1939. That sub-section reads:

"No action shall be brought against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty or authority, unless it is commenced before the expiration of one year from the date on which the cause of action accrued."

[HIS LORDSHIP stated the facts and continued:] In s. 1 of the National Health Service Act, 1946, it was the design of Parliament that there should be instituted a comprehensive free health service. By s. 3 (1) of the Act, which has been the matter of controversy in this court, the Minister was empowered to provide that health service. It is true that the services which are to be provided by the Minister are split up and contained in different paragraphs of s. 3 (1), which reads:

"... it shall be the duty of the Minister to provide throughout England and Wales, to such extent as he considers necessary to meet all reasonable requirements, accommodation and services of the following descriptions, that is to say:—(a) hospital accommodation; (b) medical, nursing and other services required at or for the purposes of hospitals; (c) the services of specialists, whether at a hospital, a health centre provided under Part III of this Act or a clinic or, if necessary on medical grounds, at the home of the patient . . ."

Counsel for the plaintiff admitted that s. 21 (1) of the Limitation Act, 1939, would apply to cases coming under s. 3 (1) (b) of the Act of 1946, and that, if the words "including specialist services" had appeared in brackets after "other services" in s. 3 (1) (b), he would have had nothing more to say. He contended, however, that, as specialist services were put separately in s. 3 (1) (c), they did not come within the protection of s. 21 (1) of the Act of 1939. Counsel submitted that the draftsman had in mind that the Minister was empowered, under s. 3 (1) (c), merely to provide the man, namely, the specialist, and that the elaborate machinery of the regional hospital board, and so on, was designed with that end in view. My mind is coloured a great deal by the fact that, after paras. (a), (b) and (c) have been set out, s. 3 (1) concludes in this way:

"and any accommodation and services provided under this section are in this Act referred to as 'hospital and specialist services'."

Thus all the services to be provided under the sub-section are linked together. In section after section of the Act that same phraseology, "hospital and specialist services", is employed; in s. 11 (1), for example, regional hospital boards are to be constituted

"for such areas as [the Minister] may by order determine, for the purpose of exercising functions with respect to the administration of hospital and specialist services in those areas."

The phrase also occurs in s. 12 (1) and s. 14 (1). Therefore, although the draftsman has put into separate paragraphs the services which are to be provided under s. 3 (1), it seems to me quite impossible to contend that the intention and effect of the sub-section were that the Minister's duty was merely to find the specialists. It must mean that the Minister was empowered and, indeed, enjoined, not merely to select the specialists, but to provide the specialists to perform the services which alone make the health service of any value whatsoever. If the Act is read as it ought to be read, one cannot say that a free national health service has been set up under s. 1, unless it is the duty of the Minister, under the Act, to provide, not merely the medical men, but also their services. A

It is quite plain that the plaintiff obtained her treatment under the National Health Service Act. She was treated by the defendant, the orthopaedic surgeon who had been appointed by the regional board as one of the specialists for that area on the terms set out in the letter of Jan. 5, 1950. I see that in the Terms and Conditions of Service of Hospital Medical and Dental Staffs (England and Wales), issued by the National Health Service, there is this heading: B

"Category 1: Work which is within the scope of the Hospital and Specialist Services provided under s. 3 of the Act." C

Then follow long lists of those things which can and cannot be done, hospital and specialist services being inextricably linked together in that way. It seems to me quite plain that, in performing the operation on the plaintiff, the defendant was doing that which the Minister, through the regional hospital board, had appointed him to do. Therefore, the defendant was, I think, doing what he did as an agent of the regional hospital board, or as the agent of the Minister, and, in so doing, he brought himself entirely within the words of s. 21 (1) of the Limitation Act, 1939. The defendant was doing the act in execution of the National Health Service Act, 1946, which created the health service, and, moreover, the act was done in pursuance of a public duty which had been imposed by Parliament on the Minister, who was acting through his agent in this case, namely, the defendant. For these reasons I think that the appeal should be dismissed. D

MORRIS, L.J.: I have reached the same conclusion. It was the duty of the Minister to promote a comprehensive health service. In the course of performing that duty it was his function to provide hospital and specialist services as well as hospital accommodation. It was, therefore, his duty to provide the services of medical men in the hospital, the services of nurses, the services of the hospital staff and also the services of specialists. It seems to me clear that the position in this case cannot be affected by the fact that the defendant was engaged only as to part of his time; nor can it in any way affect the position that he was exercising his skill in a matter for which he was specially qualified, so that it would be inappropriate for anyone to interfere whilst he was in the actual course of doing what he thought best in a particular case. He was engaged by the Minister to give certain services which were a part of the hospital and specialist services which it was the duty of the Minister to provide. It seems to me to follow from that that the defendant was performing a public duty and that what he did and the services that he rendered were acts done in the execution or intended execution of an Act of Parliament. E

We were referred by counsel for the defendant to a passage in the speech of Viscount MAUGHAM in *Griffiths v. Smith* (4). Viscount MAUGHAM said ([1941] 1 All E.R. at p. 76): F

"It is sufficient to establish that the act was in substance done in the course of exercising for the benefit of the public an authority or a power conferred on the public authority not being a mere incidental power, such as a power to carry on a trade."

In the course of the judgment in *Nelson v. Cookson* (2), to which my Lord has G

H

referred, ATKINSON, J., expressed himself as follows ([1939] 4 All E.R. at p. 34; [1940] 1 K.B. at p. 105):

"The council could not exercise that authority by their own hands, but must act through other people, and on the relevant occasion their authority was being exercised by these two medical men. It seems to me idle to say that they were not acting in pursuance of a public duty or authority conferred on the Middlesex County Council. They were performing this public duty or authority, whichever you may like to call it, as agents or delegates for and on behalf of the council, and they are entitled to the benefit of the Act of 1893."

It seems to me that, similarly, in the present case it can be said that the defendant was doing what he did as the agent or delegate for or on behalf of the Minister, and that he is entitled to the protection of s. 21 (1) of the Limitation Act, 1939. I think it follows from that that it does not become necessary in this case to consider any application of the doctrine of respondeat superior to the work that was done by the defendant. Similarly, it is not necessary in the present case to express any opinion as to the position of a medical practitioner to whom s. 33 of the National Health Service Act, 1946, applies, nor to express any opinion on any special case such as a case which might arise under s. 29 of the Act of 1946. Counsel for the defendant has pointed out that there are certain differences in language in other sections which may have to be considered if and when the occasion arises. I am satisfied in regard to the present case that the provisions of s. 21 (1) of the Act of 1939 were available to the defendant, and I am in agreement with the judgment of LORD GODDARD, C.J.

Appeal dismissed.

Solicitors: *Walter O. Stein* (for the plaintiff); *Hempsons* (for the defendant).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

Re HALL'S SETTLEMENT. SANDERSON AND OTHERS v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Jenkins, Romer and Parker, L.JJ.), October 27, 28, 1954.]

Estate Duty—Valuation of shares in company—Gift inter vivos by way of settlement—Shares notionally passing on settlor's death—Finance Act, 1940 (c. 29), s. 55 (1).

By a deed dated July 27, 1942, the deceased settled four hundred shares in a private limited company on trust for the benefit of his son and daughter. On Sept. 30, 1943, the deceased died. Estate duty was leviable on the shares since they were deemed to pass on the deceased's death by virtue of the Finance Act, 1894, s. 2 (1) (c). On a summons to determine whether the principal value of the shares should be estimated in accordance with the provisions of the Finance Act, 1940, s. 55, or with the provisions of s. 7 (5) of the Act of 1894,

HELD: on the true construction of s. 55 (1) of the Act of 1940, and in particular having regard to the qualification therein of the words "there pass" by the words "for the purposes of estate duty", that section applied to notional passing as well as actual passing, and, therefore, the shares ought to be valued in accordance with that section.

A.-G. v. Milne ([1914] A.C. 765), considered.

Decision of UPJOHN, J. ([1954] 2 All E.R. 679), affirmed.

PER JENKINS, L.J.: It can, in general, only be right to construe references to property passing on a death as including property deemed to pass where the particular enactment in which the phrase appears is in truth an enactment dealing with estate duty as charged by the Finance Act, 1894, s. 1,

and nothing else, i.e., dealing with valuation and calculation of rates and acceptability, and so forth, with respect to estate duty as charged by s. 1, and nothing else. If a new tax or a new and distinct liability of some sort were introduced and expressed to apply to property "passing" on a death simpliciter, then, even though such a section were incorporated in the general body of estate duty legislation, it might very well be that the court would hold that the expression "property passing on a death" must be given its primary and narrow meaning (see p. 438, letter E, post).

EDITORIAL NOTE. The Finance Act, 1940, s. 55, is amended by the Finance Act, 1952, s. 72 and the Finance Act, 1954, s. 29, s. 30. The amendments are not relevant to the decision in this case.

FOR THE FINANCE ACT, 1940, s. 55, see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 483.

Cases referred to:

- (1) *Cowley (Earl) v. Inland Revenue Comrs.*, [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. 361; 63 J.P. 436; 21 Digest 7, 27.
- (2) *A.-G. v. Milne*, [1914] A.C. 765; 83 L.J.K.B. 1083; 111 L.T. 343; 21 Digest 46, 296.

APPEAL by the plaintiffs, the trustees of a settlement, from an order of **UPJOHN, J.**, dated June 30, 1954, and reported [1954] 2 All E.R. 679.

The deceased, Harold Hall, was at all material times, up to the date of the settlement mentioned below, the owner of 2,951 shares in a company known as Thomas Hamling & Co., Ltd., that holding representing over fifty per cent. of the total issued shares of the company. By deed dated July 27, 1942, the deceased settled four hundred of the shares on trusts for the benefit of his son and daughter. On Sept. 30, 1943, the deceased died. It was agreed that the shares were liable to estate duty under the Finance Act, 1894, s. 2 (1) (c), being "deemed to pass" on the deceased's death by virtue of that enactment. If the principal value of the shares were to be estimated by reference to the net value of the assets of the company in the manner prescribed by the Finance Act, 1940, s. 55, it was agreed that the value would be £90 10s. per share; and if the value of the shares were to be estimated in accordance with the Finance Act, 1894, s. 7 (5), i.e., at their open market value, the value was thought to be approximately £22 10s. per share.

UPJOHN, J., held that, for the purposes of estate duty, the shares which notionally passed on the death of the settlor were property passing on his death within the meaning of s. 55 (1) of the Act of 1940, and that, therefore, the value of the shares was to be estimated in accordance with that section.

F. N. Bucher and *J. A. Armstrong* for the plaintiffs, the trustees of the settlement.

B. L. Bathurst, Q.C., and *J. H. Stamp* for the Crown.

JENKINS, L.J.: This is an appeal from a judgment of **UPJOHN, J.**, dated June 30, 1954, in a case concerning the valuation, for the purposes of estate duty, of some shares in a private limited company. The deceased, Mr. Harold Hall, formerly owned 2,951 shares of the company in question out of a total issued capital of 5,514 shares. He was, therefore, in control of the company. On July 27, 1942, he made a gift of four hundred of those shares to the trustees of a voluntary settlement. He died on Sept. 30, 1943, i.e., well within the minimum period of three years by which, as the law then stood, a donor had to survive a gift inter vivos in order that it should escape duty on his death. In these circumstances, duty admittedly became payable on the four hundred shares under the Finance Act, 1894, s. 2 (1) (c). It is, further, not in dispute that the company is a company to which the provisions of the Finance Act, 1940, s. 55, apply, that section being one which substitutes, in respect of shares or debentures

of companies in certain cases, a special, and usually more onerous, method of valuation for the common method of valuation by reference to market value prescribed by s. 7 (5) of the Act of 1894. The plaintiffs, now appellants, are the trustees of the voluntary settlement, and they claim that the four hundred shares held by them are, by reason of the gift inter vivos, not subject to the special provisions of s. 55 of the Act of 1940, but should be valued in the ordinary way by reference to their market value. UPJOHN, J., held that the appropriate method of valuation was that prescribed by s. 55 of the Act of 1940, and from his decision the trustees now appeal to this court.

I should next briefly refer to some of the provisions of the Finance Act, 1894. Section 1, as is well known, contains the grant of estate duty :

"In the case of every person dying after the commencement of this Part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'estate duty', at the graduated rates hereinafter mentioned, and the existing duties mentioned in sched. I to this Act shall not be levied in respect of property chargeable with such estate duty."

Section 2 (1) provides: "Property passing on the death of the deceased shall be deemed to include the property following, that is to say", and then there is the well-known list of items, including in particular para. (c) which brings in, amongst other things, gifts inter vivos made (as the law stood at the relevant date) within three years of the death.

The common method of valuation is prescribed by s. 7 (5):

"The principal value of any property shall be estimated to be the price which, in the opinion of the commissioners, such property would fetch if sold in the open market at the time of the death of the deceased";

and that is the method of valuation which the trustees say is the right one in the present case. It is maintained on behalf of the Crown that the method of valuation prescribed by s. 55 of the Act of 1940 is the appropriate one. There is a sidenote to that section: "Valuation for estate duty of shares and debentures of certain companies", and the section itself, so far as material for the present purpose, provides :

"(1) Where for the purpose of estate duty there pass, on the death of a person dying after the commencement of this Act, shares in or debentures of a company to which this section applies, then if—(a) the deceased had the control of the company at any time during the three years ending with his death . . . the principal value of the shares or debentures, in lieu of being estimated in accordance with the provisions of sub-s. (5) of s. 7 of the Finance Act, 1894, shall be estimated by reference to the net value of the assets of the company in accordance with the provisions of the next succeeding sub-section."

These are the two alternative methods of valuation, s. 7 (5) of the Act of 1894, and s. 55 of the Act of 1940, and the question for this court is whether UPJOHN, J., was right in holding, as he did, that the appropriate method of valuation was the method prescribed in s. 55.

It will be seen, if I may refer to them again, that the opening words of s. 55 (1) are:

"Where for the purposes of estate duty there pass, on the death of a person dying after the commencement of this Act, shares in or debentures of a company to which this section applies."

Accordingly, the applicability of s. 55 essentially depends on there having been a passing, on the death of a person dying after the commencement of the Act, of

such shares or debentures. Counsel for the trustees contends that this condition was not fulfilled here. He says that the words "where there pass on the death of a person" mean "where there actually pass on the death of a person", i.e., where there is a passing under the provisions of s. 1 of the Act of 1894. He claims that there is no warrant for extending these words so as to include what is commonly called a notional passing, i.e., a passing of property which is only deemed to pass by virtue of the provisions of s. 2 and does not actually pass within the meaning of s. 1.

That submission involves a return to a basic principle, which I think I can put quite shortly. As has long been settled by *Earl Cowley v. Inland Revenue Comrs.* (1), and in particular the well-known speech of LORD MACNAGHTEN in that case, as explained in *A.-G. v. Milne* (2), and in particular by LORD HALDANE's speech in that case, the relationship of s. 1 and s. 2 of the Act of 1894 is of this nature. Section 2 is not a definition section; it is a provision which enlarges the ambit of the charge imposed by s. 1; but once property has been brought within that ambit by the application of one of the conditions mentioned in s. 2, then it is in the same case for the purposes of estate duty as property which passes by virtue of s. 1 alone. That is broadly the principle, and I think the consequences of it, for the purpose of the present case, are these: the argument of counsel for the trustees cannot be met simply by treating the words "passing on the death", wherever they occur, as words by definition including property deemed to pass on the death, for s. 2, as I have said, is not a definition section. On the other hand, as I have also said, once property, by virtue of its falling within the mischief of s. 2 becomes subject to the charge imposed by s. 1, then it is in precisely the same case as the property within s. 1 for all the purposes of the Finance Act, 1894, and subsequent enactments relating to estate duty. It follows, that, wherever there are references to property passing on a death in provisions relating to the valuation of property for estate duty purposes, the assessment of the duty payable, and the accountability for it, they are to be taken as including property deemed to pass on a death, not because the expression "property passing on a death" is defined by s. 2, but because, inasmuch as property within s. 2 is subject to precisely the same liability to estate duty as property within s. 1, that which is enacted in relation to property passing on a death applies equally to property which is deemed to pass. It also follows that it can, in general, only be right to construe references to property passing on a death as including property deemed to pass where the particular enactment in which the phrase appears is in truth an enactment dealing with estate duty as charged by s. 1 of the Act of 1894 and nothing else, i.e., dealing with valuation and calculation of rates and accountability, and so forth, with respect to estate duty as charged by s. 1, and nothing else. If a new tax or a new and distinct liability of some sort were introduced and expressed to apply to property "passing" on a death simpliciter, then, even though such a section were incorporated in the general body of estate duty legislation, it might very well be that the court would hold in such a case that the expression "property passing on a death" must be given its primary and narrow meaning, there being no words to show that anything else but property actually "passing" on a death was to be subject to such new charge.

That principle is, I think, illustrated by the speech of LORD HALDANE in *A.-G. v. Milne* (2), which is one of the cases relied on by counsel for the trustees. The question in that case was whether settlement estate duty was payable. Settlement estate duty was imposed by s. 5 (1) of the Act of 1894 in these terms:

"Where property in respect of which estate duty is leviable, is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property—(a) a further estate duty (called

settlement estate duty) on the principal value of the settled property shall be levied . . . ”

The point at issue in *A.-G. v. Milne* (2) was whether property notionally passing on the death of the deceased by reason of his death within three years of a voluntary settlement, answered the description of property passing “under that disposition on the death of the deceased”, and so attracted settlement estate duty. VISCOUNT HALDANE, L.C., says ([1914] A.C. at p. 769):

“The answer to this question depends mainly on the interpretation to be placed on four sections of the Finance Act, 1894. By s. 1 estate duty is to be levied upon the principal value of property, settled or unsettled, which passes on death. By s. 2 ‘property passing on the death of the deceased shall be deemed to include’ certain specified cases of property which does not actually pass on death, like the property to which s. 1 relates. The meaning of s. 2 was discussed in this House in *Earl Cowley v. Inland Revenue Commrs.* (1), and was explained to be that the section was not a definition of the field of s. 1, but was framed for the purpose of rendering liable to taxation certain kinds of property that do not actually pass on death, but are sufficiently analogous to property so passing as to make it proper to tax them. Section 2 is thus not a definition section, but an independent section operating outside the field of s. 1.”

His Lordship also says (*ibid.*, at p. 770):

“My Lords, for reasons already indicated, I have, after consideration, come to the conclusion that s. 2 cannot properly be read as extending the category of a notional passing on death beyond what is requisite for the special purpose of bringing certain cases within s. 1 in order to impose the particular tax which s. 1 levies.”

Then LORD HALDANE says the duty imposed by s. 5 is a new and quite different duty, and, again, at the end of his speech he says (*ibid.*, at p. 771):

“The only legitimate consideration that could justify a different interpretation would be one which resulted from s. 2 being read as defining what was meant by ‘passing on death’ throughout the Act. A close examination of the structure of the Act has satisfied me that this section lays down no such general canon of construction, but is confined in its operation to the limited function of adding to the cases in which the duty enacted by s. 1 is imposed. In other words, s. 2 has no reference to the settlement estate duty which s. 5 imposes as a new and separate duty.”

The question, therefore, raised by the argument of counsel for the trustees in this case is whether s. 55 should properly be regarded merely as a new valuation section applying a new and special method of valuation to property of a specified description, or whether it should be regarded as amounting to a completely new departure in estate duty legislation which imposes something in the nature of a new liability. That is a question which is by no means free from difficulty. As at present advised, I incline to the view that s. 55 should be regarded simply as a valuation section. The method of valuation therein prescribed is to take the place of the ordinary method in the case of any shares or debentures to which the section applies. It provides :

“the . . . value of the shares or debentures, in lieu of being estimated in accordance with the provisions of sub-s. (5) of s. 7 of the Finance Act, 1894, shall be estimated . . . ”,

prescribing the new method of valuation. It is thus in terms substituted for an existing method which applies equally to property notionally passing and to property actually passing. On the other hand, the section does make a radically new departure from anything contemplated by the Act of 1894. It applies only to a particular kind of property, i.e., shares and debentures, and, furthermore, it

discriminates between the holders of property of that kind by reference to their relationship to the company in which the shares or debentures are held. Accordingly, while I incline to the view that this case could be disposed of in favour of the Crown simply by saying that this is a mere valuation provision, so that references in it to property passing on a death must, on the general principle which I have endeavoured to state, be treated in effect as including property deemed to pass, the novelty of the provision does lead me to feel some doubt about that matter. To my mind, however, the decisive feature in s. 55 consists in the opening words: "Where for the purposes of estate duty there pass, on the death of a person dying after the commencement of this Act . . ." The words "for the purposes of estate duty" qualifying, as they do, the words "there pass", seem to me to make it reasonably plain that the reference in this section to property passing on a death comprises any kind of passing, actual or notional, which, for the purposes of estate duty, amounts to a passing that attracts duty. Accordingly, while, as at present advised, I would be disposed to treat this as a pure valuation section, I prefer to refrain from forming any concluded opinion on that point, for I think that the section is, on its true construction, expressed in terms applicable to notional passing as well as to actual passing.

We have had the assistance of a full and careful argument on both sides. On the side of the Crown we were referred to a number of sections in the Finance Acts in which the expression "property passing on a death" must necessarily be held to include "property deemed to pass". On the other hand, counsel for the trustees referred us to a number of sections, and in particular he referred us to some of the provisions in the Finance Act, 1939, as well as to other provisions in the Act of 1940, in which a distinction had been drawn in express terms between actual and notional passing. I think it probable that many other examples either way could be found up and down the Acts, and unlikely that anyone could spell out of the practice of successive draftsmen as regards references to "passing" and to "notional passing" any completely logical system. In my view, however, the case does not really turn on those arguments; it turns in the end on the construction of s. 55, and, taking the view which I have endeavoured to express about the construction of that section by reason of the import of its opening words, I think that the learned judge came to a right conclusion in this case, and, accordingly, I would dismiss this appeal.

ROMER, L.J.: I agree. I am content to adopt in its entirety the judgment which my Lord has just delivered.

PARKER, L.J.: I agree, and have nothing to add.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Peacock & Gaddard*, agents for *Sanderson & Co.*, Hull (for the plaintiffs); *Solicitor of Inland Revenue*.

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

WATT v. KESTEVEN COUNTY COUNCIL.

[QUEEN'S BENCH DIVISION (Ormerod, J.), October 4, 5, November 2, 1954.]

Education—Local education authority—Grant towards tuition fees at school chosen by parents—Obligation to educate in accordance with the parents' wishes—Breach of statutory duty—No right of action—Education Act, 1944 (c. 31), s. 76.

The plaintiff, a roman catholic, sent his twin sons to roman catholic preparatory and public schools. He made applications to the defendants, the local education authority for the area in which he lived, for a full grant for tuition fees. The defendants did not provide a school for secondary grammar school education in their area, but, in the discharge of their duties under the Education Act, 1944, paid the fees of an independent school in their area for boys qualified to attend it. The plaintiff's sons were so qualified. At all material times the defendants were willing to provide places for the boys at the independent school in their area, but the plaintiff was not willing that the boys should go there. The defendants made grants towards the cost of the education of the boys at both schools, but it was less than the full amount of their tuition fees. In an action by the plaintiff for, among other relief, a declaration that the defendants were under a duty to provide secondary grammar school education for the two boys at schools chosen by him, and for payment to him of the full amount of the tuition fees paid by him to the schools concerned,

HELD: (i) under the Education Act, 1944, s. 76, the defendants, as the local education authority, were bound to have regard to the general principle that pupils were to be educated in accordance with the wishes of their parents, but were not under an absolute obligation to educate the pupils in accordance with those wishes; accordingly, the defendants were not in breach of their duty under the section.

(ii) even if a breach of statutory duty under s. 76 of the Act of 1944 were established in the circumstances, it would not give rise to a right of action for damages for breach of statutory duty.

Principles stated by LORD SIMONDS in *Cutler v. Wandsworth Stadium, Ltd.* ([1949] 1 All E.R. at p. 548), applied.

FOR THE EDUCATION ACT, 1944, ss. 68, 76 and 99, see HALSBURY'S STATUTES, Second Edn., Vol. 8, pp. 205, 210 and 225.

Cases referred to:

- (1) *Doe d. Rochester (Bp.) v. Bridges*, (1831), 1 B. & Ad. 847; 9 L.J.O.S.K.B. 113; 109 E.R. 1001; 42 Digest 750, 1737.
- (2) *Pasmore v. Oswaldtwistle Urban District Council*, [1898] A.C. 387; 67 L.J.Q.B. 635; 78 L.T. 569; 62 J.P. 628; 42 Digest 752, 1758.
- (3) *Cutler v. Wandsworth Stadium, Ltd.*, [1949] 1 All E.R. 544; [1949] A.C. 398; [1949] L.J.R. 824; 2nd Digest Supp.
- (4) *Black v. Fife Coal Co., Ltd.*, [1912] A.C. 149; 1912 S.C. (H.L.) 33; 81 L.J.P.C. 97; 106 L.T. 161; 5 B.W.C.C. 217; 34 Digest 218, 1809.
- (5) *Atkinson v. Newcastle Waterworks Co.*, (1877), 2 Ex.D. 441; 46 L.J.Ex. 775; 36 L.T. 761; 42 J.P. 183; 42 Digest 759, 1850.
- (6) *Cowley v. Newmarket Local Board*, [1892] A.C. 345; 62 L.J.Q.B. 65; 67 L.T. 486; 56 J.P. 805; 26 Digest 400, 1251.
- (7) *Groves v. Wimborne (Lord)*, [1898] 2 Q.B. 402; 67 L.J.Q.B. 862; 79 L.T. 284; 42 Digest 769, 1858.
- (8) *Monk v. Warbey*, [1935] 1 K.B. 75; 104 L.J.K.B. 153; 152 L.T. 194; Digest Supp.

ACTION.

The plaintiff, Thomas Edmund Leo Watt, the father of two children born on Dec. 5, 1939, claimed a declaration that the defendants, the local education

authority, were under a duty to provide secondary grammar school education for the two children at schools of his, the plaintiff's choice, a mandamus commanding them to provide it, and payment to him of the balance of tuition fees paid by him, or, alternatively, a like sum as damages for breach of contract. The facts appear in the judgment.

R. E. A. Elwes, Q.C., H. Hope and P. J. Fitzgerald for the plaintiff.

Sir Frank Soskice, Q.C., and M. H. Gow for the defendants.

Cur. adv. vult.

Nov. 2. **ORMEROD, J.**, read the following judgment: In this action the plaintiff, Thomas Edmund Leo Watt, seeks certain reliefs against the defendants, the Kesteven County Council, in the following circumstances. The plaintiff, who is a roman catholic, is the father of twin boys, John and Richard Watt, who were born on Dec. 5, 1939. The defendants are the local education authority under the Education Act, 1944, for the area of the Parts of Kesteven in the County of Lincoln. There is in this area no school provided by the defendants for secondary grammar school education, and it is their practice in the discharge of their duties under the Education Act to pay the fees for boys qualified to attend an independent school known as the Stamford School. The fees at this school amount to £60 10s. per annum. It is not contended by the plaintiff that this is not an efficient school. The two boys, having attended a roman catholic elementary school in Stamford until 1948, were then sent by the plaintiff as boarders to the Blackfriars School, Llanarth, Raglan, Monmouthshire. This is a private preparatory school owned by the Dominican Order. The combined fee was £120 per annum, of which £50 was for tuition and £70 for boarding. There was a question at one time whether this school was recognised as efficient by the Ministry of Education, but it is clear from the correspondence that the school was so recognised on June 22, 1951.

In December, 1950, the plaintiff, by his solicitor, wrote to Dr. Gilby, the Chief Education Officer of the defendant authority, inquiring about the arrangements that could be made for the boys to take the scholarship examination for 1951, and the conditions under which the plaintiff could obtain a grant of tuition fees. It was arranged that the boys should take the examination at a convenient school in Monmouthshire. The question of a grant was left over pending the result of the examination. In May, 1951, the boys passed the necessary examination which entitled them to be provided with a secondary grammar school education. The plaintiff thereupon renewed his application for tuition fees, but on July 19, 1951, the defendants wrote that they were not willing to make a grant at that stage but would be prepared to review the case if and when the boys were admitted to the Blackfriars School at Laxton, a public school also under the control of the Dominican Order to which the plaintiff had expressed his intention to send the boys. Further correspondence followed between the parties, and on Nov. 29, 1951, the defendants wrote that, on further consideration, they had agreed to make an award "on the committee's approved scale of assistance" towards the cost of tuition fees, amounting to £10 per annum for each boy as from the autumn term, 1951.

On Aug. 27, 1952, the plaintiff's solicitors wrote to the defendants to say that the boys would be admitted to the Blackfriars School in the autumn term, 1952, and again applying for a full grant of tuition fees. The fees at the Blackfriars School amounted to £60 and £81 for tuition and boarding respectively, with a reduction of £10 10s. in the boarding fees of the elder brother. On Nov. 8, 1952, the plaintiff, at the suggestion of Dr. Gilby, amended his application to one for assistance for combined boarding and tuition fees, at the same time denying the right of the defendants to base a grant towards tuition fees on an income scale. On Dec. 3, 1952, the defendants wrote to the plaintiff's solicitors that they had decided to make a total grant of £72, being £31 for the elder boy and £41 for the younger, for the school year ending July 31, 1953, but this did not satisfy the plaintiff. These proceedings have, therefore, resulted. It

is admitted by the defendants that they were at all material times willing to provide places for the boys at the Stamford School, and by the plaintiff that he was at no time willing for his boys to go there.

A Section 7 of the Education Act, 1944, provides that it shall be the duty of the local education authority to secure that efficient education, as specified in the section, shall be available to meet the needs of the population of their area. Section 8 provides that it shall be the duty of the authority to secure that there shall be made available in the area sufficient schools for the purpose. In the area administered by the defendants, sufficient schools have not yet been made available, and the defendants have, in consequence, acted under the powers given to them by s. 81 of the Act and the regulations* made thereunder, which enable them (inter alia) to pay the whole or part of the approved fees and expenses of children attending schools, whether within or without the area of the authority, at which fees are payable. As I have said this has been done in general in the case of boys by paying the fees for them to attend the Stamford School.

B The plaintiff claims that he is entitled to a grant for the whole of the tuition fees he has paid to enable his boys to be educated at the schools to which he has chosen to send them. He bases his claim on s. 76 of the Education Act, C 1944, which reads as follows:

D "In the exercise and performance of all powers and duties conferred and imposed on them by this Act the Minister and local education authorities shall have regard to the general principle that, so far as is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure, pupils are to be educated in accordance with the wishes of their parents."

E Leading counsel on behalf of the plaintiff puts his case in this way. It is the wish of the plaintiff that his boys should be educated at the schools at which he has chosen to send them. It is not disputed that they have been and will be provided at these schools with efficient instruction and training and, as the fees for tuition are less than the fees charged at the Stamford School, unreasonable public expenditure will be avoided. Therefore, by refusing to pay the full tuition fees to the plaintiff, the defendants are in breach of their duty under s. 76 and the plaintiff is entitled to recover this sum. That, I think, is a fair way of putting the plaintiff's contention in this case.

F I may say at once, and this really disposes of the case, that I cannot accept this contention. If counsel is right then the section must be read to mean that the local education authority shall provide education for pupils in accordance with the wishes of their parents, subject to the two provisos contained in the section. This is not what the section says. It is expressed in much more general terms. It provides nothing more than that the local education authority "shall have regard to the general principle" that pupils are to be educated in accordance with the wishes of their parents. I do not, in order to decide this G case, find it necessary to define the nature or extent of the duty which is put on education authorities by this section, nor would it be desirable for me to attempt to do so. It is enough to say that, to accept the construction put on it by the plaintiff, would be to strain unduly the meaning of the words, and if the legislature had intended the section to have the effect contended for by the plaintiff H it would have been in much more precise terms than the somewhat vague ones which have, in fact, been used.

It was further contended by leading counsel on behalf of the defendants that, even if the construction put on s. 76 of the Act by the plaintiff is the correct one, the defendants have complied with their duty by making to the plaintiff

* I.e., the Regulations for Scholarships and Other Benefits, 1945 (S.R. & O., 1945, No. 666, as amended by S.I. 1948, Nos. 688 and 2223), summarised in 6 HALSBURY'S STATUTORY INSTRUMENTS 218.

the maximum payments they are empowered to make under the arrangements approved by the Minister under the regulations made in accordance with the powers given to the Minister under s. 81 of the Act. In view of what I have said, it is not necessary for me to deal with this question, except to say that it does appear from the correspondence that, with the exception of the first year, when a contribution of only £10 in respect of each boy was paid, as against a maximum payment of £26 for each boy, the defendants have paid to the plaintiff the maximum sums in accordance with the arrangements set out in the agreed correspondence. These arrangements, which were arrangements approved by the Minister under the regulations made under s. 81, provide for assistance to pupils attending boarding schools, and empower the defendants to make payments on a scale based on the income of the parents.

The remaining question with which I think I should deal is whether a breach of duty under s. 76, assuming that there is one, can be enforced in this court. To decide this it is necessary to see what sanctions, if any, have been provided by the Act for the enforcement of its provisions. Section 68 provides as follows:

"If the Minister is satisfied, either on complaint by any person or otherwise, that any local education authority or the managers or governors of any county or voluntary school have acted or are proposing to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed by or under this Act, he may, notwithstanding any enactment rendering the exercise of the power or the performance of the duty contingent upon the opinion of the authority or of the managers or governors, give such directions as to the exercise of the power or the performance of the duty as appear to him to be expedient . . .";

and, further, under s. 99 (1) of the Act, it is provided that:

"If the Minister is satisfied, either upon complaint by any person interested or otherwise, that any local education authority, or the managers or governors of any county school or voluntary school, have failed to discharge any duty imposed upon them by or for the purposes of this Act, the Minister may make an order declaring the authority, or the managers or governors, as the case may be, to be in default in respect of that duty, and giving such directions for the purpose of enforcing the execution thereof as appear to the Minister to be expedient; and any such directions shall be enforceable, on an application made on behalf of the Minister, by mandamus."

The principle on which this question is to be decided was stated by LORD TENTERDEN, C.J., in *Doe d. Rochester (Bp.) v. Bridges* (1), where he says (1 B. & Ad. at p. 859):

" . . . where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner."

These words were cited with approval by the EARL OF HALSBURY, L.C., in *Pasmore v. Oswaldtwistle Urban District Council* (2) ([1898] A.C. at p. 394), a case dealing with the duty of a local authority to provide sufficient sewers under s. 15 of the Public Health Act, 1875. The question was further discussed by LORD SIMONDS in *Cutler v. Wandsworth Stadium, Ltd.* (3) ([1949] 1 All E.R. at p. 548). Perhaps that speech of LORD SIMONDS states as completely as is necessary for the purpose of this case the principles to be followed. It is a case dealing with an action at the suit of a bookmaker against the proprietors of the stadium to enforce what he regarded as his right to have a space provided for him where he could conveniently carry on the business of bookmaking, and it was held there that, as the Betting and Lotteries Act, 1934, under which he claimed this right, provided a sanction for means of enforcing the provisions

of the Act other than by recourse to the courts, the plaintiff had no remedy. In the House of Lords, LORD SIMONDS said ([1949] 1 All E.R. at p. 548):

A "The only rule which in all circumstances is valid is that the answer must depend on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted. But that there are indications which point with more or less force to the one answer or the other is clear from authorities which, even where they do not bind, will have great weight with the House. For instance, if a statutory duty is prescribed, but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is damnified by the breach. For, if it were not so, the statute would be but a pious aspiration. But, as LORD TENTERDEN, C.J., said (1 B. & Ad. at p. 859) in *Doe d. Rochester (Bp.) v. Bridges* (1): ' . . . where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.' This passage was cited with approval by the EARL OF HALSBURY, L.C., in *Pasmore v. Oswaldtwistle Urban District Council* (2). But this general rule is subject to exceptions. It may be that, though a specific remedy is provided by the Act, yet the person injured has a personal right of action in addition. I cannot state that proposition more happily, or, indeed, more favourably to the appellant, than in the words of LORD KINNEAR ([1912] A.C. at p. 165) in *Black v. Fife Coal Co., Ltd.* (4): 'If the duty be established, I do not think there is any serious question as to the civil liability. There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute. The principle explained by LORD CAIRNS in *Atkinson v. Newcastle Waterworks Co.* (5) and by LORD HERSCHELL in *Cowley v. Newmarket Local Board* (6) solves the question. We are to consider the scope and purpose of the statute and in particular for whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mine owners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons, there arises at common law a correlative right in those persons who may be injured by its contravention'."

F Then he goes on to deal with other examples in the well known cases of *Groves v. Lord Wimborne* (7) and *Monk v. Warbey* (8) and, applying those principles to the case with which the House of Lords were dealing at that time, concluded that the statute did not confer on the plaintiff the right to bring the action.

G Leading counsel for the plaintiff in the first place contends that, as the sections I have referred to provide only that the Minister "may" and not "shall" or "must" make an order, the statute in any event provides no sufficient sanctions to enforce its provisions, but merely gives the Minister a discretion and, in the second place, that if we consider the scope and purpose of the statute and, in particular, for whose benefit it is intended a right of action must arise if a parent has suffered damage by the breach by the authorities of any of their duties under the Act. I do not think there is any real substance in the first contention.

H As I read the sections they appear to give sufficient powers to the Minister to enforce the performance of the duties imposed on the local education authorities and others by the Act. So far as the second contention is concerned I think, too, that this cannot be sustained. The scope and purpose of the Act is to secure that efficient educational facilities shall be available to meet the needs of the population and that proper use shall be made of those facilities. It is the duty of the authorities to carry out the provisions of the Act to achieve that scope and purpose, and the Minister is provided with the necessary powers to ensure that this

is done. It is not a statute intended for the benefit of parents in the sense that the Factories Acts or the Coal Mines Acts, for instance, are intended for the protection of workmen. There seems here to be no reason why there should be a departure from the general rule which I have cited, and it follows, therefore, that, if there is a breach of duty under s. 76, it is not one which can be enforced by action in these courts. There must, therefore, be judgment for the defendants.

Judgment for the defendants.

Solicitors: *O'Brien & Brown*, agents for *Stapleton & Son*, Stamford (for the plaintiff); *Bircham & Co.*, agents for *J. E. Blow*, Sleaford (for the defendants).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

IVENS v. IVENS.

[COURT OF APPEAL (Lord Goddard, C.J., Hodson, L.J., and Vaisey, J.),
October 26, 1954.]

Divorce—Cruelty—Indecent conduct towards step-daughter—Wife's health affected—No proof of intention to injure wife—Husband's presumed knowledge of likely effect.

The husband carried on a course of indecent conduct towards his wife's daughter by an earlier marriage, a girl of thirteen to fifteen years of age, and he indecently assaulted her. The girl lived with her mother and the husband. On the wife's learning of it and protesting, he promised not to continue this conduct but he subsequently renewed his indecent acts. His conduct detrimentally affected the wife's health but it was not shown that he intended to injure the wife. The wife petitioned for divorce on the ground that since the celebration of marriage the husband had treated her with cruelty.

HELD: the wife was entitled to a decree nisi for divorce on the ground of cruelty because the husband's conduct had injured the wife's health and, although it was not shown that he intended to injure her, he must be presumed to have known that such injury would be the consequence of his conduct, which he continued in a manner showing indifference to that consequence.

Daniell v. Daniell (1954) (The Times, Feb. 2), distinguished.

Cooper v. Cooper (ante p. 415), applied.

Appeal allowed.

AS TO CRUELTY AS A GROUND OF DIVORCE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 649-653, paras. 954-960; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 293-306, Nos. 2384-2552.

Cases referred to:

- (1) *Daniell v. Daniell*, (1954), The Times, Feb. 2.
- (2) *Cooper v. Cooper*, ante p. 415.
- (3) *Thompson v. Thompson*, (1901), 85 L.T. 172; 27 Digest, Replacement, 306, 2534.
- (4) *Bosworthick v. Bosworthick*, (1901), 86 L.T. 121; 27 Digest, Replacement, 333, 2775.
- (5) *Boyd v. Boyd*, [1938] 4 All E.R. 181; 108 L.J.P. 25; 159 L.T. 522; 102 J.P. 525; Digest Supp.
- (6) *Kaslefsky v. Kaslefsky*, [1950] 2 All E.R. 398; [1951] P. 38; 114 J.P. 404; 2nd Digest Supp.

APPEAL by the wife against an order dated Mar. 26, 1954, of His Honour JUDGE GERWYN THOMAS, sitting as a Special Commissioner, dismissing a petition for a decree of divorce on the ground that the husband's indecent conduct towards his step-daughter, the wife's daughter by an earlier marriage, was not shown to have been intended to injure the wife.

G. C. Tyndale, Q.C., and John Davies for the wife, the petitioner.
The respondent husband was not represented.

LORD GODDARD, C.J.: This is an appeal from the judgment of His Honour JUDGE GERWYN THOMAS, who dismissed the petition of the wife for divorce on the ground of cruelty, holding that the facts alleged did not amount to cruelty. When the parties married in December, 1941, the wife was a widow with two sons and a daughter. At the material time the daughter was between thirteen and fifteen years of age, and the husband, her step-father, was carrying on a course of indecent behaviour towards her and indecently assaulted her. The daughter's evidence was amply corroborated by the wife, the daughter's brother, and the husband himself, who, although not admitting certain parts of the daughter's story, admitted that he was carrying on an indecent course of conduct towards her. The wife heard of this; in particular on one occasion when she was in the bathroom she overheard a conversation between her husband and her daughter downstairs, and according to the evidence the wife received a complaint about her husband's conduct from her daughter. The wife had quarrels with the husband over this matter and he promised not to do it again. Nevertheless, he started doing the indecent acts again and again, and the outcome was that one of the wife's sons was called home from the Royal Air Force, and between them they eventually got the husband out of the house. There was also medical evidence that the wife's health had suffered to some extent because of the husband's conduct, and that this had contributed to the nervous and distressed condition to which she had been reduced.

The learned commissioner refused to hold that that was evidence of cruelty because, he said, the cruelty was not aimed at the wife. He may have had in mind *Daniell v. Daniell* (1), in which a state registered nurse married a man who had children by a previous marriage. The father seems to have been a stern parent and to have corrected the children, on occasion giving them whippings. There is nothing in the report of the case to suggest that the whippings were of an excessive or brutal character in the sense that the father could have been prosecuted for occasioning actual bodily harm to the children. The wife was not the mother of the children, but, possibly having high-minded ideas about the chastisement of children, seems to have objected to any corporal punishment being inflicted on them at all. The court refused to hold that that amounted to cruelty to the wife, taking the view that the husband was justified in chastising his children so long as he did not do it in an unreasonable or brutal fashion. There was no finding by the court of any exceptional chastisement; it was merely that the wife did not like it. It was held that the husband was not doing that with the object of injuring his wife, and the fact that she objected to it is quite another matter.

In this case, however, the husband, was carrying on an indecent course of conduct towards the wife's own daughter, and committing indecent assaults on her. The wife protested, there were quarrels, he promised not to do it again, and then he repeated the offence. That is a very different state of affairs from the facts in *Daniell v. Daniell* (1).

I think this case falls exactly within the decision in *Cooper v. Cooper* (2), decided only last week in the Divisional Court before LORD MERRIMAN, P., and KARMINSKI, J. The court held there that a criminal and indecent assault by a father on his child might amount to cruelty to the mother, although no intention to injure her is shown. In delivering the judgment of the court, KARMINSKI, J., reviewed all the cases on the subject, beginning with *Thompson v. Thompson* (3), in 1901, in which the husband debauched the servants in the matrimonial home. In those days it was necessary to prove cruelty or desertion as well as adultery, and the husband's conduct was held to be cruel to the wife. KARMINSKI, J., referred also to *Bosworthick v. Bosworthick* (4), also in 1901, where it was held that indecent assaults on little girls for which the husband had been

sentenced to imprisonment amounted to cruelty to the wife. He further cited *Boyd v. Boyd* (5) in 1938, where BUCKNILL, J., held that an indecent assault on a young girl had not amounted to constructive desertion, but the court granted a decree on the ground of cruelty arising from the same offence. He referred to *Kashefsky v. Kashefsky* (6), in which DENNING, L.J., said ([1950] 2 All E.R. at p. 402):

“ . . . an intention to injure . . . may readily be inferred from the fact that it is the natural consequence of his conduct, especially when the one spouse knows, or it has already been brought to his notice, what the consequences will be, and nevertheless he does it, careless and indifferent whether it distresses the other spouse or not.”

In this case what could be worse conduct towards the wife, the mother of this child—the husband not being the father—than for her husband with her knowledge to carry on an indecent course of conduct and indecent practices towards the daughter, and the daughter resenting it? I can imagine nothing more likely to affect the woman's health, as in fact it did in this case. I can conceive of no conduct more calculated to justify the court in saying that this man knew perfectly well what the effect would be on his wife and on the state of her health, and yet, being careless or indifferent of what the effect would be, he continued to carry on this filthy conduct. In my opinion, *Daniell v. Daniell* (1) is no authority for the view that acts of this nature could not be cruelty towards the child's mother. In my judgment, on the facts proved a strong case of cruelty was made out, and the wife is entitled to a decree.

HODSON, L.J.: I agree. In his careful judgment the learned judge obviously accepted the wife's evidence, and that of the daughter who had been indecently assaulted by the husband; but he felt some difficulty because he thought that the husband's misconduct was directed, not against the wife, but against the wife's daughter, from which he inferred that it must necessarily follow that it could not constitute cruelty because of what was said in *Daniell v. Daniell* (1). The learned judge summarised his conclusion in this way:

“ . . . I do not find that he did it [the indecent conduct] to hurt his wife. It was to satisfy his own unnatural, reprehensible feelings.”

That is perfectly true as far as it goes, but I do not think it goes far enough. It is true that the husband's conduct was directed against the daughter, but, with the daughter living in the mother's house, knowledge of his conduct was bound to come to his wife, as it did. The wife protested, the husband promised not to do it again, he did it again, and the wife's health was not only likely to be injured, but was in fact injured. When the husband was eventually turned out of the house by one of the sons, the wife went to see a doctor, who found her in a bad state of health, which in his opinion would properly be attributed to the complaints which she had made against her husband. In my judgment, this appeal ought to succeed.

VAISEY, J.: I agree with all that my Lords have said, and with their conclusion that the wife's appeal in this case must be allowed. The indecent conduct of the husband towards the wife's own daughter, as the learned commissioner found, was not intended to hurt the wife, but it had that consequence, as the evidence quite clearly shows, and as the husband must have known that it would or might. In my judgment, that is sufficient to establish the wife's right to a decree.

Appeal allowed. Decree nisi pronounced.

Solicitors: *Kinch & Richardson*, agents for *L. B. Fagot & Tillyard*, Cardiff (for the wife, the petitioner).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

HEALEY v. MINISTRY OF HEALTH.

[COURT OF APPEAL (Denning, Morris and Parker, L.J.J.), November 2, 10, 1954.]

National Health Service—Superannuation—Determination of questions by Minister of Health—“Mental health officer”—Shoemaker employed in mental hospital—Periodically in charge of working patients—Finality of determination of status by Minister—National Health Service Act, 1946 (c. 81), s. 67 (1) (i)—National Health Service (Superannuation) Regulations, 1950 (S.I., 1950, No. 497), reg. 1 (3), reg. 60.

Appeal—Jurisdiction of court—Appeal from Minister to whom determination referred by statute—No right of appeal unless conferred by statute.

The plaintiff, a shoemaker, was employed by the management committee of a mental hospital and was in charge of the shoemaker's shop attached to the hospital. As part of their treatment the patients worked in the shop under the control of a charge-hand and when the charge-hand was absent the plaintiff was in sole charge of them. Representations having been made to the Ministry of Health on the plaintiff's behalf for a determination whether he was a mental health officer within the National Health Service (Superannuation) Regulations, 1950, the plaintiff received a letter from the Ministry informing him that the Minister had determined, pursuant to his powers under reg. 60, that the plaintiff was not a mental health officer within the meaning of the regulations and so was not entitled to certain rights relating to superannuation. In an action by the plaintiff for a declaration that he was a mental health officer within the meaning of reg. 1 (3)*, the Ministry claimed that the court had no jurisdiction to determine the matter.

HELD: the plaintiff, by seeking a declaration that he was a mental health officer within reg. 1 (3) of the regulations of 1950, was claiming a determination of his rights by the court, as distinct from asking the court in exercise of its supervisory or controlling jurisdiction to set aside a determination which had been made, and was, in fact, asking the court to review a question which, under reg. 60, was to be heard and determined, and had been determined, by the Minister; accordingly, the court had no jurisdiction to entertain the action.

Barnard v. National Dock Labour Board ([1953] 1 All E.R. 1113), distinguished.

Decision of *CASSELS, J.* ([1954] 2 All E.R. 580), affirmed.

PER MORRIS, L.J., and PARKER, L.J.: the enactments conferred no right of appeal and the court would not assume to itself a right of appeal from the Minister to whom the determination of the matter was referred by statute (see at p. 453, letter E, and p. 454, letter E, post).

AS TO APPEALS FROM AND CONTROL OF STATUTORY TRIBUNALS, see 9 HALSBURY'S LAWS (3rd Edn.) 580, 581, para. 1352.

FOR THE NATIONAL HEALTH SERVICE ACT, 1946, s. 67 (1) (2), see 15 HALSBURY'S STATUTES (2nd Edn.) 395.

Cases referred to:

(1) *Barnard v. National Dock Labour Board*, [1953] 1 All E.R. 1113; [1953] 2 Q.B. 18; 3rd Digest Supp.

(2) *Dean v. Prince*, [1954] 1 All E.R. 749; [1954] Ch. 409.

(3) *R. v. Northumberland Compensation Appeal Tribunal, Ex p. Shaw*, [1952] 1 All E.R. 122; [1952] 1 K.B. 338; 116 J.P. 54; 3rd Digest Supp.

(4) *Crisp v. Bunbury*, (1832), 8 Bing. 394; 1 L.J.C.P. 112; 131 E.R. 445; 3 Digest 135, 98.

* Regulation 1 (3) of these regulations was amended by S.I. 1952 No. 1264, but the amendments are not relevant to the definition of mental health officer.

(5) *Crosfield (Joseph) & Sons, Ltd. v. Manchester Ship Canal Co.*, [1904] 2 Ch. 123; 73 L.J.Ch. 345; 90 L.T. 557; 68 J.P. 421; *on appeal*, H.L. [1905] A.C. 421; 74 L.J.Ch. 637; 93 L.T. 141; 69 J.P. 441; 42 Digest 740, 1637.

(6) *Walsall Overseers v. London & North Western Ry. Co.*, (1878), 4 App. Cas. 30; 48 L.J.M.C. 65; 39 L.T. 453; 43 J.P. 108; 16 Digest 186, 920.

APPEAL by the plaintiff from an order of CASSELS, J., dated June 4, 1954 and reported [1954] 2 All E.R. 580. A

The plaintiff was at all material times a shoemaker employed by the Morgannwg Hospital Management Committee at Morgannwg Hospital, Bridgend, in the county of Glamorgan. The hospital was used wholly or partly for the treatment of mental patients. On Dec. 31, 1952, the plaintiff received a letter signed on behalf of the defendant, the Ministry of Health, saying that the Minister had determined pursuant to reg. 60 of the National Health Service (Superannuation) Regulations, 1950, that the plaintiff was not a mental health officer within the meaning of the regulations. The plaintiff commenced an action for a declaration that he was a mental health officer within the meaning of the regulations, and by his statement of claim he alleged, *inter alia*, that he devoted the whole or substantially the whole of his time to the treatment or care of mental patients at the hospital. By the defence the defendant denied this allegation. By para. 3 of the defence the defendant pleaded that reg. 60 of the regulations of 1950 provided that any question arising under the regulations as to the rights or liabilities of any person claiming to be treated as a mental health officer should be determined by the Minister of Health, and that the defendant would contend that the determination of the Minister in regard to the plaintiff was final and was not subject to review or appeal, that the court had no jurisdiction to grant to the plaintiff the relief sought, and that the statement of claim disclosed no cause of action. Further, or in the alternative, the defendant pleaded that the determination was right. The master directed that the matter raised by para. 3 of the defence should be tried as a preliminary issue. B
C
D

On trial of the issue CASSELS, J., held that as reg. 60 provided that any question arising under the regulations of 1950 as to the rights of a person to whom the regulations applied should be determined by the Minister of Health and as s. 67 (1) of the National Health Service Act, 1946, empowered the Minister to make a regulation in those terms, the court could not proceed as an appellate authority to review and overrule a determination of the Minister under the regulations, there being no provision as to appeal either in the Act or in the regulations; and that, therefore, as the Minister had determined pursuant to reg. 60 that the plaintiff was not a mental health officer within the meaning of the regulations, the court had no jurisdiction to entertain the action which was, in effect, an appeal against the determination of the Minister. E
F

P. M. O'Connor for the plaintiff.

The Solicitor-General (Sir Harry Hylton-Foster, Q.C.) and *R. J. Parker* for the defendant. G

Cur. adv. vult.

Nov. 10. The following judgments were read.

DENNING, L.J., stated the facts and continued: A question has arisen whether the plaintiff is a "mental health officer" within the meaning of the National Health Service (Superannuation) Regulations, 1950, reg. 1 (3). It is an important matter for him, because if he is a mental health officer, he is entitled to more favourable terms of superannuation than he otherwise would be. Under the definition section in those regulations he is a "mental health officer" if he devotes H

"the whole or substantially the whole of his time to the treatment or care of" the patients. The question is whether the plaintiff comes within the definition.

The regulations provide that that question is to be determined by the Minister. Regulation 60 says that:

"Any question arising under these regulations as to the rights or liabilities of an officer or retired officer . . . or of a person claiming to be treated as such . . . shall be determined by the Minister."

A In accordance with that regulation the question was referred to the Minister who determined it against the plaintiff. His decision was given in a letter of Dec. 31, 1952, in these words:

B "National Health Service (Superannuation) Regulations, 1950 to 1952. I am directed by the Minister of Health to refer to the representations made on your behalf and to inform you that he hereby determines under reg. 60 of the above-mentioned regulations that in your employment as shoemaker at Morgantwg Hospital you are not a mental health officer within the meaning of those regulations. The Minister has designated as mental health officers all those officers who devote the whole, or substantially the whole, of their time to the treatment or care of mental patients or defectives. He has considered fully all the evidence before him in relation to your duties. Even if he accepts your own estimate of six to eight hours (instead of that of the Hospital Management Committee of four hours) a week as the time during which the charge-hand is away from the shop and you are fully responsible for the patients working there, he is unable to find that you devote substantially the whole of your time to the treatment or care of such patients. Your employment is not, therefore, of such a nature as to make you a mental health officer. I am, Sir, Your obedient servant, (Sgd.) J. F. Hunt."

D The plaintiff was dissatisfied with the Minister's decision and he has brought this action against the Minister in which he claims a declaration that he

"is and was at all material times a mental health officer within the meaning of the National Health Service (Superannuation) Regulations, 1950."

E In answer to this claim the Minister contends that

"This Honourable Court has not jurisdiction to grant to the plaintiff the relief sought herein or any part thereof."

F This question of jurisdiction has been ordered to be tried as a preliminary issue. CASSELS, J., decided that the court has no jurisdiction to grant the relief. The plaintiff appeals to this court. The plaintiff's object is clear: he is seeking in these proceedings to get the court to say that the Minister's decision was wrong. It was wrong, he says, either in law or in fact or in both, but it was certainly wrong; and that is a ground for the court making a declaration saying what the right order should have been.

G Since *Barnard v. National Dock Labour Board* (1) I take it to be clear law that the Queen's Courts can grant declarations by which they pronounce on the validity or invalidity of the proceedings of statutory tribunals. Counsel for the plaintiff prayed that case in aid. He took an instance where the Minister had made a palpable error. Suppose, he said, that a man had served more than ten years and had reached the age of sixty. Under reg. 7 he would be entitled to a pension. Suppose, however, that the Minister determined that he had no right to one. H Would not the courts interfere? I think that they would. In that case there would be good reason for thinking that the Minister had mistaken or misused his powers: and on that ground the court would declare his determination to be invalid, in much the same way as it can declare the decision of a valuer to be invalid: see *Dean v. Prince* (2). The present case is not of that kind. The relief which is sought does not include a declaration that the Minister's determination was invalid. It seeks only a declaration that the plaintiff is and was a mental health officer. It is obvious that if the court were to consider granting this

declaration it would have to hear the case afresh. The plaintiff would have to give evidence showing how he spent his time and the Minister would have to be allowed to give evidence in answer to it. In short the court would have to re-hear the very matter which the Minister has decided. If the court were to embark on a re-hearing of this sort there is no telling where it would stop. Every person who was disappointed with a Minister's decision could bring an action for a re-hearing. That would be going much too far. Suppose that the court did re-hear the matter and decide in the plaintiff's favour, and did grant the declaration for which he asks, what would happen to the Minister's decision? So far as I can see, it would still stand unless the Minister chose of his own free will to revoke it. There would then be two inconsistent findings, one by the Minister and the other by the court. That would be a most undesirable state of affairs. In my opinion, if the court were to entertain this declaration, it would be going outside its province altogether. It would be exercising a jurisdiction to "hear and determine" which does not belong to it but to the Minister.

At one stage in the argument counsel for the plaintiff sought leave to amend and claim a declaration that the Minister's decision was void, but he had to concede that it was too late to amend now for the purposes of the preliminary issue.

In conclusion I would say that the questions arising under these regulations are for the most part much more suited for determination by the Minister than by the court. The courts have ample powers to see that the Minister does his work properly but they should not seek to do it for him, or to do it all over again, with possibly a different result. If a question of law should arise on which it is desirable that the opinion of the High Court should be taken, the Minister will no doubt give a reasoned decision, and the court can review it by the procedure laid down in *R. v. Northumberland Compensation Appeal Tribunal, Ex p. Shaw* (3), or alternatively, by a declaration. That has been done in many cases lately and has proved very beneficial. If the plaintiff had asked for a reasoned decision in this case raising a point of law, I do not doubt that the Minister would have granted it and it could have been reviewed: but not having asked for it, I do not think we should permit him to question the correctness of the decision by these proceedings. I think that this appeal should be dismissed.

MORRIS, L.J., stated the facts and continued: If the plaintiff's contention is correct the practical significance of this for him is that he becomes entitled to superannuation at a date earlier than if he is not a mental health officer. Section 67 of the National Health Service Act, 1946, empowered the Minister to make regulations in regard to the superannuation of officers which regulations could provide (see s. 67 (1) (i))

"for the determination of all questions arising under the regulations by the Minister."

Regulations were made within the powers of the Minister: they are the National Health Service (Superannuation) Regulations, 1950. Regulation 60 provides:

"Any question arising under these regulations as to the rights or liabilities of an officer or retired officer of an employing authority, or of a person claiming to be treated as such, or of the widow, any dependant or the legal personal representatives of an officer or retired officer shall be determined by the Minister."

The question arose as to the status of the plaintiff. Paragraph 4 of the statement of claim, which is the last paragraph, pleads that:

"By letter to the plaintiff dated Dec. 31, 1952, signed by one J. F. Hunt on behalf of the defendant, the defendant determined pursuant to reg. 60 that the plaintiff was not a mental health officer within the meaning of the said regulations."

The plaintiff then claims

"A declaration that the plaintiff is and was at all material times a mental health officer within the meaning of the National Health Service (Superannuation) Regulations, 1950."

Further and other relief is also claimed. The position is, therefore, that having set out that the Minister had determined the rights of the plaintiff and having set out what was the determination, the claim advanced in the pleading is that the court should embark on a new determination and without cancelling or revoking the Minister's determination should arrive at a new one contrary to that of the Minister. In para. 3 of the defence it is pleaded that

"the determination of the Minister referred to in para. 4 of the statement of claim is final and is not subject to review or appeal by way of the proceedings herein or at all. The defendant will contend that in the premises this Honourable Court has not jurisdiction to grant to the plaintiff the relief sought herein or any part thereof and that the statement of claim discloses no cause of action."

The preliminary issue concerns the question of jurisdiction so raised.

It seems to me clear that what is claimed in the statement of claim is a review, by way of appeal, of the decision of the Minister. The court is being asked to decide a question which by reg. 60 is to be determined by the Minister. The court is not asked to revoke the Minister's determination and if the court made a declaration as asked then the fate of the Minister's determination might remain obscure. In substance what is undoubtedly sought, however, is a declaration binding on the Minister which would reverse his previous decision. This can only mean that the plaintiff is seeking to appeal from the Minister. His action and his claim can have no other significance or intention. The plaintiff is asking the court to assume a jurisdiction to overrule the Minister. By raising the preliminary issue the defendant invites the court to rule now that it is not endowed with any jurisdiction to grant the relief sought. In my judgment there is no right of appeal to the court from the determination of the Minister. None is given by reg. 60 or in any other regulation. There can certainly be no implication of a right of appeal. Had it been desired to provide some machinery or procedure for an appeal from the decision of the Minister, it could have been done. Any such prescribed appeal might or might not have been an appeal to the courts. Questions as to which methods for determining rights are the most desirable raise issues of policy which are for Parliament to decide; but the courts cannot invent a right of appeal where none is given. The courts will not usurp an appellate jurisdiction where none is created.

This is sufficient to dispose of this matter and no occasion arises to express an opinion as to what might have been the possibilities had there been different facts and different assertions and different claims. There has been no application for an order of certiorari, and it has not been suggested that any error of law is revealed on the face of the determination of the Minister as recorded in the letter of Dec. 31, 1952. In the exercise of their supervisory jurisdiction over inferior courts Her Majesty's Courts are always strict in seeing that inferior courts comply with and observe the law and that their proceedings are in order and within their powers. The powers which are exercised over inferior courts are supervisory and controlling powers. In the present case it is to be noted that there is no suggestion that the Minister lacked jurisdiction. It is not said that there was any irregularity of proceeding. It is not said that there was any failure to make due inquiry or that the Minister acted contrary to the principles of natural justice. There is no pleading that the determination of the Minister was wrong in law; whether if there had been any such pleading of error of law it could have assisted the plaintiff is not a matter which can be disposed of on the hearing of this defined preliminary issue. By his pleading the plaintiff is inviting the court

to assume an appellate jurisdiction which it has not been given and which the court cannot create.

PARKER, L.J.: Having regard to the decisions in *Crisp v. Bunbury* (4), and *Joseph Crosfield & Sons, Ltd. v. Manchester Ship Canal Co.* (5), it is, I think, clear that the effect of reg. 60 is that a determination must be made by the Minister, at any rate in the first instance. It is not a case where, as in the case of a submission in a contract to arbitration, the court may decide the matter in the absence of an application to stay the proceedings and the grant in the discretion of the court of a stay. In the present case the court could not decide the matter even if the parties consented. Indeed, this was conceded by counsel for the plaintiff.

It is, however, contended that once the Minister has determined the matter the High Court has jurisdiction, in the absence of express words in the regulation to the contrary, to go behind the determination and to hold that it was wrong in law even though no error of law appeared on the face of the determination. In other words, it is contended that the court's supervisory jurisdiction is wide enough to enable it to declare a determination to be unlawful in the sense of being wrong in law even though the matter was not one which could form any ground for moving for an order of certiorari. This is at once a novel and far-reaching contention—novel in that so far as I know such a jurisdiction, if it exists, has never been invoked and far-reaching in that, if valid, awards of arbitrators and decisions of statutory tribunals, such as rent tribunals, would be open to review, even though there was no error on the face of such awards or decisions. For the reasons set out below, however, I find it unnecessary to consider this contention.

[His Lordship stated the facts and continued:] The issue to be tried is whether, the Minister having made a determination, this court has jurisdiction by declaration, not to declare that his determination is null and void or that it should be quashed, but to make another determination and one in the opposite sense to that made by the Minister. In my opinion the court has no such jurisdiction. To hold otherwise would be to invest the court with an appellate jurisdiction, as opposed to a supervisory jurisdiction, which it certainly has not got. A right of appeal is the creature of statute, and the regulations give no right of appeal. Further, the absence of such words as "whose determination is final" or "whose determination shall not be called in question in any court of law" cannot preserve a jurisdiction which apart from such words did not exist.

The judgments of the Court of Appeal in *R. v. Northumberland Compensation Appeal Tribunal, Ex p. Shaw* (3), point the distinction between an appellate jurisdiction and a supervisory jurisdiction. In that case the court were considering the scope of the remedy by way of certiorari under the court's supervisory jurisdiction, and **SINGLETON, L.J.**, expressed his view in these words ([1952] 1 All E.R. at p. 126):

"The decision of the tribunal was a 'speaking order' in the sense in which that term has been used. The court is entitled to examine it, and if there be error on the face of it, to quash it— . . . not to substitute another order in its place, but to remove that order out of the way, as one which should not be used to the detriment of any of the subjects of Her Majesty", as **LORD CAIRNS** said in the *Walsall* case (6) (4 App. Cas. at p. 39)."

Further, **DENNING, L.J.**, said (*ibid.*, at p. 127):

"The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it, offends against the law. The King's Bench does not substitute its own views for those of the tribunal, as a court of appeal would do. It leaves it to the tribunal to hear the case again, and in a proper case may command it to do so."

And **MORRIS, L.J.**, said (*ibid.*, at p. 133):

"It is plain that certiorari will not issue as the cloak of an appeal in

disguise. It does not lie in order to bring up an order or decision for rehearing of the issue raised in the proceedings."

In the present case the court, if it were to allow the proceedings to continue, would, in my view, be usurping a jurisdiction, namely, an appellate jurisdiction, which it does not possess. On this ground I would dismiss the appeal.

Appeal dismissed.

A Solicitors: *Foss, Bilbrough, Plaskitt & Co.* (for the plaintiff); *Solicitor, Ministry of Health.*

[*Reported by PHILIPPA PRICE, Barrister-at-Law.*]

UNITED DOMINIONS TRUST, LTD. v. BYCROFT.

B

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Hodson, L.J., and Upjohn, J.), October 11, 12, 1954.]

County Court—Appeal—Raising in Court of Appeal of point of law not argued in court below—Legality of promissory note.

Hire-Purchase—Agreement—Illegality—Promissory note as collateral security—

C

Hire-Purchase Act, 1938 (c. 53), s. 5 (c).

The defendant entered into a hire-purchase agreement with M. Ltd. in respect of a refrigerator. He made an initial payment and promised to pay the balance of £57 in eighteen instalments. It was a condition of the agreement that the defendant should simultaneously with the making of the agreement make and give to M. Ltd. a promissory note as collateral security for the due payment of the instalments and not as payment thereof. The defendant gave the promissory note to M. Ltd. who sold it to the plaintiffs. The refrigerator remained with one S. who was connected with M. Ltd. The defendant suspecting that he would not obtain the delivery of the refrigerator stopped the last four instalments. S. and M. Ltd. became insolvent. The plaintiffs now sued the defendant for the amount of the last four instalments as holders in due course of the promissory note. The defendant pleaded, *inter alia*, that the agreement was void by virtue of s. 5 (c) of the Hire-Purchase Act, 1938, because under the agreement he might become liable, if the promissory note came into the hands of an unscrupulous finance company, to pay more than required by s. 4 of the Act. At the trial the plaintiffs based their case on the proposition either that they were holders in due course of the promissory note and entitled to sue on it whatever its earlier history might have been, or that the promissory note was a wholly separate instrument from the hire-purchase agreement and was, therefore, unaffected by any invalidity which might attach to any provision of that agreement. The county court judge dismissed the action on the ground that the agreement was illegal and that the plaintiffs had notice of its contents. In the Court of Appeal the plaintiffs submitted that the whole transaction was one, that they were not holders in due course and that on the true construction of the agreement the defendant could never have been asked to pay more than was provided by s. 4 of the Act of 1938.

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Held: the way in which the case was put by the plaintiffs in the Court of Appeal was completely at variance with the way in which it had been put in the court below and amounted to taking a new point of law which, in consequence of the principle laid down by the House of Lords in *Smith v. Baker & Sons* ([1891] A.C. 325), could not be raised for the first time in the Court of Appeal.

Appeal dismissed.

Per SIR RAYMOND EVERSHED, M.R.: as at present advised I do not accept the argument that, if as a result of something done, not as the agreement contemplated but in fraud of the hirer, the promissory note should get

into the hands of an innocent third party, to whose suit the hirer would have no defence, there would be an infringement of s. 5 (c) of the Hire-Purchase Act, 1938 . . . If a party appeared who could say that he was the holder in due course without any notice of the hire-purchase agreement, the liability which might impose itself on the hirer would not be a liability under the agreement or one to which he had been made, or was, subject by virtue of any provision of the agreement (see p. 460, letters E and H, post).

EDITORIAL NOTE. SIR RAYMOND EVERSHED, M.R., states plainly (at p. 459, letter E, post) that he makes no attempt to define what is a "new point" for the purpose of the principle laid down in *Smith v. Baker & Sons* ([1891] A.C. 325). The present case decides no new principle but illustrates the determination whether, in the particular instance, an argument raised before the Court of Appeal on a general issue amounted to the taking of a new point of law, a determination which, the Master of the Rolls said, was in the end a matter of common sense. He did, however, particularly indicate one guiding factor which had influenced him, viz., that the judgment from which the appeal was brought did not seem to be related to the point raised on the appeal.

AS TO APPEALS FROM COUNTY COURTS ON QUESTIONS OF LAW, see 8 HALSBURY'S LAWS (2nd Edn.) 378, para. 812; and FOR CASES, see 13 DIGEST 527-530, 787-815.

FOR THE HIRE-PURCHASE ACT, 1938, s. 5 (c), see 22 HALSBURY'S STATUTES (2nd Edn.) 1024.

Cases referred to:

- (1) *Bouverbank v. Monteiro*, (1813), 4 Taunt. 844; 128 E.R. 564; 6 Digest 89, 650.
- (2) *Modern Light Cars, Ltd. v. Seals*, [1934] 1 K.B. 32; 102 L.J.K.B. 680; 149 L.T. 285; Digest Supp.
- (3) *Maillard v. Page*, (1870), L.R. 5 Exch. 312; 39 L.J.Ex. 235; 23 L.T. 80; 6 Digest 89, 653.
- (4) *Smith v. Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 13 Digest 527, 789.

APPEAL by the plaintiffs against an order of His Honour JUDGE BLOCK at the Mayor's and City of London Court, dated June 29, 1954.

On Aug. 18, 1949, the plaintiffs entered into an agreement with Munday (Walthamstow) Ltd., wherein it was stated that the latter company was about to enter into hire-purchase agreements and requested the plaintiffs to grant financial facilities for so doing (by the discounting of certain notes or bills), and agreed to assign, whenever called on, to the plaintiffs all their contractual rights and interests in the hire-purchase agreements. The defendant wished to purchase a refrigerator and entered into negotiations with one Stebbings. On July 18, 1952, Stebbings brought to the defendant for his signature a hire-purchase agreement. In this agreement Munday (Walthamstow) Ltd. were described as the owner and the defendant as the hirer of an Elwood ice cream conservator; the total hire-purchase price was £87. In the agreement it was also stated, *inter alia*:

"(i) The hirer may put an end to this agreement by giving notice of termination in writing . . . (ii) He must then pay any instalments which are in arrear at the time when he gives notice. If, when he has paid those instalments, the total amount which he has paid under the agreement is less than £43 10s. he must also pay enough to make up that sum.

"Conditions (i) . . . the hirer shall, upon the making of this agreement, pay the initial instalment of hire . . . and shall punctually pay the several instalments of the balance of hire . . . The hirer shall pay interest at the rate of six per cent. per annum on all overdue instalments until payment thereof. The hirer shall simultaneously with the making of this agreement

make and give to the owner a promissory note as collateral security only for due payment of such instalments (other than the initial instalment) and not as payment thereof."

The defendant paid as the initial instalment the sum of £30, leaving a balance of £57, and signed the promissory note (referred to in condition (i) which was at the foot of the agreement and separated from it by a line of perforation.

A The promissory note was in the following form:

"For value received I promise to pay to the order of Munday (Walthamstow) Ltd., the sum of £57 payable in eighteen consecutive monthly instalments of £3 3s. 4d. . . . with interest on each instalment after its maturity at six per cent. per annum until payment thereof. Payable at the office of [the plaintiffs]."

B It was agreed that the refrigerator should remain in the custody of Stebbings until the defendant was able to have it installed in his own premises. The defendant paid fourteen instalments. He then learned that Munday (Walthamstow) Ltd. were in liquidation, that Stebbings was bankrupt, and the refrigerator had disappeared. He therefore refused to pay the remaining four instalments. By particulars of claim dated Apr. 8, 1952, filed in the county

C court, the plaintiffs claimed against the defendant, as maker of the promissory note, the sum of £12 17s. 4d., being the four instalments together with interest of 4s. and alleged:

"Notice of dishonour of the said promissory note has been given to Munday (Walthamstow) Ltd. The plaintiffs purchased the said promissory note and are holders in due course."

D The defendant filed a formal defence and on May 11, 1954, the case came before His Honour JUDGE BLOCK who granted an adjournment to enable the defendant to amend his defence. By his amended defence the defendant pleaded, inter alia:

E "3. The plaintiffs at the time of the negotiation of the said promissory note, if any, which is denied, had notice of a defect in the title of the person who negotiated the said promissory note in that the said promissory note was drawn pursuant to condition (i) of a hire-purchase agreement to which it was attached. The said hire-purchase agreement was within the protection of the Hire-Purchase Act, 1938 . . . The issue and/or subsequent negotiation of the said promissory note was affected by illegality, the said condition (i) being illegal and void by reason of s. 5 (c) of the Hire-Purchase Act, 1938, and/or the plaintiffs were at all material times aware of the existence of the said condition and that the said promissory note was drawn pursuant thereto . . .

F "6. In the further alternative the said promissory note is an agreement which is rendered void by s. 5 (c) of the Hire-Purchase Act, 1938."

The county court judge dismissed the action and the plaintiffs appealed.

G *Maurice Lyell, Q.C.*, and *J. M. Rankin* for the plaintiffs.
C. N. Shawcross, Q.C., and *M. Share* for the defendant.

SIR RAYMOND EVERSLED, M.R., stated the facts and continued: Section 4 (1) of the Hire-Purchase Act, 1938, gives the hirer the right at any time before the final payment to determine the agreement by notice and in that case his liability is limited to what he has paid or to what has accrued due before the termination or to one half the purchase price, less anything paid, whichever is the greater. That provision is reflected in the terms of the agreement. Section 5 (c) provides that any provision in any agreement

H "whereby a hirer, after the determination of the hire-purchase agreement . . . in any manner whatsoever, is subject to a liability which exceeds the liability to which he would have been subject if the agreement had been determined by him"

in accordance with the provisions of s. 4, shall be altogether void.

[HIS LORDSHIP referred to the pleadings and the adjournment to permit amendment* and continued:] The course that the trial took emerges plainly from the full and careful judgment of His Honour JUDGE BLOCK. I think it manifest that at the trial the plaintiffs founded themselves from first to last on the propositions either that they were holders in due course of this promissory note and, therefore, entitled to sue on it, whatever had been its earlier history; or that, at least, it was a wholly separate instrument from the hire-purchase agreement itself and was in any event, therefore, unaffected by any invalidity which might attach to any provision of that agreement. On the other hand, counsel for the defendant insisted that the agreement and the promissory note were one single agreement, and he founded his argument for invalidity on the proposition that the effect of condition (i) was to enable the promissory note, which was but part of the agreement, to get into the hands of somebody who could sue for it even though the defendant had terminated the hiring.

That view of the course of the trial is made plain by certain passages which I shall read from the judgment. In the course of his judgment the learned judge read without any comment paras. 3 and 6 of the defence. He then said:

"It was argued by counsel for the defendant that this agreement should be regarded as one agreement, that is to say, the document headed 'Hire-Purchase Agreement' and the detachable promissory note at the bottom referred to in condition (i) of the hire-purchase agreement; and, in my view, that submission is correct. In the event, can it be said that in this complete document any provision which makes the hirer liable to pay more than he would otherwise have had to pay under the Act makes it void? In my view it can, because it is not disputed that, in the hands of an unscrupulous finance company, [the defendant] could, after the payment of, shall we say, one instalment, have returned the machine and, under the Act, would then become liable to pay half of the purchase price, which would be £43 10s. If an unscrupulous finance company, being holders in due course, could enforce the payment of the full amount under the promissory note, that clearly in my view would make the agreement void."

The learned judge then referred to the wording of the Act and said that in his view the hirer became, as a result of the condition, liable to pay more than he otherwise would have to pay, and accordingly that the provision in the agreement was void.

The judge continued:

"... If I am wrong in regarding the document as a whole as an agreement, and counsel for the plaintiffs is right that the promissory note should be treated as a separate agreement, then, in my view, the wording of s. 5 is wide enough to include this promissory note as a separate agreement."

I am not quite sure, with all respect to the learned judge, that I entirely follow the argument, but thus brevi manu he disposed of counsel for the plaintiffs' submission, having already held that the premise on which it was founded was incorrect.

In this court counsel for the plaintiffs in opening the appeal put his case quite plainly in an entirely different way. He no longer claimed that the plaintiffs were holders in due course; nor did he claim that the promissory note was an instrument wholly distinct from the hire-purchase agreement and unaffected by any disabilities which might attach to the hire-purchase agreement. Indeed, he accepted in limine the proposition that in the hands at any rate of the plaintiffs, who had negotiated it from the owners, the promissory note was necessarily affected by any disqualification which might affect the right of the owner to sue on the hire-purchase agreement itself. Counsel for the plaintiffs quoted from BYLES ON BILLS (20th edn.), p. 107:

* The relevant paragraph of the amended defence is stated at p. 457, letter D, ante.

"A written agreement on a distinct paper, to renew, or in other respects to qualify, the liability of the maker or acceptor, is good as between the original parties."

In support of that general principle counsel for the plaintiffs referred us to *Bowerbank v. Monteiro* (1) and to certain other cases [*Modern Light Cars, Ltd. v. Seals* (2), *Maillard v. Page* (3)] designed to show, in accordance with the statement I have read, that the right of the plaintiffs, as holders of the promissory note, to sue on it, was limited by the conditions in the agreement to which the promissory note had originally been attached, the two being to that extent dependent one on the other. That submission is completely at variance with the plaintiffs' submission in the court below that the promissory note was quite separate from and unaffected by the agreement itself, and also it involved a negation of that which, according to the learned judge, had been conceded, namely, that in the hands of an unscrupulous finance company the defendant could have been sued after termination of the agreement. For, however unscrupulous the finance company (of course I am not suggesting that the plaintiffs are unscrupulous), their unscrupulousness would have availed them nothing, according to the present agreement, since they would in the supposed circumstances have been necessarily disabled by the fact that the owners under the hire-purchase agreement could not themselves sue.

When that point had been put and argued with skill and persuasiveness by counsel for the plaintiffs, counsel for the defendant replied that this was, to use his own language, a turning of the plaintiffs' case inside out. He raised the question that this was really a new point which, not having been taken in the court below, according to well-known principles, must be treated as not available to an appellant from a county court judgment in this court. I agree, of course, that the general issue of the validity of the agreement and whether any invalidity affected the right of the holder of the promissory note to sue on it has been raised by the amended pleading, but I have myself come to the conclusion that, although within the scope of the general issue, this was such a new way of putting the plaintiffs' case as to amount to a new point within the meaning of that formula, as it has been used and applied in these courts ever since *Smith v. Baker & Sons* (4) in 1891. I make no attempt to define "a new point" for this purpose or to declare what are its characteristics. I think it is, perhaps, a matter in the end of common sense in the light of all the circumstances of a particular case, but in the present case I am satisfied that this way of putting the case is a new point of law. I rest my conclusion perhaps most strongly on this consideration, that the judgment, extracts from which I have read, seems to me to be in no way whatever related to it. Indeed, it seems to me to have proceeded on a basis which was absolutely inconsistent with the way in which counsel for the plaintiff now puts his case. As a matter of principle the Court of Appeal has always been strict in applying the rule that an appellant from a county court, unless the other party consents, cannot be allowed in this court to raise a new point of law not raised below. After all, the county court is intended to serve litigants of relatively small means. It is not in accordance with the public interest that a party who has fought a case in a county court and been defeated should then raise in this court a new point and put his case in an entirely different way as a matter of law and so make the other party, hitherto successful, litigate the matter again at the risk of having to pay the costs not only below, but in this court.

I am aware that in the present case the defendant is legally aided, but that I hold to be an entirely irrelevant consideration. The scheme of the Legal Aid Act is to put the litigant who is not sufficiently affluent in the same position as that of what is sometimes known as a dives litigant. Nor does it affect the case, as I think, that the issue now raised is one of importance to the plaintiffs. The Legal Aid Act was devised to assist those whom it finances in the course of

litigation and not indirectly to assist other parties or even the general public in determining points of interest. I, therefore, do not further develop this matter except to say, if analogy is of any use, that one can well conceive that where on a given set of facts the question is whether a person is liable to account to another as a trustee and that is the general issue, within the scope of that general issue the case might be put in many ways, and it would not be difficult to imagine the putting of a case in an appellate court in so different a way as to amount quite plainly to a new point of law. I add one further point. As counsel for the defendant observed by reference to *Smith v. Baker* (4), one consideration which has moved the courts in applying this rule is, that, if the point taken in the appellate court had been earlier taken, evidence might have been obtained to meet it. Stebbings, in whose possession the refrigerator was, apparently disappeared or became insolvent and Munday (Walthamstow) Ltd. are in liquidation. But had the present point been pleaded as clearly as it was argued in this court, it might well have been the duty of those advising the defendant to see if they could not establish some relationship between Stebbings and Munday (Walthamstow) Ltd., which would have disabled the latter from suing and which on this argument would also have disqualified the plaintiffs.

Having stated my conclusion on that matter, it is unnecessary to consider the other points raised in the present case and, indeed, it would not be right for me to go into them, since all that I said would in the circumstances be obiter. I have made clear in fairness to the learned county court judge, that the language of his judgment which I have read was directed to the plaintiffs' case as it was then put, and does not bear at all on the case as it was put here. It cannot in my judgment be fairly treated as expressing an opinion on the matter as it has been argued before us. Indeed, I doubt whether, if the case had been put as counsel for the plaintiffs put it in this court, the learned judge would have decided the case in the way he did or at least would have used the language which I have already quoted. There may be other grounds available under the Act for successfully impeaching the validity of the condition and thereby disqualifying the plaintiffs. On that I express no view. I observe that counsel for the defendant did intimate that there was a point about interest and other points too. As this matter was debated, it may be perhaps convenient if I say that I do not, as at present advised, accept the argument of counsel for the defendant that, if as a result of something done, not as the agreement contemplated and in pursuance of its terms, but in complete disregard of its terms and in breach of them, in other words, in effect in fraud of the hirer, the promissory note should get into the hands of an innocent third party to whose suit the hirer would have no answer, there is infringement of s. 5 (c). It would not appear to me, on those facts alone, that an infringement of the terms of s. 5 (c) is shown, for it seems to me that such a result would involve reading the words "is subject to" as "may become subject to". Section 5 reads:

"Any provision in any agreement . . . (c) whereby a hirer, after the determination of the hire-purchase agreement . . . in any manner whatsoever, is subject to a liability which exceeds the liability to which he would have been subject"

on determination in accordance with s. 4. On the facts that I have supposed, the dealings would have been in complete disregard of the condition, which in terms states that the promissory note is to be collateral only to the main obligation. If, therefore, in breach of that condition transactions took place as a result of which a party appeared who could say that he was the holder in due course without any notice of the hire-purchase agreement, then the liability which might impose itself on that hirer would not be a liability under the agreement or one to which he had been made, or was, subject by virtue of any provision of the agreement. That is all I desire to say on that aspect of the matter.

In the view I take, applying what I believe to be the proper and salutary rule

in these courts, I think it is too late now for the plaintiffs to put their case on a basis quite inconsistent with that on which hitherto they had fought it. I think, therefore, that the appeal ought to be dismissed.

HODSON, L.J. : I agree.

UPJOHN, J. : I agree.

Appeal dismissed.

Solicitors: H. H. Harper (for the plaintiffs): *Leader, Henderson & Leader* (for the defendant).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

FORBES v. FORBES.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Davies, J.), October 6, 7, 8, November 1, 1954.]

Divorce—Desertion—Constructive desertion—Alleged belief in wife's adultery—Husband leaving matrimonial home after wife's request for his help—Desertion by husband.

The parties were married in 1940 and there were two children of the marriage. In the summer of 1949, the wife fell in love with one W. On May 25, 1950, the wife told the husband that she was in love with W. and asked him (the husband) to help her to overcome this feeling. There was a conversation between them which, the husband alleged, convinced him that the wife had committed adultery with W. On May 29, 1950, the husband left the matrimonial home. On May 31, 1950, W. wrote to the husband and as a result they had lunch together but they did not refer to the question whether or not W. had committed adultery with the wife. The husband made no inquiries of anyone in respect of this question and made no allegation of adultery against W. and refused the wife's request to return to her. On July 6, 1953, the husband presented a petition for divorce on the ground of desertion, alleging in effect that she had by her conduct made him believe that she had committed adultery, that he had in consequence left the matrimonial home, and that she had, therefore, deserted him. The wife denied desertion and cross-prayed for a divorce on the grounds of the husband's desertion.

HELD: (i) on the facts the husband did not believe that the wife had committed adultery, but had taken advantage of the wife's confession of her love for W. to put an end to a bond that was irksome and intolerable to both of them; but even if he did hold that belief there were no reasonable grounds for it; accordingly, his petition would be dismissed.

(ii) the fact that a wife confessed to her husband that she was and had been for some time in love with another man and wanted his help to put an end to the situation would not amount to just cause for him to leave her; on the contrary, it was the husband's duty to afford his wife all the help that he could; accordingly, when the husband left the matrimonial home on May 29, 1950, he left without just cause and, therefore, deserted her; and a decree would be granted in favour of the wife.

PER CURIAM: the fact that a petition does not bring a charge of adultery is relevant when the court is asked to find that the petitioner on reasonable grounds believes, and has believed for three years immediately preceding the presentation of the petition, that the respondent had committed adultery (see p. 466, letter C, post).

AS TO CONSTRUCTIVE DESERTION, see 10 HALSBURY'S LAWS (2nd Edn.) 655, para. 964; and FOR CASES, see 27 DIGEST (Repl.) 350-352, 2897-2913.

Cases referred to:

- (1) *Glenister v. Glenister*, [1945] 1 All E.R. 513; [1945] P. 30; 114 L.J.P. 69; 172 L.T. 250; 109 J.P. 194; 27 Digest, Replacement, 367, 3040.
- (2) *Everitt v. Everitt*, [1949] 1 All E.R. 908; [1949] P. 374; 113 J.P. 279; 27 Digest, Replacement, 348, 2881.
- (3) *Baker v. Baker*, [1953] 2 All E.R. 1199; [1954] P. 33; 117 J.P. 556; 3rd Digest Supp.
- (4) *Allen v. Allen*, [1951] 1 All E.R. 724; 115 J.P. 229; 27 Digest, Replacement, 84, 633.
- (5) *Chilton v. Chilton*, [1952] 1 All E.R. 1322; [1952] P. 196; 116 J.P. 313; 3rd Digest Supp.
- (6) *Barker v. Barker*, [1950] 1 All E.R. 812; 27 Digest, Replacement, 560, 5116.
- (7) *Pratt v. Pratt*, [1939] 3 All E.R. 437; [1939] A.C. 417; 108 L.J.P. 97; 161 L.T. 49; 27 Digest, Replacement, 350, 2895.
- (8) *Beer v. Beer*, *Beer v. Beer & Neilson*, [1947] 2 All E.R. 711; [1948] P. 10; [1948] L.J.R. 743; 112 J.P. 50; 27 Digest, Replacement, 367, 3041.

PETITION by the husband for divorce.

The parties were married on July 13, 1940, and there were two children of the marriage, a boy A. born in February, 1944, and a girl H. born in March, 1947. The marriage was never very happy. In June, 1945, they moved into a flat which remained thereafter the matrimonial home. In another flat in the same house lived a Mr. and Mrs. W. The wife joined a local tennis club which Mr. W. also joined in 1947. The wife and Mr. W. played regularly as partners in the club team. In August, 1948, the husband and the wife were on holiday in a bungalow in Sussex. The parties had a serious quarrel as a result of which the husband's parents, who were staying with them, left. The parties then had a conversation in which the husband asked why the marriage was a failure, to which the wife replied:

"Well perhaps it is I who am wrong. We ought to get a divorce or separate."

The husband replied that they must keep together for the sake of the children. In the summer of 1949 the husband and the wife occupied separate rooms and from about that time the wife and Mr. W. became infatuated with each other, but this fact was unknown to the husband, who said that he "never saw anything improper between them at all". On May 25, 1950, the wife told the husband that she was in love with W. and asked him (the husband) to help her overcome this feeling. According to the husband she told him she had been having an "affair" with W.; he asked her if she had had intercourse with W. to which she made no reply. He did not ask her where or when it had taken place but he was, he said, convinced that she had had intercourse with W. On May 29, 1950, the husband left the matrimonial home taking with him the boy A. On May 31, 1950, W. wrote to the husband as a result of which they had lunch together, but no reference was made to the question whether or not adultery had taken place between W. and the wife. Nor did the husband at any time make inquiry of anyone as to this question; but at all times he refused the wife's requests that he should return to her. At Christmas, 1950, the husband went with the wife to her firm's party. Shortly thereafter they had lunch together during which she asked him to come back but he was adamant in his refusal. In 1951 she asked him if he had "met someone else," to which he replied "yes"; and in the summer of 1951 he told the wife that he wanted a divorce. On Nov. 12, 1951, the wife's solicitors wrote to the husband telling him that the wife's affection for W. had completely disappeared and asking him to return to her. The husband denied receipt of this letter. On Dec. 5, 1952, the wife wrote a letter to the husband in which she stated, *inter alia*:

"Maybe from a hard man's point of view, you were justified in what you

did to her, but from no point of view can there be any justification for what you did to H. Whether you ever admit it or not, you are responsible for denying her a normal home and family life; the choice was entirely your own, and you chose other things that you preferred to her . . . ”

By his petition dated July 6, 1953, the husband alleged, inter alia:

A “ 6. That the [wife] has deserted the [husband] without cause for a period of at least three years immediately preceding the presentation of this petition. Particulars. For many years the [husband] and the [wife] lived very unhappily together. The [wife] showed no interest in or affection for the [husband] and in later years rarely spoke to him except to criticise. In the summer of 1947 at a bungalow at Elmer Sands Sussex after a violent quarrel the [wife] said that it was hopeless going on and that they should get a divorce. On May 25, 1950, the [wife] at . . . orally informed the B [husband] that she was in love with another man and had been having an affair with him and was still in love with him. The [wife] would neither admit nor deny adultery. The [husband] believing that the [wife] had committed adultery thereupon left the matrimonial home and has never since resumed cohabitation with the [wife].”

C By her answer dated Aug. 28, 1953, the wife merely denied desertion. By an amendment to her answer on June 9, 1954, she added allegations:

D “ (2) That the [husband] had deserted the [wife] without cause for at least three years and upwards immediately preceding the presentation of this answer. (3) That at or about Whitsun 1950, the [wife] told the [husband] as was the truth that she was for the time being infatuated with the neighbour; that the [husband] then said to the [wife] ‘ I shall leave you now but I will come back when you have got over this infatuation if it doesn’t take you too long and I shall take [A.] with me as if I leave him you won’t try ’ or used like words; that in or about the month of January, 1951, following upon a successful meeting between the [wife] and the [husband] at a party given by the firm which employed the [wife] the [wife] asked the E [husband] to meet her with a view to discussing the whole situation between them; that the [husband] met the [wife] at lunch and said to her that any discussion was useless as a reconciliation was out of the question; that in or about August or September of the same year in reply to a letter written by the [wife] again suggesting a meeting to discuss a reconciliation the [husband] F told the [wife] that a reconciliation was impossible as he was interested in another woman; that since the month of January, 1951, the [husband] has never returned to live with the [wife] ”

and the wife prayed that the prayer of the petition might be rejected and that the marriage might be dissolved.

P. M. Wright, Q.C., and *R. F. Ormrod* for the husband.

G *Miss M. Morgan Gibbon* for the wife.

Cur. adv. vult.

H Nov. 1. DAVIES, J., referred to the pleadings and continued: The husband’s case may be set forth in three sentences: You made me by your conduct believe that you had committed adultery. Therefore, I left you. Therefore, you have deserted me. A number of cases have been cited in the course of the argument, substantially all of which have been decided on what may for convenience be called the rule in *Glenister v. Glenister* (1) and its later developments. In *Glenister v. Glenister* (1) the husband had withdrawn from cohabitation with his wife and it was held by the Divisional Court, reversing the decision of a metropolitan magistrate, that the husband, though he failed to prove his charge of adultery, was entitled to rely on his belief, induced by her conduct, that she had been committing adultery as constituting just cause for withdrawing from cohabitation with her, so that he had an answer to her charge of desertion. The

next development in the rule was in *Everitt v. Everitt* (2). In that case it was the party who withdrew from cohabitation who caused the suspicion of adultery; for the husband withdrew from cohabitation with his wife in circumstances which made it reasonable to believe he was committing adultery. When that apparently adulterous association ended, he asked her to take him back, but it was held by the Court of Appeal that her belief in his adultery was just cause for her refusal to take him back, so his desertion of her continued.

The most recent case on the subject, and the authority on which the present case turns, is *Baker v. Baker* (3) in which the Divisional Court held that if a husband deliberately induces in his wife the belief that he is carrying on an adulterous association, and his wife leaves the matrimonial home in consequence, he can be held to have expelled her and, therefore, to have deserted her, even though she fails to bring a charge, or to prove the fact, of adultery. LORD MERRIMAN, P., having set out the facts, said ([1953] 2 All E.R. at p. 1200):

"There was evidence that the wife had objected to what she believed was an improper association between her husband and this woman, and when it had been persisted in and lied about, as she asserted, she had withdrawn from cohabitation, as being, it was suggested, the only thing a decent woman could do. In my opinion, the magistrate was justified in saying, hypothetically and as a matter of law, that, if a man deliberately induces the belief that he is carrying on an adulterous association, and, in consequence, his wife leaves the matrimonial home, he can be held to have expelled her, and, therefore, to have deserted her, even though she fails to bring a charge, or to prove the fact, of adultery."

LORD MERRIMAN, P., goes on to say that there was, in that case, a good deal of other evidence on which one could have come to the conclusion that the husband had been guilty of expulsive conduct, apart from this suspicion of adultery which he had occasioned, which in itself would have been sufficient to justify a finding of constructive desertion. That is implicit in what he says (*ibid.*):

"I should be prepared, on the evidence as a whole, to draw the inference which the learned magistrate has not directly expressed, that the husband had been guilty of conduct which could fairly be held to have expelled his wife from the home. But I must also deal with the specific point on which he [the magistrate] decided this case, namely, that, although he was not satisfied that adultery had been proved, the wife had reasonable ground for suspecting that her husband had committed adultery. He founded his decision on *Glenister v. Glenister* (1)."

The principle of the decision of the court is summed up in the last main paragraph of the learned President's judgment (*ibid.*, at p. 1201):

"The learned magistrate has used the decision that in such circumstances a husband cannot be held guilty of desertion so long as the belief holds the field, so to speak, in reverse, to justify the proposition that the wife's charge against her husband of desertion cannot be displaced so long as a belief, induced by her husband's conduct, that he was committing adultery, held the field. In other words, he was saying that their respective rights in relation to cross-charges of desertion are regulated by the existence of the belief, a proposition which has twice been held by the Court of Appeal to be right."

In my judgment, there is no doubt at all that *Baker v. Baker* (3) is a direct authority in favour of the proposition of law which is advanced on behalf of the husband in the present case. It is most important, however, to observe in all the decided cases the emphasis which has been laid on the temporary effect of this doctrine of reasonable belief. For example, LORD MERRIMAN, P., himself in *Everitt v. Everitt* (2) said in dealing with a state of affairs somewhat different from those with which I am concerned ([1949] 1 All E.R. at p. 913):

"... there might come a moment when, in spite of her confession, or,

indeed, because of her oath that her confession had been false, and supported with equally circumstantial detail, a judge might hold that, not only was the charge of adultery not proved, but the wife had not, in fact, committed adultery. From that moment the fact has been ascertained and there is no longer any room for the belief, but that does not act retrospectively or retroactively. So long as the belief is reasonably and properly held, the husband's conduct and their respective rights in relation to cross charges of desertion are regulated by the existence of the belief, though there may come a moment beyond which that is no longer possible."

HODSON, L.J., in *Allen v. Allen* (4) referred ([1951] 1 All E.R. at p. 728) to that passage in the learned President's judgment in *Everitt v. Everitt* (2) in these terms:

"*Glenister v. Glenister* (1) was referred to by LORD MERRIMAN, P., sitting as President of a division of this court in *Everitt v. Everitt* (2), and he there emphasised what is, in my judgment, an essential feature of the defence which the husband sought to raise in the present case, namely, its temporary nature, because, although at one moment a person may be able to say that he or she reasonably believes in a state of facts, that reasonable belief may be dispelled at any moment. Nobody could give an exhaustive statement of the ways in which a belief could be dispelled. The question in issue in the present case is whether the husband's belief must be taken to have been dispelled when a judgment of a court of competent jurisdiction has been given in favour of the wife to the effect that the husband has failed to prove a charge of adultery against her . . . I do not think it is necessary to express a view as to what the position may be if, in the course of events as between man and wife, a belief by a husband in his wife's adultery, may be held to be based on reasonable grounds at one moment and not at another."

LORD MERRIMAN, P., in *Chilton v. Chilton* (5) reiterated ([1952] 1 All E.R. at p. 1323 et seq.) the same point. It is plain, therefore, in my judgment, that it must not be assumed that because at the moment of parting, or at whatever other date it is alleged that desertion commenced, the respondent may have induced in the petitioner the belief that adultery had been committed, the petitioner is necessarily entitled without further inquiry and by mere inactivity to assert that such belief subsisted throughout the statutory triennium up to the presentation of the petition.

A further consideration is, in my view, of importance. In *Barker v. Barker* (6) BUCKNILL, L.J., in a passage which is, it is true, obiter, because the issue in *Barker v. Barker* (6) was whether a commissioner who heard an undefended petition was entitled to refuse to make an order for costs in favour of the petitioner, said ([1950] 1 All E.R. at p. 816):

" . . . I wish also to say a few words on the extension of the rule laid down in *Everitt v. Everitt* (2) and the cases therein cited to the present case and to cases like it. Where there is no doubt that the spouse has committed adultery, but proof of it cannot be obtained, it seems from the decision in *Everitt v. Everitt* (2) that the innocent spouse may refuse to cohabit with the guilty spouse and may, at the end of three years, petition for a divorce on the ground of desertion. In such a case there is no room for the argument, which was successful in *Pratt v. Pratt* (7), that repentance and a genuine wish to return home communicated to the deserted spouse brings the desertion to an end. If this is the law surely the court should require the deserted spouse to take all reasonable steps to obtain proof of the adultery, and, if possible, bring a petition on that ground, because adultery is the solid basis of the decree. Constructive desertion in such a case is, in my view, somewhat of a legal fiction. To take an extreme case. The wife in a temper tells her

husband that she committed adultery on one occasion with a man, now dead, and then leaves the matrimonial home. The next day she implores the husband to let her come back and persists in her entreaties, but the husband refuses to do so or to have anything more to do with her, and makes no independent inquiries as to the truth of her statement. The husband waits for three years and then petitions for a divorce on the ground of desertion. Assuming that he satisfied the court that he honestly believed that his wife had committed adultery, the principle, as stated in *Everitt v. Everitt* (2), should enable him to obtain a decree."

Finally, there is a passage in *Allen v. Allen* (4) to which I have already referred, from the judgment of SIR RAYMOND EVERSHED, M.R., which, in substance, is to the same effect, though the learned Master of the Rolls was there dealing with a situation where there has been a finding of a competent court against a charge of adultery. He said ([1951] 1 All E.R. at p. 731):

" . . . unless the result is as I have suggested it ought to be, the position would be that a husband could successfully persist in refusing to discharge the obligations which lie on him as a husband by continuing to assert an honest and reasonable belief (in the sense of its being a belief that is sensible and not the result of caprice or stubborn and distorted judgment) in the proposition that his wife is an adulteress, a proposition which he has been, and continues to be, quite unable to prove in a court of law."

In my judgment, the fact that a petitioner has not chosen to bring and does not now make a charge of adultery may well be a most relevant matter for consideration when the court is asked to find that the petitioner on reasonable grounds believes, and has believed for three years preceding the presentation of the petition, that the respondent had committed adultery. Of course, if at any time within the three years he had put the matter to the test by bringing a petition on the ground of adultery and the court had decided against him on that issue, his belief would thereafter no longer avail him. That is the rule in *Allen v. Allen* (4).

[HIS LORDSHIP stated the facts and continued:] I formed the impression that, on the whole, the wife was a truthful witness. I am not at all satisfied that the question about intercourse was in fact asked by the husband [on May 25, 1950]. It is an odd—though, of course, not an impossible—word to use, and I am certainly not satisfied that, if the question was asked, the wife heard it. I am not satisfied either that she used the word "affair"—that she said, "I have been having an affair with [W.]." It is so easy for that word to creep into the evidence without any dishonesty or attempt to mislead; because she had plainly said, "I am in love with [W.]" it would have been a perfectly simple and ordinary question for the husband to ask, "How long has this affair been going on?" and the answer would have been, "Since last year," and the word "affair" might well have been used by the husband in those circumstances. In his recollection of this emotional conversation he might honestly have thought it had been used by the wife. Whether or not it was because she thought Mrs. W. was going to raise the matter, I am satisfied that she was asking the husband for help, and what she got instead of help, perhaps not surprisingly, was anger. With one small exception that conversation is really the high-spot of the husband's case. His belief in the wife's adultery is substantially based on the question which he says he asked her and the fact that she "made no reply".

But what followed? On Friday, Saturday and Sunday (May 26, 27, 28), the husband, who says he was satisfied his wife had committed adultery from her failure to reply to that question which he says he put, and which I do not believe he did put, had breakfast and dinner with the wife. The matter was not discussed. Save that on one occasion he said he was going to his parents and taking the boy A. with him, he asked her no more questions. He does not suggest he did. On the Saturday evening there was a family card party at which this

"adulteress" and "outraged husband" played their hands in the usual way. He did not go to see W. or Mrs. W. or make any inquiries of any sort or kind of anyone. He says he did not want to believe that she committed adultery. I am bound to say there is extremely little evidence from his conduct of that disinclination. One is irresistibly, I think, reminded of a sentence in the judgment of WILLMER, J., in *Beer v. Beer*, *Beer v. Beer & Neilson* (8) ([1947] 2 All E.R. at p. 713):

A "The rapidity with which he jumped to his conclusion lends some support to the wife's case that he had already made up his mind to desert and was only seeking a plausible excuse."

B On May 29, 1950, he left, taking the boy A. but leaving the wife in the flat with the three year old daughter H. For aught he knew, if in fact the wife had impliedly, by silence, admitted adultery, although I do not accept that she had admitted it, she might have continued her adulterous association with W. while this three year old baby girl was still with her in the flat. I do not think that if he really believed she had committed adultery he would have left that child there in her care. On May 31, W. wrote him a letter, as a result of which a meeting was arranged between this "outraged husband" and "adulterer." I put both of those in inverted commas because there is no charge of adultery. They meet; they have lunch together; not a word is said by either of them on the subject of whether or not adultery had taken place, and the husband does not even know who paid for the lunch. I find it impossible to believe, even in 1954, when it is fashionable to be modern and civilised about these things, that if the husband really believed that adultery had taken place some reference would not have been made at that interview. There was none. It was a reasonably friendly lunch. There is no doubt that thereafter, both by letter and orally when they met, the wife was constantly asking the husband to return to her. He always refused. He says on more than one occasion he gave as a reason her unfaithfulness. I think it is impossible for me to accept that that word was used in the sense of adultery.

E [HIS LORDSHIP referred to the fact that the husband attended a party with the wife at her firm at Christmas, 1950; that they had lunch together shortly afterwards and that the husband still refused to return; that in 1951, the husband admitted to the wife that he had met someone else whom he now wished to marry. HIS LORDSHIP found that the letter dated Nov. 12, 1951, written to the husband by the wife's solicitors, was in fact received by the husband. HIS LORDSHIP then read the wife's letter dated Dec. 5, 1952, and continued:] It does not seem to me possible to construe that letter as an admission of adultery. I think it is merely an admission of wrong-doing. Of course, she had behaved badly by allowing herself to fall in love and have this improper affair behind her husband's back with W.

G I am wholly unsatisfied that the husband believed that the wife had committed adultery. I am satisfied that, if he did, in the circumstances he had no reasonable grounds for that belief. It is, I think, impossible to resist the conclusion that he took advantage of the wife's confession of her love for W. to put an end to a bond that was irksome and intolerable to both of them. That, of course, means an end of the husband's allegation that his wife deserted him. On a possible construction of the answer itself, there is an allegation that desertion by the husband did not begin until January, 1951, and that date might not be sufficiently early, if that were my finding, for the purposes of pronouncing a decree on the answer. H It seems to me, however, that it is open to me to hold, on the answer as it is framed, that when the husband left the matrimonial home in May, 1950, he deserted her. It seems to me that it would be wholly wrong and unrealistic to hold that because a wife comes to a husband and confesses that she is and has been for some time in love with another man and wants his help, as I think this wife did, to put an end to the situation, that that would amount to just cause

for the husband to leave her. On the contrary, I should have thought that would be an occasion when it was a husband's duty to afford his wife all the help he possibly could that she was asking for. In all the circumstances, therefore, if it had been necessary to give leave to the wife to file a cross-petition I would have done so, but it seems to me unnecessary. I find and hold that when the husband left the matrimonial home on May 29, 1950, he did so without just cause and he, therefore, deserted the wife. The prayer in the petition will be rejected and, on the amended answer, I pronounce a decree nisi.

Order accordingly.

Solicitors: *F. J. Stewart & Co.* (for the husband); *Copley Singleton & Billson*, Croydon (for the wife).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

SINASON-TEICHER INTER-AMERICAN GRAIN CORPORATION v. OILCAKES AND OILSEEDS TRADING CO., LTD.

[COURT OF APPEAL (Denning, Birkett and Morris, L.JJ.), October 26, 27, 1954.]

Sale of Goods—Payment—Bank guarantee or letter of credit—Time for issuing.

On Aug. 11, 1952, the sellers, an American company, agreed to sell to the buyers, an English company, for United States dollars a quantity of Canada feed barley for shipment during October/November, 1952, c.i.f. Antwerp/Hamburg range buyer's option, for re-sale in Germany for sterling. Payment was to be net cash in London on first presentation of documents, and the buyers were to issue a guarantee to the sellers through their London bank that the documents would be taken up on first presentation. The contract did not expressly provide when the buyers were to furnish this guarantee. At the beginning of September the sellers began calling for the guarantee and when, by Sept. 10, it had not been given, they purported to cancel the contract. On Sept. 10 the buyers' London bank sent to the sellers a form of letter of credit, substantially in the terms of the guarantee required by the sellers, which the sellers refused to accept. On Sept. 16 the buyers accepted the repudiation, but claimed that the cancellation was wrongful. On a case stated by an arbitration tribunal it was said: "In so far as it is a question of fact we find, and in so far as it is a matter of law we hold, that the buyers' obligation was to provide a bank guarantee within a reasonable time before Oct. 1, 1952, and that such reasonable time had not arrived by Sept. 10, 1952." The tribunal found further that even if the obligation was simply to provide the guarantee within a reasonable time in all the circumstances, the guarantee was provided within that time. The sellers contended that the guarantee had not been given within a reasonable time, and asked for the case to be remitted for a finding on that point.

HELD: as the contract was silent as to the time when the guarantee should be issued, the buyers' obligation in law was to provide it within a reasonable time before the first date for shipment, viz., Oct. 1, 1952; accordingly there was no error of law in the conclusions of the tribunal, and the appeal should be dismissed.

Decision of *DEVLIN, J.* ([1954] 2 All E.R. 497), affirmed.

AS TO METHOD OF PAYMENT UNDER "C.I.F." CONTRACTS, see *HALSBURY'S LAWS* (2nd Edn.) 212, para. 282.

Case referred to:

(1) *Paria & Co., S.P.A. v. Thurmman-Nielsen*, [1951] 2 All E.R. 866; *affd.* C.A., [1952] 1 All E.R. 492; [1952] 2 Q.B. 84; 3rd Digest Supp.

APPEAL by the sellers from an order of *DEVLIN, J.*, dated May 26, 1954, and reported [1954] 2 All E.R. 497.

A On Aug. 5, 1952, the Bank of England issued a notice (F.E.C. 461) stating that they were prepared for a certain time to consider applications by residents of the United Kingdom acting as principals to purchase raw materials from residents of the American account area and Canada for re-sale to countries belonging to the European Payments Union. On Aug. 6 an application was made on behalf of the buyers, Oilcakes and Oilseeds Trading Co., Ltd., of London, to the Foreign Exchange Control, Bank of England, for permission to purchase for re-sale, inter alia, a quantity of Canada feed barley at a c.i.f. cost of United States \$1,490,000 for sale in West Germany for a sterling return of £580,000. On Aug. 8 the bank approved the application in principle, subject to the terms of Notice F.E.C. 461.

B By Aug. 9 the sellers, Sinason-Teicher Inter-American Grain Corp., of New York, had started discussions in Germany, through their agents, Lichtenstein and Mannheimer (referred to hereinafter as "L. & M."), with Bayerische Getreide-Commissions Gesellschaft G.m.b.H. (referred to hereinafter as "B.G.C."), who were interested in buying a cargo of Canadian barley for payment in sterling. As the sellers required payment in dollars, advantage had to be taken of the switch transaction under the provisions of Notice F.E.C. 461, which was the type of transaction in which the buyers were also interested.

C On Aug. 9 Commissionen Internationale Futtermittel G.m.b.H. (referred to hereinafter as "C.I."), who were organising the switch transaction, informed the buyers of their intention to make an offer to the sellers through B.G.C. The buyers did not object, and B.G.C. were authorised by C.I. to make the offer on behalf of the buyers. On Aug. 11 B.G.C. made an offer to the sellers through L. & M. and the sellers accepted. On the same day L. & M. advised B.G.C. of the acceptance.

D Also on Aug. 11, L. & M. sent a sale note to B.G.C., confirming that they had intervened in the transaction set out therein, viz., the sale by the sellers to the buyers, through L. & M.'s agency, of about nine thousand five hundred tons, at 1,016 kilos a ton, of No. 2 Canada feed barley for shipment during October/November, 1952, at a price of U.S. \$75.15 per thousand kilos net in bulk, delivered weight, c.i.f. Antwerp/Hamburg range at buyers' option, discharging expenses for sellers' account. Payment was to be net cash in

E London on first presentation of documents, and the buyers were to issue a guarantee to the sellers through their London bank that the documents would be taken up on first presentation. The conditions and arbitration were to be London Corn Trade Association Contract No. 27, if cargo or Contract No. 30, if parcel, the material conditions and rules printed on each of these contracts being identical. Two German firms guaranteed to the sellers the orderly liquidation of the contract.

F On the same day (Aug. 11), C.I. sent a sale note to the buyers stating that they had acted as intermediaries in a transaction between the buyers, who, under that contract, were sellers, and B.G.C., or a first class Bavarian buyer, for nine thousand five hundred tons of No. 1 or No. 2 Canada feed barley, at sellers' option, for delivery October/November, 1952, from Canada, at a price of £27 7s. 6d. per thousand kilos, c.i.f. Antwerp/Hamburg. Payment was to be

G made in the German/English Clearing, net cash against documents on first presentation in London. Arbitration was to be according to London Corn Trade Association Contract No. 27 or No. 30. These two contracts closed the switch transaction. Also on Aug. 11, the sellers made out a contract, as between themselves and the buyers, in similar terms to those of the sale note to the

H buyers from L. & M., but it was not sent to L. & M. until Aug. 19. In the meantime, on Aug. 12, L. & M. advised the sellers that the guaranteeing bank in London was Hambro's Bank. On Aug. 22 L. & M. sent to B.G.C. copies of the contract drawn up by the sellers, and on Aug. 25 C.I. sent two copies to the buyers, who were asked to sign one form and return it direct to the sellers. This the buyers did, but the signed form was never received by the sellers.

Neither the contract drawn up by L. & M. nor that drawn up by the sellers

contained a provision as to any specific date by which the guarantee by the London bank should be furnished. The sellers purported to require the guarantee by Sept. 1, then by Sept. 2, and finally by Sept. 9. The buyers never agreed to a fixed date for the provision of the guarantee. On Sept. 9 Hambro's Bank sent a cable to the sellers stating that the buyers had instructed them to issue a guarantee in the sellers' favour covering about nine thousand five hundred tons of Canada feed barley, subject to Bank of England approval, and that they would cable details as soon as possible. On the same day the approval of the Bank of England was obtained. On Sept. 10 Hambro's Bank cabled to the sellers a form of letter of credit substantially in the terms of the guarantee required by the sellers except in regard to a matter of insurance. On the same day the sellers sent a cable to the buyers saying that, as the previous day's cable from Hambro's Bank

"did not contain payment guarantee therefore our deadline given for supplying performance guarantee expired without performance and we cancel deal last night."

The buyers immediately cabled a reply to the sellers saying that the sellers' cable was incomprehensible as no deadline in barley contract had been received or accepted, that, anyhow, a guarantee had been cabled, and that they insisted on execution of the contract. The sellers replied that they had nothing to add to their previous cable and considered the deal cancelled. On Sept. 11 the buyers cabled to the sellers giving them twenty-four hours within which to recognise the contract, and saying that they would otherwise be forced to claim arbitration. As they received no reply, on Sept. 15 they again sent a cable requiring within twenty-four hours a binding declaration that delivery would be executed according to the contract, but again there was no reply.

The buyers having claimed arbitration, arbitrators were appointed, who failed to agree and appointed an umpire. On Apr. 14, 1953, the umpire awarded that the sellers were in default. The sellers appealed from the award to the appellate tribunal of the London Corn Trade Association, Ltd., who found that the buyers' obligation was to provide a bank guarantee within a reasonable time before Oct. 1, 1952, and that such reasonable time had not arrived by Sept. 10, 1952. The tribunal further found that, even if the obligation was simply to provide the guarantee within a reasonable time in all the circumstances, the guarantee was provided within that time. The questions of law for the opinion of the court were whether, on the true construction of the documents and the facts as found, (i) the contract date was Aug. 11, 1952, and (ii) the sellers were entitled to treat the contract as determined. Depending on how the court answered these questions, the tribunal made various awards. During the course of the hearing it was conceded that the contract date was Aug. 11, 1952.

DEVILIN, J., held that as the contract did not mention the time within which the guarantee was to be issued, it had to be provided within a reasonable time, which had to be measured in relation to the event which was guaranteed, viz., the presentation of the documents, and the guarantee had to be provided before some event such as the shipment which led up to the presentation of documents; that the first shipment date was to be Oct. 1, 1952; that a reasonable time had not elapsed by Sept. 10, 1952; and, therefore, the sellers were not entitled to treat the contract as determined on that date, and were liable to the buyers in damages.

Ashton Roskill, Q.C., and T. G. Roche for the sellers,
Eustace Roskill, Q.C., and R. A. MacCrindle for the buyers.

DENNING, L.J.: This arbitration arises out of a "switch transaction". An English company, the buyers, Oilcakes and Oilseeds Trading Co., Ltd., bought nine thousand five hundred tons of Canadian seed barley from an American company, the sellers, Simason-Teicher Inter-American Grain Corpn. The

contract provided that payment was to be in United States dollars. At the same time the English buyers agreed to re-sell the barley to a German concern and under that contract payment was to be in sterling. In order to carry out the "switch transaction", the German concern was to give to the English buyers a guarantee for the sterling, and the English buyers were to give a guarantee to the American sellers for the dollars. As the transaction involved the exchange control, it could not be carried out without the consent of the Bank of England. The essence of it was that the English buyers were paying in dollars and re-selling to the Germans for sterling.

The contract between the American sellers and English buyers was concluded on Aug. 11, 1952. The goods were to be delivered c.i.f. Antwerp/Hamburg range. Shipment was to be October/November, 1952, and there was this clause as to payment:

"Payment: Net cash against documents on first presentation in London. The buyers will give the sellers through their London bank the guarantee that the documents will be taken up on first presentation."

The contract contained no express provision as to the time when the English buyers should give the bank guarantee: and the question is when it should have been given. The American sellers said that it should have been given by Sept. 9, 1952, at latest and that because it was not given by that date, they were entitled to and did cancel the contract on Sept. 10, 1952. The English buyers said that they were not bound to give the guarantee by that date and that the cancellation by the American sellers amounted to a repudiation of the contract.

I must say that the American sellers, at the time they cancelled, had a wrong view of the contract. They thought that they had a right to be given the guarantee immediately after the making of the contract, which was certainly not the case. Their attitude is well shown by the cable of Sept. 9, 1952, which they sent to the German concern in which they said:

"At sale barley cargo Aug. 11 agreement was immediate guarantee Hambro's Bank. At buyers' request we granted deadline till Sept. 1, re-extended deadline till Sept. 5 and at urgent request again until today [Sept. 9] Today instead of guarantee we receive cable from Hambro's Bank that guarantee still dependent on Bank of England and further details will follow soonest. Consequently see ourselves compelled to cancel sale herewith and request you inform buyers accordingly."

That was their cancellation. It was made on the basis that the agreement was for an immediate guarantee to be given by Hambro's Bank and that they, the sellers, had the right to lay down deadlines; that the last deadline they laid down was Sept. 9; and that, when the guarantee was not given by that date, they were entitled to cancel the contract. Counsel for the American sellers had to admit that that was not correct. It must have been quite plain to everyone that the English buyers could not be expected to give the bank guarantee at once. Several things had to be done first. The German importers had to obtain their import authorisation; they had also to give their guarantee to the English buyers that the sterling would in due course be paid. Then the matter had to be submitted to the Bank of England for approval: the Bank of England would only give their approval if they were satisfied that the purchasing contracts from Germany were all in order and that the payment in sterling would be received. It was not until the Bank of England consent had been received that the English buyers could proceed to give their bank guarantee to the American sellers.

At the hearing before us the American sellers no longer contended that they had a right to an immediate guarantee (which they had contended in their cable of cancellation) nor did they contend that the guarantee should be given as soon as reasonably possible (which they had contended before the appeal tribunal of the London Corn Trade Association, Ltd.). In this court they contended

simply that the guarantee should have been given within a reasonable time in all the circumstances. They said that it was not given within that time, and asked for the case to be remitted for a finding on that point. The English buyers, on the other hand, contended that their obligation was only to provide the guarantee within a reasonable time before the shipment date, i.e., within a reasonable time before Oct. 1, 1952, and that that time was still open on Sept. 10, 1952, when the American sellers cancelled the contract. In any event, they say, if the obligation was to provide the guarantee within a reasonable time in all the circumstances, that time had not elapsed by Sept. 10, 1952. They point out that they did in fact provide the guarantee (in the form of a letter of credit) on Sept. 10, 1952.

We were referred to *Paria & Co., S.P.A. v. Thurmman-Nielsen* (1). I agree with what DEVLIN, J., said about that case. It does not decide that the buyer can delay right up to the first date for shipment; it only decides that he must provide the letter of credit by that date at latest. The correct view is that, if nothing is said about time in the contract, the buyer must provide the letter of credit within a reasonable time before the first date for shipment. The same applies to a bank guarantee for it stands on a similar footing.

The appellate tribunal of the London Corn Trade Association found all the facts in a most comprehensive statement and they said:

"The sellers were at all times aware of the practice and procedure with regard to this 'switch transaction' and the need to obtain the German guarantees before the English buyers could establish their guarantee or letter of credit. In so far as it is a question of fact we find, and in so far as it is a matter of law we hold, that the buyers' obligation was to provide a bank guarantee within a reasonable time before Oct. 1, 1952, and that such reasonable time had not arrived by Sept. 10, 1952."

That finding of the tribunal is decisive against the sellers here today. But, furthermore, the tribunal found that on any view, even if the obligation was simply to provide the guarantee in a reasonable time in all the circumstances, the guarantee was provided within that time: they said that the proper form

"was lodged with the Bank of England on Sept. 8 and approval obtained on Sept. 9, 1952. Until such approval by the Bank of England had been obtained the buyers could not furnish a guarantee or letter of credit to the sellers and the buyers were entitled to a reasonable period of time after such approval to obtain such guarantee; and so far as it is a question of fact we find, and in so far as it is a matter of law we hold, that such reasonable time had not elapsed by Sept. 10."

I read that as a finding that, having regard to the amount of work which had to be done on the German side and on the English side before the bank guarantee could be furnished, a reasonable time had not elapsed by Sept. 10, 1952. The result is that, in whichever way the obligation as to time is viewed, the appellate tribunal has found against the sellers. There is no error of law in the conclusions of the tribunal or in the learned judge's judgment and I think this appeal should be dismissed.

BIRKETT, L.J.: I am of the same opinion. The point which has to be determined by this court is, as it seems to me, in its essence one of simplicity. The question in the Case stated by the tribunal was put in this way:

"Whether upon the true construction of the documents and the facts as found . . . (2) The sellers were entitled to treat the contract as determined."

It was, I think, agreed that the answer to this question really turned on the clause in the contract respecting payment:

"Net cash against documents on first presentation in London. The buyers give the sellers through their London bank the guarantee that the documents will be taken up on first presentation."

Almost the whole of the contest in this case has been simply this: the sellers say "You failed in your contractual obligation in that you did not provide the guarantee which was there specified"; the buyers, on the other hand, say: "We did and, alternatively, you repudiated the contract before we had time to do so and you wrongfully broke the contract in that way". It is to be observed that this clause on which the controversy turns makes no mention of time. It seems to me that it would have been a perfectly simple thing to say:

A "The buyers give the sellers through their London bank a guarantee that the documents will be taken up on first presentation and they will give that guarantee immediately" or by a specified date. But no time is mentioned at all. It is common ground, I think, between sellers and buyers that the time must be ascertained by saying what is a reasonable time and it is said that that reasonable time was to be a reasonable time in all the circumstances of the case.

B One of the sellers' complaints is that the appellate tribunal and the learned judge, DEVLIN, J., have not considered all the circumstances of the case. My Lord has already pointed out that the sellers took a view of this matter which was not in any sense to be justified by the terms of the contract, for when they announced their repudiation, in a cablegram which was received in London on Sept. 9 and would appear to have been despatched from New York on Sept. 9, they said:

C "At sale barley cargo Aug. 11 agreement was immediate guarantee Hambro's Bank. At buyers' request we granted deadline till Sept. 1 re-extended deadline till Sept. 5 and at urgent request again until today. Today instead of guarantee we receive cable from Hambro's Bank that guarantee still dependent on Bank of England and further details will follow soonest. Consequently see ourselves compelled to cancel sale herewith and request you inform buyers accordingly."

Counsel for the sellers conceded that that was a mistaken view of the contract. Quite plainly there was nothing said about the immediate giving of a guarantee and equally plainly nothing in the contract justified the fixing unilaterally of a deadline of Sept. 1, Sept. 3 or Sept. 9, and in that respect they were wrong. To repudiate on that ground would be to repudiate on a wrong ground. But, said E counsel for the sellers, if at the time there existed a good ground for their repudiation, that point matters not at all and there was in fact a good ground for repudiation. He said that when the tribunal considered this matter they approached it in the wrong way and applied wrong principles of law because they said: "We observe that by the contract of Aug. 11 the shipment dates F were October/November, i.e., the earliest date of shipment was Oct. 1. Having regard to the commercial purpose of this clause relating to payment we think it must bear some relation in its interpretation and construction to that date, Oct. 1. The guarantee through the bank is that the documents will be taken up on first presentation." They came to the conclusion that the date for G furnishing the guarantee must be a reasonable time before Oct. 1 and certainly at the date of repudiation, Sept. 10, a reasonable time had not elapsed. Therefore, the sellers were in default.

Counsel for the sellers says that in so doing the tribunal drew down a curtain and began to go back from the date of Oct. 1, which was a quite reasonable way of doing it. In this Case Stated I do not think the submission of counsel is really justified, because by cl. 15, under the general heading of "We find the H following facts", the tribunal state:

"The buyers had to obtain the authority of the Bank of England on the E.2 form within one month of the date of the approval of the switch transaction which approval was given on Aug. 8, 1952. The E.2 form was lodged with the Bank of England on Sept. 8 and approval obtained on Sept. 9, 1952. Until such approval by the Bank of England had been obtained the buyers could not furnish a guarantee or letter of credit to the sellers and

the buyers were entitled to a reasonable period of time after such approval to obtain such guarantee and so far as it is a question of fact we find, and in so far as it is a matter of law we hold, that such reasonable time had not elapsed by September 10."

As I read that particular paragraph that is not looking backwards from Oct. 1, the first shipment date, but is looking forward from Aug. 11.

I find it very difficult to believe that these expert people who were sitting in this arbitration, with full knowledge of the corn trade, failed to consider all the facts of the case. They had before them learned counsel who presented their various points, and I think that cl. 15 indicates that they were looking at it as a matter of fact both backward and forward. They say: "If you look forward there comes a date before which the guarantee could not be given. After that date you are entitled to a reasonable time and the reasonable time had not elapsed when the sellers took it into their head to repudiate the contract". In the other way they say the first shipment date was Oct. 1. Looking at the purpose of this clause respecting payment, they say a reasonable time before Oct. 1 had not elapsed at that self-same date Sept. 10. I must say for my own part that I do not think that it is made out that the tribunal failed to take into account all the facts of the case and that they came to their conclusion as to reasonable time on any restricted or narrow view of the matter. I think they came to their view on full consideration of the whole of the case as it was before them. We have not, of course, had before us all the documents which were used in the various proceedings which took place before the matter came to this court, but I would be content to say that, judging from the material which we have, judging from the findings of fact made by the tribunal and the comprehensive way in which this Case is stated, it is not made out that they did not give proper legal consideration to this matter. For my own part I would agree with the conclusions of the learned judge, *DEVLIN, J.*, supporting the findings of the tribunal, and I would dismiss this appeal.

MORRIS, L.J.: I am of the same opinion. As has been pointed out, there were two points of law raised when counsel on behalf of the sellers asked the tribunal to state their award in the form of a Special Case. We have been concerned with only one of those two. That point is whether on the true construction of the documents and facts as found the sellers were entitled to treat the contract as determined. The learned judge has answered that question in the negative, and in my judgment he was correct. It seems to me that ultimately this case depends on the construction of the terms of this particular contract.

I think that it is helpful to have in mind, as counsel for the buyers has reminded us, that there is a difference in the language in the last paragraph of the contract and the language in the paragraph in relation to payment. The document that we have before us is, of course, a translation. The last paragraph against the side heading "Remarks" reads as follows:

"The firms C. Sachs, Nürnberg, Königstrasse 61, and Internationale Produkten-Handels-Gesellschaft m.b.H. Munich, Tal 13, guarantee to the firm Simason-Teicher Inter-American Grain Corporation, New York, the orderly liquidation of the above contract."

There is a contrast between those words and the words against the heading "Payment". The wording there is:

"Net cash against documents on first presentation in London. The buyers give the sellers through their London bank the guarantee that the documents will be taken up on first presentation."

That being a translation, the phrasing is perhaps not as happy as it would have been if the document had in the first place been drafted in the English language, but I think that it is common ground that the words mean that the buyers are

to give the guarantee to the sellers through their London bank. Had the sellers wished to have the guarantee that they specified within some particular time, it would have been so easy for them to stipulate this. But no time is specified and, therefore, in my judgment, it becomes a question of construction, having regard to the whole terms of the contract and the purpose of the contract, when the sellers can require the guarantee to be given.

A It seems to me that as this is a guarantee in relation to payment and as what the sellers were ensuring was payment, it is reasonable to look at this obligation in relation to the date of shipment or the date of the first presentation of documents. It does not seem to me that anything turns on the fact that what was presented was a letter of credit and not a guarantee. As has been pointed out, it is found in the award, para. 15, that some time before Aug. 21 the sellers had been requested to state the terms of the guarantee that they desired. The terms

B so desired are not annexed to the award, but there is the finding that
 "On Sept. 10, 1952, Hambro's Bank cabled to the sellers a form of letter of credit substantially in the terms of the guarantee required by the sellers."

It still was not, of course, a guarantee. The reason I think why nothing turns on that is because, as is found in para. 19,

C "The sellers never did raise any objection to the form of the letter of credit—indeed they repudiated the contract before its receipt and maintained that repudiation thereafter."

The way in which the matter was put on behalf of the buyers is quite clear from paras. 5 and 6 of the award and, indeed, it is the way in which counsel has principally put the matter before us today. Paragraphs 5 and 6 read as follows:

D " (5) That the buyers' obligation in relation to the said bank guarantee was to cause it to be opened so that it should be available to the sellers by the first shipment date under the contract, viz., Oct. 1, 1952 [that refers to the *Pavia* case (1)]; (6) Alternatively that the buyers' obligation in relation to the said bank guarantee was to cause it to be opened so that it should be available to the sellers within a reasonable time before the first shipment date, viz., Oct. 1, 1952, and that such reasonable time had not arrived by

E Sept. 10, 1952."
 Counsel for the buyers has referred us to the decision in this court in the *Pavia* case (1) in which the answer which was given by McNAIR, J., in the court of first instance, was approved in this court and we have been referred to what
 F McNAIR, J., said when the matter was before him. He said ([1951] 2 All E.R. at p. 868):

"Accordingly, it seems to me that, unless the sellers are to be deprived of their right of shipment at any time during the contract period, it necessarily follows that the credit must both be opened and confirmed, if reasonably practicable, within such time as will enable the sellers to ship at any
 G moment of their permissible period."

It is, I think, quite clear that of the two submissions to which I have referred made to the tribunal and repeated here by counsel, the tribunal decided on the basis of the second. That is quite clear from their findings in para. 14, to which reference has been made:

H "In so far as it is a question of fact we find, and in so far as it is a matter of law we hold, that the buyers' obligation was to provide a bank guarantee within a reasonable time before Oct. 1, 1952, and that such reasonable time had not arrived by Sept. 10, 1952."

It seems to me that if it can be said there was any error in that at all it was an error in favour of the sellers and I am quite unable to see that the decision that the sellers were not entitled to repudiate the contract was erroneous as a matter

of law. On that ground I consider that the learned judge answered this question correctly and I agree that the appeal should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Thomas Cooper & Co.* (for the sellers); *Richards, Butler & Co.* (for the buyers).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

NOTE.

JONES v. JONES.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Karminski, J.), October 28, 1954.]

Justices—Husband and wife—Wife's summons for maintenance—Defence of reasonable belief in wife's adultery—Need for notice and particulars.

Where in answer to a complaint made by the wife under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, the husband asserts that he reasonably believes that she has committed adultery, although he does not assert that she has committed adultery, proper and particular notice of the substance of his assertion should be given to the wife.

AS TO THE EFFECT OF ADULTERY OF WIFE ON RELIEF UNDER SUMMARY JURISDICTION, see 10 HALSBURY'S LAWS (2nd Edn.) 841, 842, para. 1343 and note (i); and FOR CASES, see 27 DIGEST (Repl.) 724, 725, 6924, 6929 et seq.

Cases referred to:

- (1) *Broadbent v. Broadbent*, (1927), 43 T.L.R. 186; 27 Digest (Repl.) 724, 6924.
- (2) *Duffield v. Duffield*, [1949] 1 All E.R. 1105; 113 J.P. 308; 27 Digest (Repl.) 714, 6807.
- (3) *Frampton v. Frampton*, [1951] W.N. 250; 95 Sol. Jo. 400; 27 Digest (Repl.) 717, 6843.

APPEAL by the wife against an order of the Flintshire justices dated July 6, 1954.

On June 29, 1954, a summons was issued against the husband on the wife's complaint that on and before that date he had been guilty of wilful neglect to provide reasonable maintenance for her. At the hearing of the complaint the wife was cross-examined as to her relationships with certain other men over the previous fourteen years, and the husband produced a note dated Apr. 27, 1954, written by the wife in which it appeared that there had been a quarrel the night before and in which she stated:

"You told me to clear out and I have now cleared out. I know [H.D.] wants a housekeeper and that is where I am going."

It was not disputed that she went to H.D.'s house on that date and had remained there until the date of the hearing. The justices dismissed the complaint giving as their reason that they

"accept the husband's evidence that the wife's conduct induced a bona fide reasonable belief in the wife's adultery."

The wife appealed.

H. E. Hooson for the wife.

R. G. Waterhouse for the husband.

LORD MERRIMAN, P., in the course of his judgment referred to the justices' reasons and said: 'The justices' statement of their reasons for dismissing the summons lacks precision. It is only fair to the justices and their clerk to say that nobody on either side has asked for any elucidation of that statement. It was laid down in this court in *Broadbent v. Broadbent* (1), that it was necessary that in any substantive charge of adultery brought against a wife under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, proper

and particular notice should be given to her of the substance of the charge. That has been a commonplace ever since, and is constantly acted on. It is not restricted to cases where the husband is making a substantive complaint of adultery, for in *Duffield v. Duffield* (2) the same principle was expressly extended to cases in which the husband was relying on adultery as an answer to the wife's charge, or as vitiating or removing the jurisdiction of the justices to try the matter. Even that was not the end of the matter, because, it appears that in *Frampton v. Frampton* (3), this court extended the same principle to a case such as the present where, in answer to the charge, the husband does not actually assert that adultery has been committed, but puts forward a reasonable belief that adultery has been committed. If ever there was wanting an illustration of the propriety of that ruling, the present case affords an overwhelming example . . . I ought, perhaps, in fairness to say that the only *Frampton v. Frampton* (3) referred to in the index to STONE'S JUSTICES' MANUAL is one which does not directly touch this particular point. Still, even if the solicitors were not aware of the direction of this court in that respect, it would have been possible to take the ordinary precaution to make sure that the other side were not taken by surprise, which might be followed by the unnecessary expense of an adjournment; alternatively, it would have been possible to have applied for an adjournment, so as to put things on a regular footing, before bringing the case to the court . . .

KARMINSKI, J. : I agree. The present case is an excellent example of the evil against which *Frampton v. Frampton* (3) was aimed. No notice of any kind was given to the wife of the defence that the husband had a reasonable belief, based on her conduct, in her adultery, and in the result the real issues in the present case were never formulated. The least that the wife's adviser should have been told before the summons was heard was the time and place of the conduct which had induced the reasonable belief and above all the name of the man or men with whom the husband thought she had committed adultery. That was not done, though I appreciate that the fault probably lay more with the husband himself than with his solicitor, whom he consulted only the night before the hearing. Be that as it may, it might have been desirable in the present case for the husband's solicitor to have asked for an adjournment. The matter not having been formulated rapidly became a hopeless tangle of undefined issues. When the justices gave their reasons they merely said that they accepted the husband's evidence that the wife's conduct induced a bona fide reasonable belief in her adultery. I ask myself: "What adultery, and with whom?" Having asked myself that question, in spite of the excellent argument of counsel, I am still unable to answer it. I do not know what the justices found, or on what evidence. I agree with LORD MERRIMAN, P., that this has been a thoroughly unsatisfactory trial. I adopt the words used by LORD MERRIMAN, P., in this court in *Frampton v. Frampton* (3) ([1951] W.N. at p. 250):

"This case seems to have gone as wrong as it is possible for a simple case to go wrong from the very start."

My Lord has pointed out that unfortunately *Frampton v. Frampton* (3) is not mentioned in the current volume of STONE'S JUSTICES' MANUAL (86th edn.). While my Lord was giving his judgment I found that in two other well known text-books, RAYDEN ON DIVORCE (6th edn.), p. 527, and LATEY ON DIVORCE (14th edn.), p. 440, the principle laid down by this court in *Frampton v. Frampton* (3) is mentioned.

Appeal allowed. Case remitted for re-hearing by fresh panel of justices.

Solicitors: *Lovell, Son & Pitfield*, agents for *Walker, Smith & Way*, Chester (for the wife); *Jaques & Co.*, agents for *Cyril Jones, Son & Williams*, Wrexham (for the husband).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

Re FOLLETT (*deceased*). BARCLAYS BANK, LTD. v. DOVELL
AND ANOTHER.

[CHANCERY DIVISION (Roxburgh, J.), November 9, 1954.]

Will—Omission—Words of will clearly showing accidental omission—Language connoting use of recognised precedent—Words of appropriate precedent supplied—Clause accordingly construed as creating special power.

By her will dated Aug. 31, 1923, the testatrix, who died on July 21, 1932, constituted a residuary trust fund and directed her trustees, in the events which happened, to pay the whole of the income thereof to the first defendant for life, and on her death to hold the residuary trust fund and the future income thereof upon trusts declared by cl. 5 (d) in the following words—
“in trust for all or such one or more exclusively or others of her child or children or remoter issue or any other person or persons as she should by deed or deeds revocable or irrevocable or by will or codicil without transgressing the rules against perpetuities appoint and in default of or subject to any such appointment in trust for her next of kin”. By deed dated Jan. 16, 1953, the first defendant appointed the fund to herself absolutely on the footing that cl. 5 (d) conferred on her a general power of appointment. On the question of the validity of this exercise of the power and whether the power was a general or a special power of appointment,

Held: the language of cl. 5 (d), particularly the words “for all or such one or more exclusively or others”, clearly showed that words had been omitted accidentally and by its nature entitled the court to assume that the testatrix when making her will had recourse to recognised books of precedents; the court would read into her will such words of the appropriate conveyancing precedent as appeared to have been omitted by inadvertence; accordingly cl. 5 (d) created a special power of appointment, which the appointor could not validly exercise by appointing to herself, and the deed of Jan. 16, 1953, whereby she purported to appoint to herself, was invalid.

Re Smith ([1947] 2 All E.R. 708), applied.

AS TO SUPPLYING WORDS IN WILLS, see 34 HALSBURY'S LAWS (2nd Edn.) 215-217, para. 272; and FOR CASES, see 44 DIGEST 597, Nos. 4214 et seq.

Case referred to:

(1) *Re Smith*, [1947] 2 All E.R. 708; [1948] Ch. 49; [1949] L.J.R. 765; 2nd Digest Supp.

ADJOURNED SUMMONS to determine whether on the true construction of the will and codicil of Georgina Sarah Follett and in the events that have happened the power of appointment conferred on Beryl Emily Cecil Dovell, the first defendant (in the said will called Beryl Edmonds) in cl. 5 (d) of the said will was (i) a general power of appointment which enabled her to appoint the fund therein mentioned by deed or by will or codicil to herself absolutely or (ii) a special power of appointment which enabled her to appoint the said fund therein mentioned in favour of her children or remoter issue only.

The testatrix died on July 21, 1932, having by her will dated Aug. 31, 1923, devised and bequeathed her residuary estate to her executors and trustees on trust for conversion and payment of her debts, funeral and testamentary expenses and legacies, etc. She bequeathed her residuary trust fund on trust after the death of her two nieces (who died in 1950 and 1951) to pay the total income thereof (subject to certain annuities which at the material time had ceased) to the first defendant during her life and after her death gave the residuary trust fund on trusts in the terms set out in the headnote.

By deed dated Jan. 16, 1953, the first defendant appointed the testatrix's

residuary trust fund to the first defendant absolutely and now claimed to be entitled to it.

The precedent to which, in his judgment, ROXBURGH, J., refers is as follows (KEY AND ELPHINSTONE'S PRECEDENTS IN CONVEYANCING (11th edn.) (1923), vol. 2, p. 901):

A [After the death of my wife] my trustees shall stand possessed of the capital and future income of the trust fund in trust for all or such one or more exclusively of the others or other of my children or remoter issue, at such age or time, or respective ages or times, if more than one in such shares, and with such trusts for their respective benefit and such provisions for their respective advancement (either during the life of my wife or after her death) and maintenance and education at the discretion of my trustees or any other person or persons, as my wife shall from time to time by any deed or deeds B revocable or irrevocable or by will or codicil without transgressing the rule against perpetuities appoint, And in default of and subject to any such appointment . . . ”

M. W. Cockle for the plaintiff, the sole trustee.

C *I. J. Lindner, Q.C.*, and *G. H. Crispin* for the first defendant, the donee of the power of appointment.

J. L. Arnold for the second defendant, one of the next of kin of the first defendant.

D **ROXBURGH, J.:** The testatrix made her will on Aug. 31, 1923, and a codicil on Mar. 14, 1924, and she died on July 21, 1932. She created life interests in her residuary estate in favour of two nieces, which terminated on the deaths of the life tenants. The will continued in cl. 5:

E “ (c) Upon the death of both of my said two nieces I direct my trustees to pay the total income from my residuary trust fund . . . to . . . Beryl Edmonds during her life . . . (d) On and after the death of . . . Beryl Edmonds my trustees shall hold my residuary trust fund and the future income thereof in trust for all or such one or more exclusively or others of her child or children or remoter issue or any other person or persons as she should by deed or deeds revocable or irrevocable or by will or codicil without transgressing the rules against perpetuities appoint and in default of or subject to any such appointment in trust for her next of kin.”

F As though that were not enough, in the codicil she made the following most extraordinary disposition:

G “. . . Whereas I have made no provision in my said will in the event of Beryl Edmonds dying before she becomes entitled to her share of my estate now therefore in the event of the said Beryl Edmonds dying before she becomes entitled to any share in my estate I give devise and bequeath the share or interest to which had she lived she would have been entitled to my two nephews Cecil . . . and Wilfred . . . in equal shares absolutely.”

H Now, those curious words appear, if that event had happened (which it did not), to interpose two life interests in equal shares between Miss Beryl Edmonds (or, rather, Mrs. Dovell, as she became) and her issue if she had some. I only refer to that codicil in passing, because I think one is entitled to read the will and codicil together, though they bear different dates. They both constitute the testatrix's testamentary disposition, and anything more completely confused than that codicil I find it difficult to conceive. However, if that were all, Mrs. Dovell, the first defendant, would get what she wants.

The first defendant has treated the clause which I have read from the will as conferring on her a general power of appointment and by deed dated Jan. 16, 1953, she appointed to herself absolutely, and now claims the fund. The question is: Was she entitled to do that? Looking at the clause and construing

it quite literally, I am satisfied that she was entitled to do what she did. In other words, I reject the secondary argument advanced by counsel for the second defendant. It seems to me that in this rather absurd clause the words "or any other person or persons" must be in contrast with the issue of Mrs. Dovell and not in contrast with herself. But Mr. Arnold, counsel for the second defendant, in an able argument, has brought to me compelling conviction that this sentence does not embody the intention of the testatrix.

The difficulty is not to find out what the law is, but to apply it. The law is stated very completely in the judgment of VAISEY, J., in *Re Smith* (1). He cites from a number of authorities, and says ([1947] 2 All E.R. at p. 710) that "necessity" in this connection—and he is quoting—means

"‘not natural necessity,’ but . . . ‘so strong a probability of intention, that an intention contrary to that which is imputed to the testator cannot be supposed’."

That he himself summarises as "a compelling conviction", and I am very happy to adopt that phrase. VAISEY, J., also quotes from JARMAN ON WILLS (7th edn.), vol. 1, p. 556, and adopts the citation, which is:

"Where it is clear on the face of a will that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also clear what are the words which he has omitted, those words may be supplied in order to effectuate the intention, as collected from the context."

I have reached a compelling conviction on both points. I do not think that there is any objective test. The Court of Appeal may say that I ought not to have reached a compelling conviction, but ought to have observed that I was merely speculating. That they may say, but, for my own part, I have reached a compelling conviction, and I do not know what more can be said so far as this court is concerned.

My reasons are of a very particular nature. I have already alluded, as a matter of minor importance, to the absurdities of the codicil, but now I come to the clause on which all depends, and I read it: "in trust for all or such one or more exclusively or others of her child or children or remoter issue". Pausing there, that is pure nonsense. Nobody can deny that. That clearly does not give effect to any intention at all. There obviously is an accidental omission. Is there any doubt what the accidental omission is? I do not think there would be any doubt even if no reference books were to hand, but I think that I must be entitled to treat the testatrix, when she is sitting in her armchair making her will, as having at her elbow recognised books of precedents. There is no doubt that she did not compose this language for the first time; and, if one turns to KEY AND ELPHINSTONE'S PRECEDENTS IN CONVEYANCING (11th edn.) (1923), vol. 2, p. 902 (the edition which was current at the date when the will was made), one sees it at once. There can be no doubt about it. What she was trying to say there was "in trust for all or such one or more exclusively of the others or other". That seems to me to be quite obvious. It is that which has moved me in the direction of the second defendant. But for that, I should have not travelled with him, because but for that I should have said that, while I thought that I knew what had gone wrong with the will, I could not be quite sure. The clause in the will proceeds: ". . . in trust for all or such one or more exclusively or others of her child or children or remoter issue or any other person or persons . . . as she should . . . appoint . . ." That is not sense from the logical point of view, though it is grammatical sense, because if the intention was to enable Mrs. Dovell to appoint to any person or persons including herself, which is the intention which counsel for the first defendant seeks to impute to the testatrix, there was no conceivable reason for mentioning the child or children or remoter issue, still less for saying exclusively of anybody or anything. But, of course, the answer might have been: "Well, the other words are,

after all, merely tautological. Sense can be given to the passage, and the court ought not to interfere with it". As I say, apart from the first point, I should have acceded to that argument; but when I have once been, as I think compulsorily, referred to KEY and ELPHINSTONE by reason of the first blunder, I find no difficulty in continuing to read on at the page to which I have thus been compulsorily referred, and, if I do, I find that it goes on:

"at such age or time, or respective ages or times, if more than one in such shares, and with such trusts for their respective benefit and such provisions for their respective advancement (either during the life of my wife or after her death) and maintenance and education at the discretion of my trustees or any other person or persons, as my wife shall from time to time by any deed or deeds revocable or irrevocable or by will or codicil without transgressing the rule against perpetuities appoint . . ."

I have not the least doubt that those words "any other person or persons" came from that precedent and that it was by inadvertence that the words preceding were omitted. I have a compelling conviction to that effect, and I think all the words in the precedent after "remoter issue" and before the words "any other person or persons" were intended to be inserted—substituting, of course, the appropriate life tenant—in the clause.

The result is that the first defendant has but a special power of appointment.

Declaration accordingly.

Solicitors: Terrence O'Shea, Lake & Co. (for the plaintiff and second defendant); Moon, Gilks & Moon, agents for Campion Symons & Co., Exmouth (for the first defendant).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

LOVELACE v. DIRECTOR OF PUBLIC PROSECUTIONS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Ormerod, JJ.), October 21, 1954.]

Theatre—Stage play—"Cause" unlicensed part of play to be presented—Disobedience to stage directions by actor, contrary to orders of licensee of theatre—Liability of licensee—Theatres Act, 1843 (c. 68), s. 15.

On Nov. 2, 1953, the appellant presented at a theatre, of which he was the licensee and manager, a play which had been authorised by the Lord Chamberlain in a script which included stage directions. Before the performance he told the actors that they were to adhere strictly to stage directions. Towards the end of the performance the principal actor, contrary to the orders given by the appellant, departed from the stage direction and acted in an indecent manner. The appellant was charged with causing part of a stage play to be presented before such part had been allowed by the Lord Chamberlain, contrary to the Theatres Act, 1843, s. 15.

HELD: the appellant had not "caused" the presentation of that part of the play which was not authorised by the Lord Chamberlain, because the appellant's mandate to the actors was to present the play as it had been authorised and there had been no command or direction from the appellant to the principal actor to present the indecent incident at the end of the play; and, therefore, the appellant was not guilty of the offence with which he was charged.

Dicta of LORD WRIGHT in *Houston v. Buchanan* ([1940] 2 All E.R. at p. 187), applied.

Appeal allowed.

EDITORIAL NOTE. In *James & Son, Ltd. v. Smea*, ante, p. 273, a Divisional Court of five judges considered the state of mind necessary to be

proved to establish against a master an offence consisting in his "permitting" a particular user of a vehicle by his servant contrary to a regulation which prohibited causing or permitting such use. In the enactment there considered, as in others, the words cause or permit were used in conjunction. They are, however, different verbs of which the former is the more difficult to construe: see per MACKINNON, L.J., in *Goodbarne v. Buck* ([1940] 1 All E.R. 613 at p. 616, letter D). The present case is decided on the verb "cause" and may be compared with the decisions in *Parsons v. Chapman* (1831) (5 C. & P. 33), and *R. v. Glossop* (1821) (4 B. & Ald. 616), as regards proof of causing entire plays to be acted in contravention of former statutes. The construction of "cause" adopted in the present case accords with that given to the word in the phrase "causes or permits" in *Shave v. Rosner* ([1954] 2 All E.R. 280).

AS TO PRESENTATION OF STAGE PLAYS, see 32 HALSBURY'S LAWS (2nd Edn.) 71, paras. 88, 89; and FOR CASES, see 42 DIGEST 918, 139-141.

Cases referred to:

- (1) *Grule v. Public Prosecutions Director*, [1942] 2 All E.R. 118; 167 L.T. 252; 106 J.P. 228; 2nd Digest Supp.
- (2) *Houston v. Buchanan*, [1940] 2 All E.R. 179; 1940 S.C. (H.L.) 17; 2nd Digest Supp.

CASE STATED by the stipendiary magistrate of the City of Liverpool.

The appellant, the licensee and manager of a theatre at Liverpool, was charged, under the Theatres Act, 1843, s. 15, with unlawfully causing to be presented part of a stage play before such part had been allowed by the Lord Chamberlain.

The stage play was licensed by the Lord Chamberlain on May 22, 1947, in a script which included stage directions. The play was booked by the owners of the theatre for evening performances during the week beginning Nov. 2, 1953, and the appellant advertised the play and paid the salaries of the company of actors who acted in it. On the morning of Nov. 2, 1953, the appellant interviewed the principal actor, who also directed the play, told him that he must keep strictly to the script, and received an assurance that there need be no fear of any departure from the script. Before the evening performance the appellant again told the principal actor that there must be no departure from the script. At the end of the performance on the evening of Nov. 2, 1953, in the final scene the principal actor departed from the stage directions in the script and acted in an indecent manner.

The contentions before the magistrate were: (i) on behalf of the appellant, that the word "caused" in the statute should be construed as involving some express or positive mandate from the appellant or some authority from him to the principal actor arising in the circumstances of the case, or some personal responsibility based on knowledge or on some act or omission of the appellant and that there was no evidence of any such mandate or authority or personal responsibility; (ii) on behalf of the respondent, that the final scene was a substantial departure from the script and that the prohibition in s. 15 of the Act of 1843 was an absolute one and that the appellant was responsible in law for any unlicensed production at the theatre.

On Apr. 8, 1954, the appellant was convicted of the offence and sentenced to a fine of £10.

J. R. D. Crichton, Q.C., and *J. M. Kennan* for the appellant.
J. P. Ashworth for the respondent.

LORD GODDARD, C.J.: This is a Case stated by the learned stipendiary magistrate for Liverpool before whom the appellant was charged that he

"on Nov. 2, 1953, unlawfully for hire caused to be presented part of a stage play entitled 'The Respectable Prostitute' before such part had been

allowed by the Lord Chamberlain, contrary to s. 15 of the Theatres Act, 1843."

Without going through all the facts stated in the Case, I think it is enough to say that the play "The Respectable Prostitute" is one which has been authorised by the Lord Chamberlain for presentation as a stage play in this country. The appellant, who is the licensee of the theatre where the play was presented at Liverpool, realising, I suppose, that objection might be taken if the stage directions of the Lord Chamberlain were not strictly adhered to, and knowing that the police were visiting a performance of the play, took, as the magistrate found, every precaution that the appellant could take to warn the actors and to insist that they should adhere strictly to the stage directions. The stage direction at the end of the play was that the principal woman was to relax into the arms of the principal male actor, and, if the curtain had come down on that, no objection could have been taken. The actor, however, departed from the stage direction and, contrary to the orders which were given to him by the appellant, picked up the woman, laid her on a bed, and went through various motions which could fairly be objected to as obscene.

The Theatres Act, 1843, s. 15, reads:

"... Every person who for hire shall act or present, or cause to be acted or presented, any new stage play, or any act, scene, or part thereof ... until the same shall have been allowed by the lord chamberlain ..."

shall incur a penalty. In the present case the actor was charged and convicted of acting a part of the play which had not been authorised by the Lord Chamberlain, and there is no appeal by him, nor do I think that there could be. The question for us is whether the appellant can be convicted of the offence which was charged against him in the information, and which was causing the presentation of the unauthorised addition. We are not going to decide, because I do not think it falls for decision, whether the appellant would have had a defence if he had been charged with presenting the play. There are certain passages in *Grady v. Public Prosecutions Director* (1) which indicate that, at any rate in the opinion of one of the members of the court, there might have been a defence in such a case. We will decide that point when it is directly raised in a case which comes before us. We are asked in the present case to say that the conviction was wrong because the charge was "causing" and there was no evidence of any causation, as the facts found by the magistrate show that the appellant took every precaution to prevent that being done which was done. It has been held repeatedly that, although the prohibition of doing an act is absolute so that scienter or mens rea is not necessary, different considerations apply where a person is charged with "causing" or "permitting" the act to be done, because one cannot "cause" or "permit" an act to be done unless one has knowledge of the facts. LORD WRIGHT put it in this way in *Houston v. Buchanan* (2) ([1940] 2 All E.R. at p. 187):

"To 'cause' the user involves some express or positive mandate from the person 'causing' to the other person, or some authority from the former to the latter, arising in the circumstances of the case."

In the present case counsel for the prosecution contended that, as the appellant undoubtedly caused the presentation of the play, he caused the presentation of that part of the play which was unauthorised. I think it would be unreal to hold that. However much one may dislike deciding these cases on whether the prosecution, in framing the charge, chose the word "present" or the words "cause to be presented", the fact is that, if a defendant is to be convicted of "causing" something, there must be some act of his which is equivalent to causing, that is to say, a command or direction to do the wrongful act. There was no "causing" in the present case. It cannot be said that there was an express or positive mandate or authority from the appellant to the principal actor to present that

part of the play which was objected to and which had not been authorised by the Lord Chamberlain. The mandate was to present the play which had been authorised by the Lord Chamberlain and to present no other. Therefore, it was wrong to hold that the appellant caused the actor to present the particular incident at the end of the play to which objection was taken. As I have said, we are not deciding what the position would have been if the appellant had been charged with presenting the play with that incident in it. What we are deciding is that on the facts found by the magistrate there was no ground for saying that the appellant caused that incident to be presented, and for that reason the appeal should be allowed.

LYNSKEY, J.: I agree, and have nothing to add.

ORMEROD, J.: I also agree.

Appeal allowed.

Solicitors: *Arthur Taylor & Co.*, agents for *Mace & Jones*, Liverpool (for the appellant); *Treasury Solicitor* (for the respondent).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

Re LAPFORD.

[COURT OF ARCHES (The Dean (Sir Philip Wilbraham Baker-Wilbraham)), September 30, November 2, 1954.]

Ecclesiastical Law—Ornaments—Aumbry—Tabernacle—Reservation of the Sacrament—Reservation sanctioned by the bishop.

The reservation of the Blessed Sacrament for any purpose is still, strictly speaking, illegal. Nevertheless, reservation for the Communion of the sick may be practised, not only with impunity, but (from every point of view except that of strict law) blamelessly and rightly, provided that there is compliance with the conditions laid down in the alternative Order for the Communion of the sick. Where the bishop has sanctioned the reservation a diocesan chancellor is justified in granting a faculty for an aumbry, but not for a tabernacle or pyx "immediately behind or above a Holy Table".

Decision of EXETER CONSISTORY COURT ([1954] 2 All E.R. 310), affirmed.

AS TO ILLEGALITY OF A TABERNACLE, see 11 HALSBURY'S LAWS (2nd Edn.) 791, para. 1452; and FOR CASES, see 19 DIGEST 447, 448, 2892 et seq.

AS TO RESERVATION OF THE SACRAMENT, see 11 HALSBURY'S LAWS (2nd Edn.) 805, para. 1467; and FOR CASES, see 19 DIGEST 452, 453, 2974-2978.

Cases referred to:

- (1) *Capel St. Mary, Suffolk (Rector & Churchwardens) v. Packard*, [1927] P. 289; *subsequent proceedings*, [1928] P. 69; Digest Supp.
- (2) *Read v. Lincoln (Bp.)*, (1889), 14 P.D. 88; 61 L.T. 403; 19 Digest 231, 101.
- (3) *Re St. Mary the Virgin, Swanley*, (Dec. 19, 1946). Unreported.
- (4) *Oxford (Bp.) v. Henry*, [1907] P. 88; *subsequent proceedings*, [1909] P. 319; 19 Digest 452, 2974.
- (5) *Sheppard v. Bennett*, (1870), L.R. 4 P.C. 350; 39 L.J. Eccl. 59; 23 L.T. 145; 34 J.P. 789; 19 Digest 338, 1498.
- (6) *Re Altofts, Parish of*, (July 4, 1941). Unreported.

APPEAL by the petitioners, the rector and churchwardens of the parish of Lapford in the county of Devon and dioceses of Exeter against an order of the Chancellor of the Exeter Consistory Court dated Mar. 12, 1954, reported [1954] 2 All E.R. 310, whereby he refused to grant a faculty for a tabernacle.

The facts appear in the judgment.

E. Garth Moore for the appellants (the petitioners).

Cur. adv. vult.

Nov. 2. **SIR PHILIP WILBRAHAM BAKER-WILBRAHAM** read the following judgment: The facts are not in dispute, and I take them from the judgment of CHANCELLOR WIGGLESWORTH ([1954] 2 All E.R. at p. 311):

A "On Nov. 12, 1953, the rector of the parish of Lapford in the . . .
diocese of Exeter . . . and the churchwardens of the parish . . . presented a
petition praying for a faculty authorising them to place above the centre
of the altar in the Lady Chapel of their parish church a simple tabernacle
for the reservation of the Blessed Sacrament for the sick in accordance with
plans prepared by Mr. Herbert Read of Exeter. The petition was supported
by a unanimous resolution passed by the parochial church council on
Nov. 9, 1953. Citation issued on Nov. 17, 1953, and no one entered an
appearance in opposition to the citation. Although the petition was un-
opposed [it was heard in court, as the Chancellor] was not satisfied that a
tabernacle could lawfully be introduced into a church, and . . . therefore,
wished to hear argument on the matter . . .

B "The circumstances which led to this application were explained to me
by the rector who gave evidence in support of the petition. The rector
was appointed in November, 1952, and on his arrival he found that the
Blessed Sacrament was reserved in an aumbry resting on a window-sill in
the wall on the north side of the principal altar. The aumbry had been placed
there some fifteen years earlier during the incumbency of the Reverend
C W. F. Bond who, so far as it could be ascertained, had sought and obtained
the permission of Bishop Curzon, then Bishop of Exeter, to reserve the
Blessed Sacrament and for that purpose to place the aumbry on the sill.
No faculty was on that occasion sought from [the consistory] court. On the
arrival of the present rector he was authorised by the present bishop to con-
D tinue the practice of reserving the Blessed Sacrament in the aumbry and
he has done so . . . In this particular parish the reserved Sacrament is
also required for the communion of certain workers in a factory who are un-
able to make their communion in church on Sunday or weekday mornings
and who (with the bishop's sanction) make their communion from the
reserved Sacrament in the Lady Chapel after Evensong on those Sundays
E when there is no celebration of the Holy Communion in the evening. The
petition was amended at the hearing so as to make it clear that the reserved
Sacrament was not intended to be used only for the sick but was also to be
used for those [workers] who cannot attend the ordinary celebrations of
the Holy Communion.

F "The rector found that the aumbry was neither safe (it had no lock or
key) nor conveniently placed, and shortly after his arrival began to con-
sider ways and means for making other provision for the safe custody of
the reserved Sacrament. He considered that a tabernacle would be better and
was able to ensure that the necessary money for the change would be
available, the tabernacle itself being the subject-matter of a gift. He then
G sought the bishop's directions in the matter and received a letter from the
bishop dated Dec. 31, 1952, which (so far as material) was as follows: 'I am
glad to hear that you have been able to get a grant towards the cost of a
simple tabernacle for the reservation of the Blessed Sacrament at Lapford,
and I am content to leave it to you to decide—when applying for a faculty—
whether this shall be placed on the High Altar or in the Lady Chapel.'
H Supported by this letter from the bishop, the rector with his church-
wardens in the first instance presented a petition for a faculty to authorise
the placing of a tabernacle on the High Altar. This proposal was considered
by the Exeter diocesan advisory committee who advised against it on
architectural and aesthetic grounds, adding to their report: 'It would be
better either to use an aumbry in the north wall or to place the tabernacle
above the altar of the Lady Chapel in accordance with the alternative
suggestion of the bishop.' It was because of this advice that the present

proposal for a tabernacle on the altar in the Lady Chapel was made. Mr. Read, who described himself as a sculptor and designer, explained in the evidence he gave that it was not in fact proposed that the tabernacle should be placed on the altar but that it should be bolted to the wall behind so that it would protrude over the back of the central part of the altar allowing a slight clearance between the bottom of the tabernacle and the top of the altar to facilitate the placing and changing of altar cloths. The Lady Chapel is so constructed that nowhere in its walls could an aumbry be conveniently placed. The north side is occupied by the door into the vestry leaving only a strip of wall four feet wide to the east of the door and the east wall is largely occupied by the altar and its surrounding curtains. There is no south wall."

The petition came on for hearing on Jan. 2, 1954, in the chapter house at Exeter. Mr. Garth Moore appeared for the petitioners and the petition was unopposed. After hearing argument the chancellor delivered his reserved judgment on Mar. 12, 1954. By that judgment he held (i) that the reservation of the Blessed Sacrament in the circumstances of this particular case with the sanction of the bishop was legal; (ii) that if the matter had been free from authority he would have had no hesitation in granting the faculty; but (iii) that he felt constrained by authority binding on him to hold that the tabernacle was an illegal ornament. The principal authority referred to was the decision of SIR LEWIS DIBDIN in *Capel St. Mary, Suffolk (Rector & Churchwardens) v. Packard* (1) who held ([1927] P. at p. 305) that a tabernacle was

"an illegal ornament used in connection with an illegal ceremony."

Sitting in this court I am perhaps less strictly bound. The question of reopening previous decisions of ecclesiastical courts was discussed in *Read v. Bishop of Lincoln* (2), but although some latitude may be allowable, it would need strong reason to justify me in departing from SIR LEWIS DIBDIN's decision in the *Capel St. Mary* case (1). When the case came before me on appeal, on Sept. 30, 1954, the argument turned mainly on the question whether a tabernacle was a legal ornament having regard to the words of the ornaments rubric:

"And here it is to be noted, that such ornaments of the church, and of the ministers thereof, at all times of their ministration, shall be retained, and be in use, as were in this church of England, by the authority of Parliament in the second year of the reign of King Edward the Sixth."

Reference had been made in the court below to the opinion held by the late DR. ECLES that a hanging pyx over the high altar was the lawful ornament under the rubric, as it was the ornament in use for the purpose of reservation at that time. In *Re St. Mary the Virgin, Swanley* (3) heard by CHANCELLOR ASHWORTH at Rochester in 1946, evidence to the same effect was given by DR. JALLAND, a lecturer in theology in the University College of the South West, Exeter, who said that he would not expect to find evidence that tabernacles were ornaments of the church in 1549 because the normal method of reservation in this country was by means of a hanging pyx.

The arguments of the appellants in favour of the tabernacle was ably presented and took many forms. It was urged that a tabernacle was not an ornament at all, but merely a receptacle like an aumbry, and, therefore, outside the rubric. If it was an ornament, it was an ornament expressly authorised by the rubric, because it was merely a variant of the pyx, which was certainly in use in 1549. There was nothing in the rubric which expressly forbade a tabernacle. It could not be supposed that the rubric fixed the permissible ornaments for all time; new ornaments might be introduced. If a tabernacle were neither authorised nor forbidden by the rubric, its introduction became a matter for the discretion of the bishop, under his *jus liturgicum*. It was even suggested that Parliament had recently re-affirmed the legality of the pyx and of reservation, because the

Statute Law Revision Act, 1948, s. 1, sched. I, while repealing s. 3 of the Act* 1 Mar. Sess. 2, c. 3 had left unrepealed s. 1 of that Act which, inter alia, prescribed penalties for abusing

“the Sacrament of the Aulter . . . or the pyxe or canapic wherein the same sacrament is or shalbee.”

After listening to these arguments, and refreshing my memory by reference to the shorthand note, I can see no sufficient reason for departing from the opinion expressed in the *Capel St. Mary* case (1) that a tabernacle is an illegal ornament. I do not want, however, to base my judgment in this case on the foundation of the ornaments rubric alone. I would rather refer to more recent history.

First, however, as regards reservation. Comparatively little was said in argument about its legality, the appellants being naturally content to rely on the opinion expressed ([1954] 2 All E.R. at p. 315) by CHANCELLOR WIGGLESWORTH in the court below:

“I am glad to feel able to hold the view that reservation with the sanction of the bishop is not unlawful.”

I think this statement of the law requires some qualification. In the course of his judgment the learned chancellor says ([1954] 2 All E.R. at p. 315):

“I know of no authority which compels me to hold that reservation is unlawful when it takes place with the sanction of the bishop. I do not consider that it is forbidden by article 28 or by the rubric at the end of the Communion Service which was inserted for a wholly different reason, namely, for the prevention of the irreverent practices of Puritans. In my view, the Prayer Book neither forbids nor authorises reservation. It makes no provision for it. Where the bishop considers that something not provided for is needed, it is for the bishop to make provision in the exercise of that authority which he has in his diocese. Where he considers reservation to be needed, it is for him to sanction it, and where he sanctions it, this court can and should by faculty authorise such alterations or additions in the church as are necessary to secure that due provision is made for reservation.”

I cannot accept this view of the complete neutrality of the Prayer Book. The relevant words of article 28 are:

“The Sacrament of the Lord's Supper was not by Christ's ordinance reserved, carried about, lifted up, or worshipped.”

If this article stood alone, there might perhaps be room for doubt. It might be argued that reservation is not forbidden either expressly or by necessary implication. The true construction of the article was discussed by SIR LEWIS DIBBIN in *Bishop of Oxford v. Henly* (4) ([1907] P. at pp. 98, 99) and I am inclined to follow his opinion that the most natural construction of the 25th and 28th articles is that the practices therein mentioned are repudiated by the Church of England because they do not satisfy the condition of being according to Christ's ordinance. However this may be, the words of the rubric at the end of the Communion Service are clear:

“If any remain of that which was consecrated it shall not be carried out of the church, but the priest and such other of the communicants as he shall call unto him, shall, immediately after the Blessing, reverently eat and drink the same.”

Whatever may have been the reasons for the insertion of these words, I think I am bound to take them as they stand, and they are inconsistent with any form of reservation.

* Given the short title of the Brawling Act, 1553, by s. 5 and sched. II of the Act of 1948.

This view, at any rate, has the support of authority. In *Sheppard v. Bennett* (5) we find LORD HATHERLEY, L.C., saying (L.R. 4 P.C. at p. 414) that reservation is illegal. This was only a dictum, but it is a dictum of high authority, and the Lord Chancellor refers to the illegality of reservation as if it were a well known fact, too plain to need any argument:

"Such an act could not be done except in the service, because the Sacrament may not be 'reserved'."

In 1899 and 1900 the question of reservation was fully considered by Archbishop Frederick Temple of Canterbury and Archbishop Maclagan of York, and in May, 1900, Archbishop Temple delivered the following opinion:

"In conclusion, after weighing carefully all that has been put before us, I am obliged to decide that the Church of England does not at present allow reservation in any form, and that those who think it ought to be allowed, though perfectly justified in endeavouring to get the proper authorities to alter the law, are not justified in practising reservation until the law has been altered."

The practice of reservation was held to be illegal by SIR LEWIS DIBDIN in *Bishop of Oxford v. Henly* (4), and by the same judge in the *Capel St. Mary* case (1). So far, the question of reservation by permission of the bishop had not come into prominence; but, although the bishop has no doubt a large discretion in matters which are doubtful, or not fully provided for by the rubrics, it does not enable him to legalise anything which is plainly illegal. Incidentally, I should mention that an instance of the exercise of this discretion occurs in this case, where the bishop has sanctioned the use of the reserved Sacrament for the benefit of certain workers who by reason of their employment are unable to attend the ordinary services of Holy Communion. Clearly, any such extension should be carefully watched, but I regard it as a matter within the bishop's discretion.

It is curious, to my mind, that throughout these proceedings so little reference was made to the work of Prayer Book revision, which occupied so much of the attention of the church during the years 1922-28. Many controversial questions arose in the course of that revision, but none more controversial or more crucial than this question of reservation. The revisers were anxious to legalise reservation for a strictly limited purpose—the Communion of the sick. For that purpose they thought it necessary to alter the rubric at the end of the Communion service so as to read as follows:

"If any of the consecrated bread and wine remain, apart from that which may be reserved for the Communion of the sick, as is provided in the alternative Order for the Communion of the sick, it shall not be carried out of the church, . . ."

If reservation had been legal, or if the revisers of the Prayer Book had thought it to be so, this exception would have been unnecessary; much of the work and controversy involved in the revision might have been spared; and the ultimate result in Parliament might have been different. The rubrics preceding the alternative Order for the Communion of the sick in the 1928 Book prescribed with minute care the conditions under which reservation might be sanctioned. The first deals with the practice of "extended Communion", when the consecrated bread and wine are taken at once, or at any rate on the same day, to the sick person or persons. The second provides for continuous reservation in cases where the bishop thinks it necessary: this requires a licence from the bishop. The third and fourth rubrics are as follows:—

"The consecrated bread and wine set apart under either of the two preceding rubrics shall be reserved only for the Communion of the sick, shall be administered in both kinds, and shall be used for no other purpose

whatever. There shall be no service or ceremony in connection with the Sacrament so reserved, nor shall it be exposed or removed except in order to be received in Communion, or otherwise reverently consumed.

"The consecrated bread and wine thus set apart shall be reserved in an aumbry or safe. The aumbry shall (according as the bishop shall direct) be set in the north or south wall of the sanctuary of the church or of any chapel thereof, or, if need be, in the wall of some other part of the church approved by the bishop, provided that it shall not be immediately behind or above a Holy Table. The door of the aumbry shall be kept locked, and opened only when it is necessary to move or replace the consecrated Elements for the purposes of Communion or renewal. The consecrated bread and wine shall be renewed at least once a week."

In this last rubric a clear distinction is drawn between an aumbry on the one hand, and a tabernacle or pyx on the other hand. Though neither the word "tabernacle" nor "pyx" is to be found in the rubric, the aumbry is not to be "immediately behind or above a Holy Table" which is the place where a tabernacle or pyx would be. The reason for the distinction is not far to seek. Reservation was to be authorised for the purpose of communion only, and for this purpose an aumbry set in a side wall would be a proper and sufficient provision.

Such would have been the law if the Prayer Book Measure of 1928 had been accepted by Parliament. Its rejection left the bishops in a difficult position. All the deviations and additions contained in the 1928 Book remained, strictly speaking, illegal, including the provisions as to reservation for the sick. The law as it stood, however, was evidently too rigid, and (under the Church Discipline Act, 1840 and the Public Worship Regulation Act, 1874) the power of enforcing compliance with the law rested with the bishops, or rather with each bishop in his own diocese. How could the bishops discipline their clergy or allow them to be prosecuted in respect of practices which they themselves—to say nothing of the clergy and laity—had so recently sanctioned by large majorities in the Convocations and the Church Assembly? Some common policy was obviously necessary. The bishops consulted their dioceses, and when the Convocation of Canterbury met in July, 1929, resolved that in the exercise of their administrative discretion they would in their respective dioceses consider the circumstances and needs of parishes severally, and give counsel and directions. In these directions the bishops would conform to the principles which they had already laid down, namely:

"(1) That during the present emergency and until further order be taken the bishops, having in view the fact that the Convocations of Canterbury and York gave their consent to the proposals for deviations from and additions to the Book of 1662, as set forth in the Book of 1928, being laid before the national assembly of the Church of England for final approval, and that the national assembly voted final approval to these proposals, cannot regard as inconsistent with loyalty to the principles of the Church of England the use of such additions or deviations as fall within the limits of these proposals. For the same reason they must regard as inconsistent with such loyalty the use of any other deviations from or additions to the forms and orders contained in the Book of 1662.

"(2) That accordingly the bishops, in the exercise of their legal or administrative discretion, will be guided by the proposals set forth in the Book of 1928, and will endeavour to secure that the practices which are consistent neither with the Book of 1662 nor with the Book of 1928 shall cease."

This resolution received the support of the clergy, and I understand that a similar resolution was passed in the Convocation of York. It will be noted

that these resolutions were provisional—"until further order be taken"; but so far as I am aware no further order has been taken with regard to reservation. These resolutions could not alter the law in any respect; but they did constitute a claim by the church to do a number of illegal things within certain limits, coupled with an obligation to endeavour not to transgress those limits. The obligation could not be absolute. None knew better than the bishops the impossibility of securing absolute uniformity. The obligation is, however, one which should be honoured as far as possible. An aumbry set in a side wall of a church is clearly within the limits which the church has claimed to authorise. A tabernacle or pyx "immediately behind or above a Holy Table" is clearly outside those limits. In a lesser degree, the rejection of the Prayer Book Measures caused a difficulty for diocesan chancellors. They would be asked to decree faculties for the installation of aumbries. Could they rightly do so, in connection with a practice which they knew or believed to be unlawful? In the course of time, this question appears to have been answered in accordance with common sense. The duty of a diocesan chancellor in this matter is ancillary. He is not responsible for the reservation; but if he finds that reservation is in fact practised with the sanction of the bishop in a church within his jurisdiction, it is his duty to see that the provision made for keeping the consecrated bread and wine is both safe and seemly. This is well expressed in a judgment of CHANCELLOR VAISEY, K.C., in *Re Parish of Altofts* (6) quoted in the judgment in the court below.

My general conclusions therefore are: (i) That reservation of the Blessed Sacrament for any purpose is still, strictly speaking, illegal. (ii) That nevertheless reservation for the Communion of the sick may be practised, not only with impunity, but (from every point of view except that of strict law) blamelessly and rightly, provided that the conditions laid down in the alternative Order for the Communion of the sick are complied with. (iii) That where the bishop has sanctioned the reservation a diocesan chancellor is justified in granting a faculty for an aumbry, but not for a tabernacle or pyx "immediately behind or above a Holy Table." In the present case, the parish of Lapford has had for over fifteen years provision for reservation for the Communion of the sick, and if the aumbry in which the Sacred Elements are now reserved is unworthy or unsafe, the learned chancellor has offered ([1954] 2 All E.R. at p. 317) to consider an application for "alternative proposals not involving a tabernacle." I do not think the appellants are entitled to ask for anything more, and the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Trollope & Winckworth* (for the appellants).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

WELLS v. WELLS.

[COURT OF APPEAL (Lord Goddard, C.J., Hodson and Romer, L.J.J.), October 29, November 1, 1954.]

Divorce—Condonation—Condonation by husband—Adultery by wife—Several acts with one person—Resumption of sexual intercourse.

A *Divorce—Restitution of conjugal rights—Sincere wish for husband's return.*

After the wife had confessed to committing adultery with another man, the husband, suspecting, as he subsequently learned for certain, that she had committed adultery with him more than once, had intercourse with the wife. The husband then left her and did not live with her again, although she wrote many letters begging him to return and he admitted that he believed she wanted him to go back. He paid her £4 a week for her maintenance and for that of their child. In his answer to her petition for restitution of conjugal rights he made certain accusations against her but did not accuse her of any matrimonial offence other than the adultery to which she had confessed; in reply to these she wrote a bitter letter making complaints against him, including a charge of adultery.

C HELD: (i) the wife's several acts of adultery with the one man were condoned by the subsequent act of sexual intercourse, even though the husband only learned for certain later that she had committed adultery more than once.

D *Henderson v. Henderson & Crellin* ([1944] 1 All E. R. 44), applied.

(ii) on the facts, the wife sincerely wished the husband to return and, therefore, whether or not she had any affection for him or he for her, was entitled to a decree for the restitution of conjugal rights.

Price v. Price ([1951] 2 All E.R. 580 n.), applied.

Appeal allowed.

E AS TO KNOWLEDGE IN RELATION TO CONDONATION, see 10 HALSBURY'S LAWS (2nd Edn.) 679, para. 1004; and FOR CASES, see 27 DIGEST (Repl.) 402, 403, 3311-3320.

AS TO SINCERITY IN RELATION TO RESTITUTION OF CONJUGAL RIGHTS, see 10 HALSBURY'S LAWS (2nd Edn.) 648, para. 950; and FOR CASES, see 27 F DIGEST (Repl.) 286-293, 2314-2318, 2327, 2353, 2367, 2378.

Cases referred to:

(1) *Henderson v. Henderson & Crellin*, [1944] 1 All E.R. 44; [1944] A.C. 49; 113 L.J.P. 1; 170 L.T. 84; 27 Digest (Repl.) 397, 3271.

(2) *Price v. Price*, [1951] 2 All E.R. 580 n.; [1951] P. 413; 115 J.P. 468 n.; 27 Digest (Repl.) 85, 636.

H APPEAL by the wife, the petitioner, against an order of Mr. Commissioner GRAZEBROOK, Q.C., dated June 15, 1954, dismissing a petition for the restitution of conjugal rights on the ground (i) that the husband had not condoned the wife's adultery by sexual intercourse with her after she had confessed adultery, since he had not then been in possession of all the material facts; and (ii) that the wife was not sincere in her desire to have her husband back.

D. R. Stuckey for the wife.

Victor Russell for the husband.

LORD GODDARD, C.J.: This is an appeal from a judgment of Mr. Commissioner GRAZEBROOK, Q.C., in which he refused the wife an order for

restitution of conjugal rights. Although I think the decision of the commissioner must be reversed, I have considerable sympathy for the view which he took, because the law seems to be in a somewhat curious state, and it is not easy to reconcile all the cases cited to us.

The wife committed adultery, with the result that she had a child by another man. Shortly before the child was born, when she was obviously pregnant, she confessed to her husband that she had had intercourse with another man. Moreover the husband knew the child was not his, because he and the wife had always used contraceptives.

He admitted in evidence that he subsequently learnt that intercourse had taken place more than once. On the day on which this confession was made he had intercourse with his wife with knowledge that she had committed adultery, and suspecting that she had committed adultery more than once. After that he left her and he did not live with her again. She subsequently gave birth to this child, which was improperly registered as his. The wife wrote the husband many letters begging him to go back, and he admitted in evidence that he had recognised she wanted him back. He was not prepared to go because he had found a letter which she had written to the man who was the father of the child, in which she stated that she had committed adultery with him eight times.

We feel that we cannot say that this was a case of condonation without knowledge of the facts. The adulterer was always the same man. This was not a case of the wife committing adultery on eight occasions with eight different men. I think it is impossible for this court now to say that, where a man has intercourse with his wife with knowledge that she has committed adultery, he does not condone that adultery entirely. VISCOUNT SIMON, L.C., in an opinion concurred in by the other Lords of Appeal in *Henderson v. Henderson & Crellin* (1) ([1944] 1 All E.R. at p. 45) makes it clear that the fact that intercourse takes place with knowledge of adultery is a complete and absolute condonation. I cannot see that it matters in the least whether the husband, when he had the intercourse with his wife, only suspected that she had been guilty of more than one act of adultery. She never said that she had committed only one act of adultery, and whether she had committed adultery once, twice or eight times has no bearing on the subject. The husband had intercourse with his wife, and thereby condoned the adultery.

After the husband had left her the wife wrote many letters begging him to come back, and he admitted that he thought she wanted him back. He has been supporting his wife and the one child of their marriage. He has been sending her £4 a week. She filed a petition for restitution of conjugal rights, and the husband put in an answer in which he accused her of various matters of conduct which would show that she was not a good wife to him, although not alleging any matrimonial offence other than the particular acts of adultery which the court has said are condoned. The wife then wrote him an angry letter, in which she said: "You have committed adultery. You know quite well you have committed adultery." When he gave his evidence, I do not think he was examined whether or not he had committed adultery. She catalogued various other causes of complaint against him. Taking as dispassionate a view of this case as I can, I feel that this was very much in the nature of a tu quoque. He having in his answer set out various complaints against her, she says in effect: "How about you! Think of all the complaints I have against you."

The learned commissioner was not satisfied that the wife had a sincere desire to return to her husband. It seems to me that, perhaps, the commissioner has misunderstood, or has not given due consideration to, the expression "lack

of sincerity " which is used in the cases that have been cited to us. Of these cases *Price v. Price* (2) is the one that particularly impresses me. The wife there admitted that she hated her husband, but, nevertheless, this court held that, as she obviously desired that the home should be re-established, she was entitled to an order for maintenance.

A On the question of sincerity, or whether there is a sincere wish by the wife that the husband should return and live with her, various expressions have been used about living together as man and wife in a true and happy way, and so forth. I do not think, however, that the court can go into what HODSON, L.J., described as matters of emotion. The fact that a wife commits a matrimonial offence does not mean that she does not sincerely desire the return of the husband, and if she does so desire his return the court will grant a decree.

B The fact that the wife is being supported only by the husband seems to show that she really does want him to return to her. The court does not force him to go back if the decree is made, but does give her the right to obtain a sum of money. Whether she wants or is likely to get more than she is already obtaining I do not know. It is also possible that, if he did return, he would leave again very quickly. However that may be, the cases show that, if a wife

C sincerely wishes her husband to return to her, as I think the facts in this case show, the court is bound to grant a decree, although the wife may have no affection for the husband and he none for her. Therefore, though with some regret, I think the appeal must be allowed.

HODSON, L.J.: I agree.

D ROMER, L.J.: I also agree.

Appeal allowed.

Decree of restitution of conjugal rights.

Solicitors: *P. G. W. Simes*, the Law Society (for the wife); *Arthur Benjamin & Cohen* (for the husband).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

PALMER v. PALMER.

[COURT OF APPEAL (Lord Goddard, C.J., Hodson, L.J., and Vaisey, J.), October 28, 1954.]

Divorce—Cruelty—Respondent of unsound mind—Test of legal responsibility—The M'Naghten rules.

A husband suffering from insane delusions seriously assaulted his wife on several occasions. The medical superintendent of a mental hospital at which the husband had been treated for several years gave evidence that, when committing the assaults, the husband would not know that his acts were wrong, because he was suffering from delusions. On the evidence, however, it appeared that the husband struck his wife on several occasions because he thought she had been unfaithful to him, which was not the case, and because she wanted him to go back to the mental hospital and he did not wish to go, and the evidence showed that he recognised that he had ill-treated her.

HELD: the wife was entitled to a decree nisi for divorce on the ground of cruelty, because both limbs of the M'Naghten rules applied on the hearing of petitions for divorce on grounds involving insanity and assaults or the inflicting of personal injuries, and because, on the facts, the husband knew the nature and quality of his acts, that is to say, of his assaults, and knew that what he was doing was wrong; therefore, he was not excused from responsibility for his acts on the ground of insanity.

Dictum of HODSON, L.J., in *Swan v. Swan* ([1953] 2 All E.R. at p. 860), applied.

Appeal allowed.

EDITORIAL NOTE. The present case carries to a logical conclusion a view indicated in *Astle v. Astle* ([1939] 3 All E.R. 967 at pp. 970, 971) that insanity, if it is to be an answer in a matrimonial suit, must be measured by the test applied in other courts, and accords with the principle that the state of mind of the guilty party is an essential element in cruelty as a ground for divorce. *Astle v. Astle*, as well as *Swan v. Swan* ([1953] 2 All E.R. 854) in which HODSON, L.J., stated the dictum which is adopted in the present case, were cases of cruelty. The application of the M'Naghten rules in divorce cases seems in principle, however, not to be limited to cases of cruelty; compare, e.g., *Yarrow v. Yarrow* ([1892] P. 92). The present case does not go the length of deciding that, but passages in the judgment of LORD GODDARD, C.J. (p. 495, letter F, and p. 496, letter G, post) support that view.

AS TO INSANITY IN RELATION TO CRUELTY AS A GROUND OF DIVORCE, see 10 HALSBURY'S LAWS (2nd Edn.) 653, para. 958; and FOR CASES, see 27 DIGEST (Repl.) 374, 3086, 3087.

Case referred to:

(1) *Swan v. Swan*, [1953] 2 All E.R. 854; [1953] P. 258; 117 J.P. 519; 3rd Digest Supp.

APPEAL by the wife, the petitioner, against an order of Mr. Commissioner GRAZEBROOK, Q.C., dated Apr. 5, 1954, dismissing a petition for divorce based on cruelty. The petition was dismissed on the ground that the husband was insane and did not realise what he was doing when he committed acts of violence against the wife and that he did not think that what he did was wrong.

A. R. A. Beldam for the wife, the petitioner.

B. S. Horner for the husband.

LORD GODDARD, C.J.: This is an appeal from an order of Mr. Commissioner GRAZEBROOK, Q.C., dismissing the wife's petition for divorce based on cruelty. He dismissed the petition on the ground that the husband was insane, and that, on the evidence, the husband did not know what he was doing. The learned commissioner, therefore, was applying what are generally called the

M'Naghten rules. He came to the conclusion that he was bound to reject the petition because it had been decided, with regard to what I may call the mental element of cruelty, i.e., the element of intention in it, that, if a person was so insane that he did not know what he was doing or that what he was doing was cruelty to his wife, then his conduct would not constitute cruelty.

The application of the M'Naghten rules was much discussed in *Swan v. Swan* (1). The rules, which have been quoted so often, especially in murder cases, are these:

- A From the point of view of the law, an act can be excused on the ground of insanity if the person charged did not know the nature or quality of the act, or if, knowing that, he did not know that the act was wrong. As a simple illustration of a man knowing the nature and quality of the act, but not knowing that it was wrong, I remember a case on circuit many years ago where a man took a knife to his wife. It was proved that he was devotedly attached to his wife and believed that
- B in using the knife on her he was performing a surgical operation, which he thought was necessary to relieve a condition from which he believed she was suffering. Although he knew the nature and quality of the act, he obviously did not know it was wrong, because, although he knew he was putting the knife into his wife, he thought he was doing a kindly and beneficial act. It might be said that he did not know the quality of the act, but, if I remember aright, the
- C case turned largely on the fact that he believed that he was doing a service to his wife.

The wife in the present case was fond of her husband and at first the marriage was a complete success. Unhappily, about 1946 the husband began to show signs of mental instability, and between that time and 1952 he twice went into a mental home as a voluntary patient and discharged himself. In 1952 he was finally

D certified and he has not been out of the mental hospital since. During the time when he was at home, both before he went into the mental hospital as a voluntary patient and after he came out, he assaulted his wife on various occasions, and the assaults were serious enough to justify the court in granting the wife relief, if they accepted the evidence, as no doubt the commissioner did in this case.

- E Apart from the evidence of the wife, there was the evidence of the relieving officer. A relieving officer does not profess to be a medical man, but, if he hears that a person's mental condition is doubtful, it is his duty to see him, because he may have to apply either for an ordinary certification, or in certain cases for an emergency certification. His conversations with the husband show that the husband recognised that he had from time to time ill-treated his wife. He struck her blows, because he believed she had been guilty of unfaithfulness to him,
- F which was not the case. These delusions or hallucinations show that he was a person of unsound mind; but in criminal cases the law does not merely consider whether the man has some defect of reason, and I can see no reason to distinguish between criminal and divorce cases for this purpose. The defect of reason must be such as to affect the man's responsibility. It is often said that the difference in these cases between lawyers and doctors is that the doctor
- G looks only at the mental condition of the man and the lawyer looks at how that affects his responsibility to the law.

I entirely agree with what HODSON, L.J., said in *Swan v. Swan* (1) ([1953] 2 All E.R. at p. 860), although it was not necessary finally to decide that case, viz., that both limbs of the M'Naghten rules apply in these cases in considering whether or not an insane man has been cruel to his wife, i.e., that to be excused,

H either he must not know the nature and quality of the act, or, if he does know it, he must not know that it is wrong. If he knows that it is wrong, then he is responsible.

It is not always remembered, at any rate by laymen, that cases turning on hallucinations and delusions do not differ from those of a perfectly sane man, not subject to delusions, but acting under a genuine mistake. An instance is afforded by the common case of a soldier returning from the war, who has been

told her about his wife, and, with the belief that she has been unfaithful to him, kills her. It transpires that the wife had not been unfaithful at all and there was no reason to suppose that she had. The man does not suffer from a disease of the mind, but he has been misled by slanderous rumours. No one doubts that he honestly believed what he had been told, but he knew perfectly well that that did not justify him in killing his wife. If he has been suffering from an insane delusion produced by a disease of the mind, which makes him think that his wife has been unfaithful to him, although he has never been told so, he still knows quite well that it is wrong to kill her (and if he were suffering from paranoia he would know that quite well). It is no excuse to say he had an insane delusion that his wife was unfaithful, because he knows perfectly well that he is not entitled for that reason to kill her.

When the wife took proceedings against the husband on the ground of persistent cruelty, which the magistrates found proved, the husband told the magistrates that he knew perfectly well that he was assaulting his wife, and that he did it because he hoped it might bring her back to him, or because she wanted him to go to Knowle Mental Hospital to be treated again and he did not want to go. So he slapped her. He did not pretend that he did not know it was wrong for him to slap her. He knew he was committing an assault on his wife.

The doctor from the Knowle Hospital, who knew the husband when he was there first as a voluntary patient and said that he was a progressive case, was asked: "Would he know that those acts [the assaults on his wife] were wrong?" The doctor said "No". Then he gave the reason.

"He is basing his conduct not on sensible things, but on delusions . . .".

The doctor, as a medical man, was taking the view that the question was whether the man was suffering from a delusion, but a lawyer takes the view that the question is whether that delusion affects his responsibility. The doctor went on:

" . . . and he might very well think he was doing the correct thing by correcting her."

What does that mean? A husband might very well think, sometimes correctly if his wife has done something wrong or stupid, that a good slap might make her sensible again, and I do not suppose a single slap would be enough to enable her to get a decree on the ground of cruelty. Here it is a case, not of a single slap, but of several assaults, and the husband does not pretend that he was entitled to assault his wife in that way. He knew his wife was trying to get him to go back to the mental home and he did not want to go back, and thought that he would teach her not to get him to go back. It is really in no way different from the position in *Swan v. Swan* (1). Although that case proceeded on different grounds, I entirely agree with HOBSON, L.J.'s opinion that both limbs of the M'Naghten rules apply ([1953] 2 All E.R. at p. 860). When one is dealing with insanity and the inflicting of personal injury or assaults on a person, I see no reason for any difference between the rule applied by the Divorce Division and that applied in the criminal courts. Before assaults, or any form of personal injury which is inflicted on a wife or by a wife on a husband can be excused, on the ground of insanity, both limbs of the M'Naghten rules must be considered. For those reasons, although I quite appreciate the care which the learned commissioner gave in his review of the cases, in my opinion, this appeal ought to succeed and the wife should be granted a divorce, because I do not think the husband can be excused on the ground of insanity for the injuries which he inflicted on his wife.

HODSON, L.J.: I agree. In a very careful judgment the learned commissioner came to the conclusion that the wife had proved her case on cruelty. He said:

"The matters detailed by the wife—and she gave her evidence very well and very fairly, and they are in fact to some extent supported by her sister—would be sufficient to constitute cruelty in an ordinary case."

Then he went on to say that this was not an ordinary case, because the court had to consider whether there could be cruelty having regard to the state of the husband's mind. Unfortunately, I think the learned commissioner made a slip in his conclusion, because he said:

"I am satisfied that the husband did not realise what he was doing when he committed these acts of violence against the wife, and further, that when he committed these acts he did not think they were wrong . . ."

The evidence never went to the length that the husband did not realise what he was doing when he committed the acts of violence against the wife, and it was never contended on behalf of the Official Solicitor that that was so.

The real point in this case is whether the husband did not know the acts were wrong when he committed them. That contention succeeded before the learned commissioner and has been supported here, and I think it is based entirely on the evidence of a very experienced medical man, the medical superintendent at the Knowle Hospital, where the husband has been for many years. He was obviously familiar with what lawyers call the M'Naghten rules, and, when asked "Would he know that those acts were wrong?", he answered: "No." On that, counsel for the husband was fully entitled to argue that there was evidence before the court which would justify it in saying that the second branch of the M'Naghten rules applied and, therefore, that the husband had a good defence.

The doctor, in answering "No", gave his reason for that answer. The Lord Chief Justice has already read that answer, which indicates that the doctor was basing himself on the husband's motive for acting in the way in which he did, the delusion from which he suffered giving him that motive. The doctor reasoned from that, that the husband did not know the act was wrong. With all respect to the doctor, I think that reasoning is unsound. As counsel for the wife put it, one must look at the matter as if the wife had indeed been unfaithful, as the deluded man thought she had. The fact that that was the motive does not mean that the husband did not know that what he was doing was wrong. In fact, the contrary appears from the evidence, because, as was pointed out in the cross-examination of the doctor, the relieving officer had seen the husband in January of the same year, 1952, in which he was certified, and he then expressed regret for the assaults which he had committed on his wife. That is, surely, the strongest possible evidence that he knew that what he was doing was wrong.

In that state of the evidence, which was fairly recognised by the doctor in cross-examination when counsel for the wife put it to him, I think it is quite impossible to come to the conclusion that this case is covered by either branch of the M'Naghten rules. Accordingly, the husband being responsible for his acts and the cruelty being established against him, this wife is entitled to a decree. Therefore, the appeal should be allowed.

VAISEY, J.: For the reasons given by my Lord, I agree that this appeal succeeds.

Appeal allowed.

Solicitors: *Philip Mills & Co.*, Guildford (for the wife); *Official Solicitor* (for the husband).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

REID AND ANOTHER *v.* DAWSON.

[COURT OF APPEAL (Denning, Morris and Parker, L.J.J.), November 3, 1954.]

*Agriculture—Agricultural holding—Letting for grazing for period of 364 days—**Whether a "specified period of the year"—Agricultural Holdings Act, 1948 (c. 63), s. 2 (1), proviso.*

By an agreement under hand dated Dec. 19, 1950, C. agreed to let and D. agreed to "take and hire the exclusive right and liberty to mow for hay and to depasture only sheep and cattle over and upon" fifty acres of land "for a term commencing on Nov. 1, 1950, and terminating on Oct. 30, 1951," at a rent of £150 a year payable by half-yearly instalments. On the termination of that period, no further arrangement was expressly made, but two half-yearly instalments of rent were paid, and it was found as a fact that the payments were made on the footing that the land was let for a second period of 364 days on the same terms as those comprised in the written agreement. In an action by the plaintiffs, the successors in title of C., for possession, the second period of 364 days having expired, D. claimed that by virtue of the Agricultural Holdings Act, 1948, s. 2 (1), each agreement had effect as if it created a tenancy from year to year,

HELD: the period of 364 days for which the tenancy was created under each agreement was a "specified period of the year" within the proviso to s. 2 (1) of the Act of 1948 and, therefore, as the agreement in each case contemplated the use of the land only for grazing or mowing, s. 2 (1) had no effect in relation to it; accordingly, the plaintiffs were entitled to possession.

Appeal dismissed.

FOR THE AGRICULTURAL HOLDINGS ACT, 1948, s. 2 (1), see 28 HALSBURY'S STATUTES (2nd Edn.) 29.

Case referred to:

(1) *Land Settlement Assn., Ltd. v. Carr*, [1944] 2 All E.R. 126; [1944] K.B. 657; 114 L.J.K.B. 33; 171 L.T. 121; 2nd Digest Supp.

APPEAL by the defendant from an order of JONES, J., dated May 28, 1954, granting the plaintiffs possession of land and mesne profits.

The facts appear from the first judgment.

C. P. Harvey, Q.C., and *L. A. Blundell* for the defendant, the tenant.

P. Ingress Bell, Q.C., and *I. S. Warren* for the plaintiffs, the landlords.

DENNING, L.J.: In 1946 Lady Craigie bought nearly fifty acres of land in Sussex which were near her own premises. They were at that time under requisition and she wanted in due course to occupy them herself. An adjoining farmer, Mrs. Dawson, who had a number of sheep and cattle, was anxious to have the use of those fields for grazing. She approached Sir Robert Craigie about it, and Sir Robert said that they hoped to recover the land from the requisitioning authorities and that she could have it for a year for grazing. In due course, at the urgent request of Mrs. Dawson, Sir Robert managed to get the agricultural executive committee to release the land. Then a question arose as to the terms on which Mrs. Dawson should be allowed to use it. Advice was taken on the matter through local agents and in consequence an agreement was drawn up which both sides knew was intended to avoid the land being caught by the Agricultural Holdings Act, 1948. If it was just a simple letting of land for a year, even if a simple letting of grazing for one whole year, it would be caught by the Act and there would have to be a year's notice to quit before the owner could regain control of it, and he could not even give that notice without the consent of the Minister. In order to avoid this the parties, with full knowledge, entered into their agreement. It is dated Dec. 19, 1950, and in it Lady Craigie agreed to let and Mrs. Dawson agreed

"to take and hire the exclusive right and liberty to mow for hay and to depasture only sheep and cattle over and upon the land",

which is then described,

"for a term commencing on Nov. 1, 1950, and terminating on Oct. 30, 1951"

A at a rent of £150 a year payable by half-yearly instalments. It is important to notice that the letting was not for a whole year, but only for 364 days. In pursuance of the agreement, Mrs. Dawson put her sheep and cattle on the land for all the time.

B When it came towards the end of the 364 days, a question arose as to what was to happen after they came to an end and, although nothing specific was arranged, rent was paid for the first six months commencing on Nov. 1, 1951, and then again for the second half year. Those second payments the learned judge has found were made on the footing that the second period was granted on precisely the same terms as the first period. By the time the second period came to an end Lady Craigie had sold her interest to the present owners who claim possession.

C So we have here a case of two agreements for mowing and grazing on fifty acres of land for two periods of 364 days. The question is whether the agreements so made are caught by the Agricultural Holdings Act, 1948. Before I read the relevant section perhaps I might just refer to the history. Under s. 25 of the Agricultural Holdings Act, 1923,* if there was a yearly tenancy or a tenancy for a term of years the landlord could not obtain possession except on giving twelve months' notice. That section came up for consideration in 1944 in *Land Settlement Assocn., Ltd. v. Carr* (1), where there was an agreement to let for 364 days and thereafter for successive periods of 364 days. This court held that that was not a tenancy from year to year or for a term of years: it was not caught by the Act of 1923 and, therefore, there was no need for the twelve months' notice. When the Agriculture Act, 1947, was passed that decision was overcome. A section was inserted which is now repeated in the Agricultural Holdings Act, 1948, s. 2 (1), which provides (missing out immaterial words):

E "... where under an agreement . . . any land is let to a person for use as agricultural land for an interest less than a tenancy from year to year, or a person is granted a licence to occupy land for use as agricultural land, and the circumstances are such that if his interest were a tenancy from year to year he would in respect of that land be the tenant of an agricultural holding . . .",

F then, unless the agreement is approved by the Minister, it shall take effect as if it were a tenancy from year to year. That means that a tenancy for 364 days like that in *Land Settlement Assocn. v. Carr* (1) operates as if it were a tenancy from year to year. So also, under that section, a letting for any shorter period than a year or, indeed, a licence to occupy. They all operate as a tenancy from year to year and are caught by the Act. It is subject, however, to this proviso, and this is what we have to consider in this case:

G "Provided that this sub-section shall not have effect in relation to an agreement for the letting of land, or the granting of a licence to occupy land, made (whether or not the agreement expressly so provides) in contemplation of the use of the land only for grazing or mowing during some specified period of the year . . ."

H The question in this case is whether the agreement which I have cited comes within that proviso. This was certainly an agreement for the letting of land, or the granting of a licence to occupy land. It was certainly made in contemplation of the use of the land only for grazing or mowing. The whole question in the case is whether it was made in contemplation of the use of the land "during some specified period of the year". The learned judge has held that, as it was granted for 364 days, it was granted for a specified period of the year, and has given judgment accordingly in favour of the owner.

*The section is printed in 1 HALSBURY'S STATUTES (2nd Edn.) 545.

The farmer appeals to this court, and the argument which is put before us is that the 364 days is a device to avoid the operation of the section and that it should not be permitted. It is said that when the statute spoke of a "specified period of the year" it had in mind a period of the year which had some significance in agriculture such as the hay-making season or the summer grazing or the winter grazing. The difficulty which I feel about that construction is that it is impossible to put it accurately into words whereas the section itself is quite clear. In my judgment, a period of 364 days is a specified period of the year just as much as 200, 250 or 350. Where would one stop? 364 days is a specified period of the year. It was in contemplation, by the express terms of this agreement, that the land should be used for mowing and for grazing for that specified period of the year, 364 days. In my judgment, the appeal should be dismissed.

MORRIS, L.J.: I have reached the same conclusion. The issue which has been debated in this court is very much narrower than the issues which were originally raised in the action. It was, for example, pleaded in the defence that the real intention between Lady Craigie and the defendant was to enter into an agreement from year to year. It was further pleaded in the defence that the tenant became a tenant from year to year and that such a tenancy was implied from facts and circumstances which were pleaded. None of those matters now remains in issue in view of the clear findings of the learned judge. The learned judge recites that Sir Robert Craigie went to a firm of land agents to prepare a grazing agreement: they suggested to him that the proposed tenancy should not be for a year but for a period less than a year because of the provisions of the Agricultural Holdings Act, 1948, s. 2. It is quite clear that that was the origin of the form that the agreement took. It is equally clear that the defendant fully appreciated what was being done. The learned judge said in his judgment:

"The defendant consulted another agent and a solicitor (who were, I believe, the agent and solicitor of the Farmers' Union) before or after attending this meeting and she showed them the draft agreement, or the agreement in its final form, before she signed it."

Then the learned judge summarised the effect of her evidence and said:

"In her evidence she said that her view of the agreement was as follows: 'I realised that in the first agreement Sir Robert and Lady Craigie meant to retain control over the land and that they only meant to give me a grazing tenancy for less than a year, viz., 364 days. I knew that that was their intention. I did not think I was getting more than a non-ploughing agreement for less than a year'."

Furthermore, the learned judge referred to the evidence of Mr. Clark, and he summarised it:

"Mr. Clark said: 'I have acted for the defendant. I witnessed her signature to the grazing agreement. I think it was signed on Nov. 1 but, anyhow, it was before Nov. 30. I had a firm impression that she understood that she was entering into a temporary grazing agreement for less than one year'."

In those circumstances, it seems to me that the learned judge was amply justified in saying, as he did later in his judgment:

"I am satisfied that the original agreement was an agreement for the letting of the land made in contemplation of the use of the land only for grazing or mowing. This appears from the agreement itself. There is also much evidence (to which I have referred) that this is what the parties contemplated and that the land was used by the defendant only for grazing or mowing."

That being so, and the conclusion up to that point being, as I respectfully think, entirely correct, the next point was whether the agreement was to be one for a

specified period of a year. As my Lord has said, this point does not really permit of elaborate argument or discussion. The learned judge, I think, put the matter very clearly when he said :

“ In my view, 364 days is a period of the year and that period was specified in the agreement by the parties to it. I hold, therefore, that the original agreement came within the proviso to s. 2.”

A I can see no escape from that reasoning, and, in my judgment, it is entirely correct. Then, when the period ended, there was a further period. The actual conclusion of the learned judge with regard to this matter is not challenged, i.e., it is not suggested that the approach was on wrong lines or was directed by wrong principles. The learned judge said:

B “ I find that neither party intended to create a tenancy for successive periods of 364 days. I find that the defendant knew that the most she could get by holding over was a new tenancy for 364 days on similar terms to those of the original tenancy, as it had been made so clear to her that no other tenancy would be granted to her.”

C That, again, as I think, was a finding that was entirely correct. In regard to that part of the case, however, an additional argument has been addressed to us, that inasmuch as this further period was a period that arose by implication, then it was not for some specified period of the year; for it is said that if the period arises by implication it cannot be “ specified ”. In my judgment, that reasoning is not sound. For the later period there was a necessity to resort to some extent to implication, but that merely means that, in the absence of a new agreement in writing, or in the absence of terms wholly and completely orally expressed, D the learned judge found that there was material from which he could infer or imply what the new contract was. It is quite clear what the new contract was and what were the terms that the parties agreed. They were terms similar to those that they had previously agreed. Therefore, in the new contract they agreed to terms one of which was that the period was to be 364 days, which in E my judgment is a specified period within the meaning of the words of s. 2. I therefore think that the learned judge came to a correct conclusion in this case.

PARKER, L.J.: I entirely agree with both judgments which have been just delivered and there is nothing that I can usefully add on what is a very short point.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Langhams & Letts*, agents for *Dawson & Hart*, Uckfield (for the defendant); *Bulcraig & Davis* (for the plaintiffs).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

SWYMER v. SWYMER.

[COURT OF APPEAL (Lord Goddard, C.J., Hodson and Romer, L.J.J.), November 2, 3, 12, 1954.]

Divorce—Insanity—Incurable unsoundness of mind—Care and treatment for five years—“Continuously”—Absence from institution to undergo treatment for fractured leg—Matrimonial Causes Act, 1950 (c. 25), s. 1 (1) (d), s. 1 (2) (d).

In 1925 the husband was admitted to a mental hospital pursuant to a reception order. He was discharged twenty-six years later and immediately on discharge was re-admitted to the same mental hospital as a voluntary patient under the Mental Treatment Act, 1930. The hospital was an institution or approved hospital within the meaning of s. 1 (1) of the Mental Treatment Act, 1930. Thereafter until the presentation of the petition for divorce he was a patient receiving treatment in the mental hospital, except for the interval next mentioned. In January, 1953, he broke his leg in an accident and, owing to a lack of suitable facilities for treatment at the mental hospital, was sent by the hospital superintendent to a general hospital which was not an institution or a place approved for the purposes of the Mental Treatment Act, 1930, s. 1 (1). During his absence he remained on the books of the mental hospital, the superintendent of which received reports on him. He returned to the mental hospital in May, 1953. He was incurably of unsound mind. In October, 1953, the wife presented a petition for divorce on the ground that the husband was incurably of unsound mind and had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition.

HELD: a person receiving treatment as a voluntary patient under s. 1 of the Mental Treatment Act, 1930, remains such until one or other of the events mentioned in s. 1 (5), s. 2 (3) or s. 3 (2) of that Act occurs; accordingly, as none of these events happened in the case of the husband, he had, by virtue of s. 1 (2) (d) of the Matrimonial Causes Act, 1950, been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition, as required by s. 1 (1) (d) of the Act of 1950, and, in the exercise of discretion, a decree nisi for divorce should be made.

Safford v. Safford ([1944] 1 All E.R. 704), considered.

Per ROMER, L.J.: the word “continuously” in s. 1 (1) (d) of the Act of 1950 should be read, in relation to persons who are detained, in a sense which does not exclude periods of authorised temporary absence from the concept of continuity which Parliament had in mind; and the word should be construed similarly in relation to voluntary patients (see p. 505, letter G, and p. 506, letter A, post).

Decision of Mr. Commissioner GRAZEBROOK, Q.C. (ante, p. 114), reversed.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 1 (1) (d), s. 1 (2) (d), see 29 HALSBURY'S STATUTES (2nd Edn.) 389, 390; and FOR CASES, see 27 DIGEST (Repl.) 368-372, 3048-3068.

Case referred to:

(1) *Safford v. Safford*, [1944] 1 All E.R. 704; [1944] P. 61; 113 L.J.P. 54; 171 L.T. 29; 2nd Digest Supp.

APPEAL by the wife against an order of Mr. Commissioner GRAZEBROOK, Q.C., dated July 30, 1954, and reported ante p. 114, dismissing a petition for dissolution of marriage based on the husband's incurable insanity. The commissioner held that, owing to the husband's temporary transfer from a mental hospital to a general hospital for the treatment of a fractured leg, he had not been receiving treatment, while in the general hospital, for mental illness in an institution within the meaning of the Mental Treatment Act, 1930, and, therefore, had not

been continuously under care and treatment for at least five years immediately preceding the presentation of the petition as required by s. 1 (1) (d) and s. 1 (2) (d) of the Matrimonial Causes Act, 1950.

D. Tolstoy for the wife (the petitioner).

B. S. Horner for the husband.

Cur. adv. vult.

A Nov. 12. The following judgments were read.

LORD GODDARD, C.J.: This is an appeal from the decision of Mr. Commissioner GRAZEBROOK, Q.C., dismissing the wife's petition for dissolution of marriage on the ground of her husband's incurable insanity. There is no doubt that the husband is insane and that his insanity is incurable; the only question raised by the appeal is whether he has been continuously under care and treatment for at least five years immediately preceding the presentation of the petition as required by s. 1 (1) (d) of the Matrimonial Causes Act, 1950. The commissioner found that there had been a break in the necessary period, and dismissed the petition.

B The facts are that the parties were married in 1918, and in November, 1925, the husband became subject to a reception order and was admitted to a mental hospital at Bexley. He remained subject to that order until Dec. 27, 1951. During this time he had had certain periods of leave, and for a week in 1951 was in charge of the Mental After Care Association on a holiday, which was regarded as part of his treatment.

C On Dec. 27, 1951, he was discharged as "relieved", and thereupon the reception order ceased to have effect. On the same day he was admitted into D the same hospital as a voluntary patient under the provisions of the Mental Treatment Act, 1930; he is still there, and is suffering from general paralysis of the insane. In January, 1953, he met with an accident and broke his leg; and, as there were not suitable facilities for dealing with this condition at Bexley, the medical superintendent sent him for treatment to a neighbouring establishment known as the Southern Hospital, Dartford, where he stayed till May 11 E of that year, when he returned to the Bexley Hospital, where he has ever since remained. The Bexley Hospital is, but the Southern Hospital is not, an institution or a hospital or place approved for the purposes of s. 1 of the Mental Treatment Act, 1930. During the short interval that he was in the Southern Hospital he remained on the books of the Bexley Hospital, and arrangements were made for his progress, and in particular any change in his mental condition, to be reported F to the superintendent of the latter; and these arrangements were carried out. The petition was presented on Oct. 21, 1953, and it is agreed that he was then and still is incurably insane.

By s. 1 (2) (d) of the Act of 1950 a person of unsound mind is deemed to be under care and treatment while he is receiving treatment as a voluntary patient under the Mental Treatment Act, 1930. We have, therefore, to consider the G provisions of the Act of 1930 to see whether the fact that the husband was sent for treatment for his broken leg to a general hospital which was not an approved place under that Act interrupts the care and treatment for unsoundness of mind so that the period of five years' continuous treatment is broken.

A person who wishes voluntarily to submit to treatment for mental illness and who applies in writing for that purpose to the person in charge may be H received without a reception order as a voluntary patient in an approved hospital; see s. 1 (1) of the Act of 1930. By s. 1 (5) it is provided that he may leave the institution on giving seventy-two hours' notice of his intention so to do. Notice of his reception and notice of his death or departure have to be given to the Board of Control before two days have elapsed (s. 2 (1), (2)). Apparently, therefore, this notice has to be given whether the patient has left the institution pursuant to his giving seventy-two hours' notice or whether he has taken himself off without notice.

By s. 2 (3), if a voluntary patient becomes incapable of expressing himself as willing or unwilling to remain, he must not be retained as a voluntary patient for more than twenty-eight days. I need not set out the whole provisions of this lengthy sub-section, but it is obvious that it is meant to apply to the case of a voluntary patient who deteriorates mentally while in an institution. He must not be kept indefinitely on a voluntary basis, but, if not discharged, must be certified as insane or as a person fit for temporary treatment under s. 5 of the Act of 1930. Temporary patients are not received on their own application but on that of their relatives or local health officials. The section seems designed for persons who are regarded as merely temporarily insane and likely to recover in a short time and who, therefore, need not be the subject of formal certification and a reception order. A

The only other section of the Act of 1930 to which I need refer is s. 3. Sub-section (1) provides for the visitation of voluntary patients and for reports on them to the Board of Control. Sub-section (2) enables the board to order their discharge or to have them certified or dealt with under s. 5. No doubt that sub-section appears to contemplate that the action of the board will follow a commissioner's visit and report, but it seems to me that the board also has power under this sub-section to deal with a person to whom s. 2 (3) applies. B

It is unnecessary to decide in this case the precise rights and obligations of a voluntary patient so far as submitting to detention or restraint are concerned. There is no doubt that he can discharge himself from an institution and get rid of the description applied to him by giving seventy-two hours' notice, and I have no doubt that this particular period is prescribed so that, if the medical superintendent should consider that the voluntary patient ought to be restrained for his own or the public safety, he can take steps either under s. 5 or under the Lunacy Act, 1890. It is clear, however, that, once he has applied for reception and has been received as a voluntary patient, he so remains until one or other of the steps provided by the Act of 1930 is taken, i.e., voluntary discharge under s. 1 (5), or action under s. 2 (3), or s. 3 (2). A voluntary patient is invested with the same kind of quasi-status as was mentioned by LORD GREENE, M.R., in *Safford v. Safford* (1) ([1944] 1 All E.R. at p. 706), where he was dealing with an insane person. Accordingly, in my opinion, the husband has always been a voluntary patient since his reception as such in December, 1951, and he was still a voluntary patient when he was taken to the Southern Hospital. C D E

The question then remains whether he was receiving treatment for mental illness while in that hospital. In my opinion he was. He was still on the books of the Bexley Hospital. Reports on him were required by and were sent to the superintendent, who, therefore, had not in any way abandoned him or discontinued his treatment. I see no reason to suppose that, if the superintendent had considered some action on account of the patient's mental state to be necessary, he would not have requested the Southern Hospital to take it. I find nothing in the Act of 1930 to require that all treatment must be given within the curtilage of the approved institution. Otherwise, if a voluntary patient were to go out for a walk or take any form of necessary and beneficial exercise outside the curtilage of the institution, the period of care and treatment would be ended, which would indeed be an absurd result. A patient certified under the Lunacy Act, 1890, can be granted leave or sent on holiday as part of his treatment, as indeed was done in this very case. In my opinion the temporary absence of a voluntary patient for convenience of nursing him for a physical, as distinct from a mental, injury does not break the continuity of his treatment, though that be given outside the walls or grounds of the institution to which it was always intended he should and did return. I would allow the appeal. F G H

HODSON, L.J.: I agree. I have had the advantage of reading beforehand the judgment which ROMER, L.J., is about to deliver, and I agree with that also.

A ROMER, L.J.: I am in full agreement with the judgment of the Lord Chief Justice. It seems to me that, once a person has been received into an approved hospital or other place under s. 1 of the Mental Treatment Act, 1930, he becomes and remains a voluntary patient until one or other of the events mentioned in s. 1 (5), s. 2 (3) and s. 3 (2) of the Act occurs. As none of these events has happened in relation to the husband since he was received by the Bexley Hospital as a voluntary patient on Dec. 27, 1951, it follows that he has at no time ceased to be a voluntary patient, and, indeed, he is still one now.

B This, however, is not sufficient in itself to satisfy the relevant provision of s. 1 (1) (d) of the Matrimonial Causes Act, 1950, which, as applied to the present case, requires that the husband should have been continuously receiving care and treatment for a period of at least five years immediately preceding the presentation of the petition. Even if the word "continuously" in the subsection has to be construed strictly and literally, I am of opinion that no interruption in his treatment as a voluntary patient resulted from his four months' sojourn in the Southern Hospital in 1953. There is no evidence that he received any special treatment for his mental condition in the Bexley Hospital of which he was deprived on his transfer to the Southern Hospital, and it may well be that all he received was general care and supervision. The Bexley Hospital at no time disclaimed responsibility for the husband's welfare or regarded his absence as other than temporary, for they kept him on their register the whole time he was away, and the medical superintendent made arrangements to be notified of the husband's progress generally while at the Southern Hospital, and, in particular, if his mental condition altered or required attention. Accordingly there was, in my opinion, continuity, even in the narrowest sense of that word, in the husband's treatment during the relevant period, and s. 1 (1) (d) of the Act of 1950 is, therefore, satisfied.

E It appears to me, however, that the word "continuously" in that section should not be construed with absolute strictness, but should be interpreted, as it legitimately can be, in such a sense as to conform to the subject-matter, namely, mental treatment, in connection with which it is used. In *Safford v. Safford* (1) this court held that absences for periods of less than four days under s. 275 (5) of the Lunacy Act, 1890, and absences for longer periods under s. 55 (1) of that Act, having regard to the circumstances which attended those absences, were not interruptions of the "detention" required by s. 3 of the Matrimonial Causes Act, 1937. As LORD GREENE, M.R., recognised in his judgment in that case ([1944] 1 All E.R. at p. 707), the legislature must be taken to have known when the Act of 1937 was passed that some of the persons who are detained under the Lunacy Act, 1890, are permitted periods of absence from the institution or other place in which they are detained; and, in my opinion, Parliament must be taken to have had the like knowledge when the Act of 1950 was enacted, and to have known, moreover, that, during these periods of absence, such persons are, in many cases, not receiving actual "treatment" at all. The word "continuously" in s. 1 (1) (d) of the Act of 1950 must, therefore, be read, in relation to persons who are detained, in a sense which does not exclude these periods of temporary absence from the concept of continuity which Parliament had in mind; for a strict interpretation would lead to imputing to the legislature a disregard of features which are incidental to the care and treatment to which the word is applied.

H By para. 2 of sched. III to the Mental Treatment Act, 1930, the Board of Control were authorised to make rules applying s. 55 of the Lunacy Act, 1890, to the voluntary and temporary patients received under the Act of 1930. The board have in fact made a rule applying s. 55 (with modifications) to temporary patients, with the result that authorised absences of such patients are clearly on the same footing, for the purpose under consideration, as authorised absences of persons who are detained under the Act of 1890. For some reason of which

I am not aware, the board have not made a similar rule applying s. 55 to voluntary patients, so that the position with regard to periods of absence by these patients is not so clear as it might be. Whatever may be the reason for the board's omission, it does not alter the fact that the Act of 1930 envisaged the making of rules under which voluntary patients might be absent for temporary periods, and the word "continuously" in s. 1 (1) (d) of the Act of 1950 must therefore be construed in relation to voluntary patients also with due regard to that possibility.

Accordingly, just as in the case of certified persons and temporary patients, so also with regard to voluntary patients, the word "continuously" in the Act of 1950 is to be read as including periods of authorised absence in the legislative conception of continuity. Indeed, not to read it so would result in drawing a purposeless and wholly illogical distinction between absences by detained and temporary patients on the one hand and by voluntary patients on the other. On this construction of this section, and apart altogether from the fact that there was, in my opinion, actual continuity of treatment, the respondent's visit to the Southern Hospital cannot be regarded as constituting an interruption of the requisite five-year period, for it took place with the approval (and indeed by the direction) of the mental hospital and is thus within the same category as any other authorised absence.

It appears to me that this conclusion accords, not only with common sense, but with the true object and intention of s. 1 (1) (d) of the Act of 1950. That section was concerned to ensure that divorces for mental disability should only be granted on proof of five years' continuous mental disability; and, provided that that is established (as it undoubtedly has been in the present case), it is, in my opinion, *nihil ad rem* that, consistently with, and as incidental to, the treatment for that disability, periods of temporary absence are permitted to the patient away from the hospital or other place into which he has been received. I agree that the appeal should be allowed.

[The case being one in which the discretion of the court was asked for, their Lordships exercised their discretion in favour of the wife.]

Appeal allowed.

Solicitors: *L. H. Whitlamsmith* (for the wife); *Official Solicitor* (for the husband).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

DRUMMOND v. BRITISH BUILDING CLEANERS, LTD.

[COURT OF APPEAL (Denning, Morris and Parker, L.J.J.), November 4, 5, 8, 1954.]

Window Cleaner—Safe system of work—Duty of employer to provide.

The plaintiff was employed as a window cleaner by the defendants who were window cleaning contractors. On Nov. 14, 1949, the plaintiff was employed at factory premises when he was instructed by the defendants' foreman to clean the outside of a window of the factory. While so engaged he stood on the sill of the window and slipped and fell some twenty feet to the ground, suffering severe injuries. In an action for damages against the defendants he alleged that they were negligent and in breach of their duty failed to take proper precautions for the safety of their workmen. The defendants denied negligence and alleged contributory negligence on the part of the plaintiff, in particular, that he could have attached the rope of his safety belt to the transom below the fanlight of the window which he was cleaning when he fell.

HELD: it was the duty of employers in the trade of window cleaning, even when they employed experienced workmen and even though the workmen might be likely to disregard safety instructions if given to them, to inquire what safety precautions could be taken for the work in hand and to instruct their men to use such method of safe working as was available, although it might be available for work on some only of the windows to be cleaned; in the present case this method was that of attaching the safety belt to the transom, and, as the employers had not given instructions to use that method they were in breach of their duty to the plaintiff, who was, therefore, entitled to recover damages. .

General Cleaning Contractors, Ltd. v. Christmas ([1952] 2 All E.R. 1110), considered.

Appeal allowed.

AS TO MASTER'S DUTY TO PROVIDE A SAFE SYSTEM OF WORK, see 22 HALSBURY'S LAWS (2nd Edn.) 188, para. 314; and FOR CASES, see 34 DIGEST 194-198, 1583-1623.

AS TO MASTER'S LIABILITY VARYING ACCORDING TO EXPERIENCE OF SERVANTS, see 22 HALSBURY'S LAWS (2nd Edn.) 190, para. 318.

Cases referred to:

- (1) *General Cleaning Contractors, Ltd. v. Christmas*, [1952] 2 All E.R. 1110; [1953] A.C. 180; 3rd Digest Supp.
- (2) *Roberts v. Dorman Long & Co., Ltd.*, [1953] 2 All E.R. 428; 3rd Digest Supp.

APPEAL by the defendants from an order of PILCHER, J., dated Feb. 17, 1954.

The plaintiff was employed as a window cleaner by the defendants who were window cleaning contractors. On or about Nov. 14, 1949, the plaintiff while so employed was directed by the defendants' foreman to clean the outside of a window at a factory in London. While he was engaged in cleaning the window the plaintiff slipped and fell a distance of about twenty feet and thereby suffered severe injuries. In an action for damages the plaintiff alleged that the defendants were negligent, giving, among other particulars of negligence, that they failed to provide suitable ladders and that they failed to arrange with the occupiers of the factory for the insertion of safety hooks into the walls adjoining the windows to enable safety belts to be secured and used by the plaintiff while cleaning the window. The defendants in their defence denied negligence on their own part and alleged contributory negligence by the plaintiff in that (i) he failed to use one of the ladders on the job; (ii) he failed to wear his safety belt; (iii) he failed to ascertain whether there was anything to which to attach the rope of his safety belt, which could have been attached to the transom below

the fanlight of the window from which he fell. By his amended statement of claim the plaintiff in his particulars of negligence alleged that he should have been provided with, inter alia, two loops which he could have attached to the transom below the fanlight of the window from the inside and to which he could have attached his safety belt from the outside of the window. PILCHER, J., gave judgment for the defendants and held that they were not guilty of negligence towards the plaintiff.

Marven Everett, Q.C., and J. Sofer for the plaintiff.

F. W. Boney, Q.C., and Stephen Chapman for the defendants.

DENNING, L.J., stated the facts and continued: It is clearly shown by the evidence in this case, and in other cases which have come before the court, that the practice of cleaning windows by standing on the sill is dangerous. In those circumstances the employers are under a duty to do all they can to reduce the risk. They should insist on the men taking precautions for their own safety. It is no answer for the employers to say: "We cannot help it. The men will stand on the sill". The employers should always be on the look-out to see if there is any more that can be done for the safety of the men. As LORD REID pointed out in *General Cleaning Contractors, Ltd. v. Christmas* (1) ([1952] 2 All E.R. at p. 1117):

"Where a practice of ignoring an obvious danger has grown up I do not think that it is reasonable to expect an individual workman to take the initiative in devising and using precautions. It is the duty of the employer to consider the situation, to devise a suitable system, to instruct his men what they must do, and to supply any implements that may be required such as in this case wedges or objects to be put on the window sill to prevent the window from closing. No doubt, he cannot be certain that his men will do as they are told when they are working alone. But, if he does all that is reasonable to ensure that his safety system is operated, he will have done what he is bound to do."

In this case the plaintiff suggested several methods of cleaning the window which he said should have been devised by the defendants. I need say nothing about them except for one particular method which is described as the "transom method". It was said on behalf of the plaintiff that if the defendants had examined the windows of this particular building, they would have found that the men could have used their safety belts, by putting the rope around a transom, and that they should have instructed the men to do this. By a strange irony, it was the defendants themselves who first suggested this method. They raised it by way of a plea of contributory negligence against the plaintiff himself. They said that he was provided with a safety belt and a rope, that there was a strong transom at the top of this window and that he should have fastened his rope over the top of the transom and attached it to his safety belt. When the plaintiff's advisers saw this plea, they turned it to their own advantage. They amended the statement of claim so as to charge the defendants with negligence in not ordering the men to use the transom method. They said with some force: If the defendants can think of this method now for the purposes of their defence, why did they not think of it before the windows were cleaned? The plaintiff's advisers sought thus to hoist the defendants with their own petard, just as in *General Cleaning Contractors, Ltd. v. Christmas* (1).

At the trial it was the defendants themselves who proved that the transom method was practicable. [HIS LORDSHIP reviewed the evidence of the works manager and others on this point and continued:] It is quite clear, therefore, that the transom method was a practicable way of securing safety subject only to the possible objection of the occupier; but I do not see that the defendants can raise that objection. They ought to have asked the occupier whether he objected or not.

In my opinion the defendants were guilty of negligence in that they failed to inquire into the possibility of attaching the safety belt to the transom or to instruct their men to use that method. Window cleaning is a trade which is more dangerous than many others, and it is the duty of employers on that account to take all the more care to protect their workmen. They know that their workmen often stand on the sills to do their work; and they know of the many accidents which have happened in so doing. In this small firm employing twenty men, in the course of fifteen or twenty years there were two fatal accidents, two cases of broken legs and several other injuries. The employers are not able to prevent danger to the men altogether, but they ought to do everything possible to lessen it. The defendants' expert, Mr. Harrington, said in evidence that the only satisfactory method was to have a safety belt fastened by a rope on to something secure. The London County Council have made regulations with regard to work over the highway in which they insist on a safety belt attached to some secure object. So here when the defendants undertook the task of cleaning the windows of this factory building which has seven hundred windows, they should have inspected the building to see what could be done to safeguard the men and particularly to see if there was a secure support to which a safety belt could be fixed. Had they done so, they would have discovered that there were stout transoms which could be used. If there were any possibility of damage to the paintwork they should have asked the occupiers of the factory building whether they objected. Not having asked that question, it does not lie in the defendants' mouth to say the occupiers would have refused. It does not appear that the occupiers would have refused inasmuch as after the accident they inserted eyes outside the windows so that safety belts can be attached.

It seems to me that the defendants, not having done any of these things, were guilty of negligence. I know it is the general practice in this trade for men to work on the sills, but that does not excuse the defendants from simply folding their hands and doing nothing. The judge disposed of the "transom method" by saying that he thought that the men

"if ordered to take this precaution before getting out on to the sill would have regarded such an intervention by their employers as unreasonable and grandmotherly."

But it seems to me that the defendants cannot be excused unless they took the step of ordering these men to use their ropes on the transoms. If employers take all proper steps and give all proper instructions, they have done all that they can do; and if the men do not obey them it is the men's own fault; but the employers must, first of all, take all proper steps to protect their men and give them proper instruction.

In my judgment, therefore, this appeal should be allowed and judgment entered for the amount of damages which the judge assessed at £1,750.

MORRIS, L.J. : I have reached the same conclusion. It was pointed out in the course of the submissions that the work of the plaintiff was by its nature risky and dangerous. That is beyond question. It was said in the pleadings that the plaintiff had voluntarily run the risks of his employment. In para. 7 of the defence it was put in this way:

"In the further alternative the plaintiff with full knowledge of the risks involved in a window cleaner's calling, including the risks of standing on a window sill, voluntarily and deliberately decided to run those risks by engaging in that calling and cannot now be heard to complain on that account. Alternatively on the occasion in question he voluntarily ran the risk involved in standing on the window sill although he had a ladder available and cannot now be heard to complain on that account."

That matter was only very faintly raised before us, but, although the plaintiff

in embarking on this particular occupation may have run the risks that were inevitable and the dangers that were unavoidable, it could not, in my judgment, be said that he had run the risks which reasonable care, diligence and forethought on the part of the defendants could have obviated. The defendants knew that the plaintiff would be called on to do something which was fraught with danger. It was said in evidence that the sill method, that is to say, the method of standing on a narrow sloping sill with a considerable drop if a grip was lost, was as safe a method as could be devised. It was, however, plainly a method that was fraught with considerable peril, and, therefore, it was the duty of the defendants to apply their minds constantly to the question of doing all that reasonably could be done to minimise the dangers and the risk. I do not think it was suggested in this case that it would be the duty of employers to lay down specifically what a workman was to do in respect of each window. The photograph which is before us shows, however, that there are several windows similar to that from which the plaintiff fell. If the defendants could have laid down some system, which would have obviated the dangers or lessened the risks, even though it was referable to some only of the windows that the plaintiff would be called on to clean, then it was, in my judgment, the duty of the defendants to do their best reasonably to adopt and prescribe such a system.

In his speech in *General Cleaning Contractors, Ltd. v. Christmas* (1), LORD REID said this ([1952] 2 All E.R. at p. 1116):

"The need to provide against the danger of a sash moving unexpectedly appears to me to be so obvious that, even if it were proved that it is the general practice to neglect this danger, I would hold that it ought not to be neglected and that precautions should be taken. It is at this point that lack of evidence causes difficulty, for there is no evidence as to what would be reasonably practicable or effective precautions. But I cannot believe that there would be any great difficulty in devising a simple method of preventing the lower sash from closing. I do not know what the best method would be. Generally, the plaintiff ought to put forward some method which can be tested by evidence. But in this case I am assisted by the fact that the appellants in their defence allege negligence against the respondent 'if he knew of the said defect [the tendency of this window to move easily] in taking no or no adequate steps to wedge or secure the said window; if he did not know of the said defect, in taking no or no adequate steps to ascertain whether it was safe to rely on the sashes of the said window for hand-hold'".

A similar and comparable position arose in this case, for here what was pleaded by the defendants as one part of their defence to the claim presented against them was that the plaintiff was negligent in failing to take any or any adequate steps to ascertain whether there was anything to which to attach the rope of his safety belt, which it was said could have been fixed to the transom below the fanlight. Further particulars were asked and the defendants said:

"The rope could have been attached to the transom below the fanlight by passing it around the transom and then hooking it on to itself . . . It could also have been attached to one of the short ladders, the latter being put up against the window or laid lengthwise across the window's breadth."

They were therefore saying to the plaintiff as one answer to his claim: "You ought to have attached the rope to the transom."

When the matter was investigated at the trial the defendants were at some pains to show that the method would have been very difficult because it would have caused damage to the paint, and further because it would have been necessary to obtain the permission of the owners of the building. Those objections when examined do not seem to me to have substance. In any case they lie somewhat ill in the mouth of the defendants who themselves have said that

there could have been some measure of safety if the plaintiff had attached the rope to the transom. The objection in regard to the paint was investigated and considered by the learned judge. In regard to obtaining permission it does not lie in the mouth of the defendants to say that if they had asked they would not have been given permission; every likelihood is the other way.

A It was laid down in *General Cleaning Contractors, Ltd. v. Christmas* (1) that it is not enough merely to advance vague general suggestions; there should be something which the court can examine. EARL JOWITT, in the course of his speech, said this ([1952] 2 All E.R. at p. 1113):

B "It may be, in some other case, that evidence will be called to prove that there is some other method of securing the end of the safety belt, or, indeed, that there is some safer method of cleaning windows for which no hook is available than standing on a narrow sill, such, for example, as the provision of a plank projecting on the outside of the window and in some way secured on the inside. There was no such evidence called in the present case. . ."

C In the present case there has been such evidence. The method of attaching a rope to the transom was first mentioned by the defendants themselves. The plaintiff not unnaturally then said that if he had been given instruction in regard to that method of securing the rope to the transom, then his fall to the ground could have been avoided. LORD OAKSEY in his speech in the case last cited said this (*ibid.*, at p. 1114):

D "It is, I think, well known to employers, and there is evidence in this case that it was well known to the appellants, that their work-people are very frequently, if not habitually, careless about the risks which their work may involve. It is, in my opinion, for that very reason that the common law demands that employers should take reasonable care to lay down a reasonably safe system of work. Employers are not exempted from this duty by the fact that their men are experienced and might, if they were in the position of an employer, be able to lay down a reasonably safe system of work themselves. Workmen are not in the position of employers. Their duties are not performed in the calm atmosphere of a board room with the advice of experts. They have to make their decisions on narrow window sills and other places of danger, and in circumstances in which the dangers are obscured by repetition."

F That passage, in my judgment, meets many of the submissions that have been made to us here. It was said that the plaintiff was an experienced man, that he was best fitted by his knowledge to deal with all situations, and that it was reasonable to leave matters to him. There was evidence which suggested that window cleaners do not think constantly of the risks that they run. It may be a very happy circumstance that those who do perform this work are not constantly obsessed by the perils that beset them; but it is that very circumstance which makes it so necessary that those who employ them to do this dangerous work should take reasonable care to devise a reasonably safe method.

G In this case it has been shown by the evidence that the method of attaching a rope to the transom would have been effective. [HIS LORDSHIP referred to the evidence of the defendants' works manager, and to his statement in evidence that he did not discuss any matters (i.e. including measures for safety of employees), with competitors, and continued:] One might have hoped that in a matter affecting the whole trade every possible idea might be pooled, every suggestion tested and every conceivable course tried in order that, in the interests of all concerned in the community, the maximum degree of safety might be achieved. There is no suggestion in this case that these employers were in any way callous or anything of that kind; nobody has suggested that. But this case has shown once again the risks in this occupation. One can only hope that in time some additional safety suggestions other than those referred to in the evidence in this

case may be considered. The fact remains that on the evidence here it is shown that the method of attaching the rope to the transom was a practicable method. [HIS LORDSHIP then read the evidence of the defendants' works manager in respect of the transom method and continued:] Mr. Barr, another witness who was called, said it was practicable, and my Lord has referred to the passages in his evidence, which I do not read again, which also bear out that this was a practicable method.

Mr. Harrington (an expert witness called by the defendants) raised the point as to damage to the paint that might result from the transom method, and he also said in answer to the question:

"If they put their rope round the transom the plaintiff would probably not have fallen. It is not by any means every window that has got a transom, is it? A. — Very few proportionately. And I am quite sure that if the men were told to do that they would not do it."

It may be that that was the passage which the learned judge had in mind when he used the words in regard to this part of the case which my Lord has cited. It seems to me that that approach is covered precisely by the words of LORD REID in the *Christmas* case (1) ([1952] 2 All E.R. at p. 1117):

"It is the duty of the employer to consider the situation, to devise a suitable system, to instruct his men what they must do, and to supply any implements that may be required such as in this case wedges or objects to be put on the window sill to prevent the window from closing. No doubt, he cannot be certain that his men will do as they are told when they are working alone. But, if he does all that is reasonable to ensure that his safety system is operated, he will have done what he is bound to do."

It seems to me, therefore, that there was evidence here proving that the method of attaching the rope to such windows as had a firm transom was a method that could have been laid down and that had such method been prescribed for windows such as that on which the plaintiff was working at the time of this accident, he would not have fallen.

Therefore, I consider that on the evidence in this case the plaintiff was entitled to recover.

PARKER, L.J. : I agree. The only allegation which, in my opinion, calls for serious consideration in this court is that the defendants failed in their duty in not instructing the plaintiff to attach the rope from his safety belt to a transom when he was working on a window with a sound transom. As to the many other points raised, I entirely agree with the conclusions reached by the learned judge in his careful judgment. In the absence of eyes fitted into the walls of a building to which the rope of the safety belt can be attached, the usual method of cleaning windows on the outside is by standing or squatting on the sill holding on to the sash. That was the method used by the plaintiff at the time of his accident. Moreover, this method was held by the House of Lords in the *Christmas* case (1) to be a reasonably safe method in the absence of those eyes, provided, of course, that precautions are taken to see that the sashes are sound and that they do not creep. The fact, however, that this method is reasonably safe in cases where no other safety measures are possible does not exonerate employers from considering all practicable methods of making it safe by providing, as it were, a second line of defence. After all, the duty is not to subject the employees to unnecessary risk.

In the present case the defendants appear to have been content to accept the view that a window cleaner's job is inherently risky in the absence of eyes fitted into the wall and to have given no consideration at all to further methods of making it safe. Yet, be it observed, as soon as the accident has occurred they themselves by their pleadings allege that the plaintiff could have used the transom. In those circumstances they cannot well say, as it seems to me, that if they

had thought about the matter before the accident they would not and could not have devised this method or have said that it was not practicable. On the evidence it is perfectly clear that the use of the transom is a perfectly practicable method. The witnesses almost entirely agree on that. The only doubt which some witnesses had was that it might dirty or injure the paint. As to that, I desire to add nothing more to what my Lords have said. What the defendants seem to have done is to have left the initiative to the plaintiff, and, indeed, by their pleading they allege that he was lacking in initiative in not using the transom when it was really their duty to think of it and to instruct the plaintiff in regard thereto. In that connection I would refer to the observations of LORD REID in his speech in the *Christmas* case (1) ([1952] 2 All E.R. at p. 1117).

In saying that, I hope that I remain conscious of the fact that there may be a real difference between the failure of a workman to devise some method ad hoc for his own safety and the failure of an employer to devise a safe system of working. A window cleaning employer cannot, for example, be expected to lay out the job window by window, whereas the employee at all times must take reasonable care for his own safety. In the present case the evidence is that the defendants had a contract with occupiers of a factory building to clean their windows once a month, an operation which took a matter of four or five days on which the plaintiff's gang, either alone or with others, appears to have been always engaged. Again the evidence is that these premises had, according to one witness, seven hundred, and, according to another witness, one thousand windows. There was, it is true, no direct evidence as to the number of windows with transoms of the type on which the plaintiff was engaged. Counsel for the defendants urged that we should approach the case on the basis that the only evidence was that the one window from which he fell had a transom. Speaking for myself, I feel that I cannot approach the case in this way. The agreed photograph, which is part of the evidence in the case, shows eight windows of that type along one wall of the building, four on the first floor, and four on the second floor, and it would be, in my view, highly unlikely that those eight windows were the only windows of this type in this very large block. I feel bound to assume that the building had, to say the least, a considerable number of windows of this type, and the evidence being that the whole building was of very sound construction, that the transoms of the other windows were sound as was the transom of the window in question. Moreover, the defendants, whose duty it was to consider the risks and the method of minimising them, are unable to show that they gave this method any consideration at all or that, if it be the case, the number of windows of this character at the factory building was so small that specific instructions with regard thereto were impracticable or unnecessary.

In my view the learned judge in giving judgment on this point took too broad a view in treating the defendants' duty in relation to windows generally rather than in relation to the windows of the job on hand, namely, the monthly cleaning of the windows at the factory building. Further, it may be, as the learned judge finds, that the plaintiff in this case, even if instructed to use his safety belt on the transom, might have refused. Indeed, there was evidence that window cleaners refused to use the safety belt even when eyes were fitted. Accordingly, it may be that he would not have used the safety belt and that the accident would not have been avoided. In my view, however, the defendants, having failed in their duty by not giving him instructions to use the rope, cannot be heard to say that even if they had he would not have used it: see *Roberts v. Dorman Long & Co., Ltd.* (2) ([1953] 2 All E.R. at p. 432) per LORD GODDARD, C.J. For these reasons I would allow the appeal.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Matthew Morris* (for the plaintiff); *J. F. Coules & Co.* (for the defendants).
[Reported by PHILIPPA PRICE, Barrister-at-Law.]

PYE AND OTHERS v. MINISTER FOR LANDS FOR NEW SOUTH WALES.

[PRIVY COUNCIL (Lord Porter, Lord Oaksey, Lord Reid, Lord Tucker and Lord Asquith of Bishopstone*), July 1, 5, 6, 7, 8, 12, 13, 14, November 4, 1954.]

Privy Council—New South Wales—Compulsory resumption of land—Compensation—Assessment—Resumption for settlement of ex-servicemen—Date for valuation of land—Closer Settlement (Amendment) Act, 1907 (No. 12 of 1907), s. 4 (4) (b), proviso (as amended).

Statute—Construction—Temporal connotation—Use of historic present—Where any such resumption “is” made—Words descriptive of purpose—Not stipulating that resumption should have been made—New South Wales Closer Settlement (Amendment) Act, 1907 (No. 12 of 1907), s. 4 (4) (b), proviso (as amended).

By the Closer Settlement (Amendment) Act, 1907, s. 2, the governor was empowered for the purposes of the Act to constitute advisory boards. By s. 3, every such board should report to the Minister (a) whether any, and if so what, land within an area specified by the Minister is suitable to be acquired for closer settlement, (b) the estimated value of such land, and (c) the price at which the board recommends the acquisition of the land. By s. 4: “(1) Where an advisory board reports that any land is suitable to be acquired for closer settlement the governor may . . . (b) resume [i.e., in the terminology of English law, compulsorily acquire] it under this Act. (2) Every . . . resumption shall be subject to approval by resolutions of both Houses of Parliament. (3) Before resuming any land, the governor shall, by proclamation in the Gazette, notify that he proposes to consider the advisableness of acquiring such land for the purposes of closer settlement . . . (4) (b) The compensation to be paid in respect of any such resumption shall . . . be the value of the land as assessed by an advisory board, or where an appeal has been made in terms of s. 9 of this Act, as determined by the Land and Valuation Court: Provided that where any such resumption is made for the purposes of s. 3 of the War Service Land Settlement Act, 1941, as amended by subsequent Acts, the following provisions shall apply:—(i) In the case of any such resumption where the owner has agreed not to claim compensation in excess of the value of the land as assessed by an advisory board the value of the land as so assessed shall not exceed by more than fifteen per centum the value which would have been so assessed or determined in respect of an identical resumption as at Feb. 10, 1942, excepting the value of any improvements effected on such land since that date; (ii) In the case of any such resumption other than a resumption where the owner has agreed not to claim compensation in excess of the value of the land as assessed by an advisory board, the value of the land as so assessed or determined shall not exceed the value which would have been so assessed or determined in respect of an identical resumption as at Feb. 10, 1942, excepting the value of any improvements effected on such land since that date.” In October, 1945, the Lieutenant-Governor of New South Wales, by proclamation in the Gazette, notified that in pursuance of s. 4 of the Act of 1907, he proposed to consider the advisableness of acquiring lands for closer settlement of which the appellants were the owners in fee simple. On May 5, 1950, a closer settlement advisory board recommended that the lands should be resumed under the Closer Settlement (Amendment) Act, 1907, and that compensation be paid in accordance with s. 4 (4) (b) (ii) of that Act, that is, at rates being the values assessed by the board as at Feb. 10, 1942. On May 9, 1950, both Houses of the New South Wales Parliament passed resolutions approving the resumption of the lands,

* LORD ASQUITH OF BISHOPSTONE died on Aug. 24, 1954.

pursuant to s. 4 (2) of the Act. On Sept. 1, 1950, the Governor of New South Wales, by proclamation published in the Gazette, declared that the lands were resumed under the Act of 1907, such resumption being for the purposes of the War Service Land Settlement Act, 1941, s. 3, as amended. On the question as at what date the value of the lands should be determined, the appellants contended that s. 4 (4) (b) was unworkable because (i) the compensation was to be determined by the advisory board in its report before the purpose of the resumption was finally determined by the governor and confirmed by Parliament, and (ii) the owner must be given an opportunity of electing to accept the value in the report or of rejecting it, and no such opportunity could be or had been given.

HELD: (i) the words "Provided that where any resumption is made" in the proviso to s. 4 (4) (b) of the Act of 1907 were descriptive of the purpose of the resumption and had no temporal connotation; accordingly the subsequent words of the proviso could apply to a case where the value was assessed before the resumption had taken place.

(ii) as the advisory board could be, and in the present case was, made aware of the purpose for which the land was to be resumed before they made their report, they could make their assessment on the basis that the proviso to s. 4 (4) (b) of the Act of 1907 applied and could give the owner of the land to be resumed the option contemplated by that proviso; accordingly the compensation was correctly based on the values of the lands as at Feb. 10, 1942, and the appeal must be dismissed.

Per curiam: (a) where the Minister informs the advisory board that his intention is to resume the land for closer settlement on behalf of ex-servicemen, the board must make the valuation on the basis of prices prevailing on Feb. 10, 1942, and, before issuing their report, must give the owner the option of electing to accept or refuse the figure arrived at; but, in the present case, by proceeding to the Land and Valuation Court, the appellants had lost their option (see p. 525, letter A, post).

(b) section 3 (1) (f) of the Act of 1907 enables the Minister to request a report on matters additional to paras. (a) to (e) of s. 3 (1), but does not confer a power to omit or change the requirements of those paragraphs, nor provide for making two or more reports nor for altering a report already made (see p. 526, letter C, post).

Appeal dismissed.

Cases referred to:

- (1) *P. J. Magennis Pty., Ltd. v. Commonwealth of Australia*, (1950), 80 C.L.R. 382; A.L.R. 33; 23 A.L.J. 564.
- (2) *Magor & St. Mellons Rural District Council v. Newport Corpn.*, [1951] 2 All E.R. 839; [1952] A.C. 189; 115 J.P. 613; 2nd Digest Supp.
- (3) *Murray v. Inland Revenue Comrs.*, [1918] A.C. 541; 119 L.T. 258; 42 Digest 612, 125.
- (4) *Nokes v. Doncaster Amalgamated Collieries, Ltd.*, [1940] 3 All E.R. 549; [1940] A.C. 1014; 109 L.J.K.B. 865; 163 L.T. 343; 2nd Digest Supp.

APPEAL by special leave by former owners of freehold property from an order of the Full Court of the High Court of Australia, dated Mar. 10, 1953, allowing three appeals (consolidated by order of the High Court) by the respondent, the Minister for Lands for New South Wales, from orders of the Full Court of the Supreme Court of New South Wales, dated July 22, 1952, and answering in a contrary sense to the Supreme Court questions of law on Cases Stated by the Land and Valuation Court of New South Wales (SUGERMAN, J.), dated May 28, 1952.

The appellants, Richard James Pye, Richard Anthony Pye and Henry Ward Pye, were the respective owners in fee simple of three adjoining parcels of land in New South Wales which they worked together as one agricultural and pastoral

estate known as "Ghoolendaadi". On Oct. 5, 1945, the Lieutenant-Governor of New South Wales, in pursuance of the provisions of the Closer Settlement (Amendment) Act, 1907, s. 4, notified by proclamation in the New South Wales (Government Gazette) that he proposed to consider the advisableness of acquiring the appellants' estate for closer settlement. After publication of the proclamation, the appellant, Richard Anthony Pye, elected to retain an area of some 3,631 acres of the part of the estate belonging to him, pursuant to the Closer Settlement (Amendment) Act, 1907, s. 13. On May 4, 1950, a closer settlement advisory board made a report to the respondent, the Minister for Lands for New South Wales, with respect to the estate, in which it recommended, among other things, that the estate be resumed under the Closer Settlement (Amendment) Act, 1907, as amended, and that compensation be paid in respect of its resumption at rates being the values assessed by the board in accordance with s. 4 (4) (b) (ii) of the Act of 1907, i.e., values as at Feb. 10, 1942. On May 9, 1950, both Houses of the New South Wales Parliament passed resolutions pursuant to s. 4 (2) of the Act of 1907, approving the resumption of the estate. On Sept. 1, 1950, by proclamation published in the Gazette, the Governor of New South Wales declared that the estate (except for the 3,631 acres) was resumed under the Act of 1907, such resumption being for the purposes of the War Service Land Settlement Act, 1941, s. 3, as amended. On Sept. 28, 1950, the appellants, in pursuance of s. 9 of the Act of 1907, appealed to the Land and Valuation Court against the assessment of the value of the estate by the advisory board. At the hearing of the appeal, the appellants tendered evidence to prove (i) that, prior to the assessment of the value of the estate by the closer settlement advisory board, they had not been given any opportunity to agree not to claim compensation in excess of the value of the estate as assessed by the board, and (ii) that the actual value of the estate at the time it was acquired was £544,800. The court rejected this evidence, and held that the value of the estate should be determined as at Feb. 10, 1942. The appellants, pursuant to the Land and Valuation Court Act, 1921, s. 17, appealed by way of Case Stated, and the questions of law for the decision of the Supreme Court of New South Wales were: (1) (a) Was the evidence or any part of the evidence sought to be tendered as set out in (i) above and objected to and rejected, relevant and admissible?; (b) was the evidence sought to be tendered as set out in (ii) above and objected to and rejected, relevant and admissible? (2) Was the court bound on the hearing of the appeals to determine the values of the resumed lands, and to assess compensation, on the basis of values determined (a) as at Feb. 10, 1942, (b) as at the date of resumption, (c) as at the date of the advisory board's assessment? (3) If (2) (c) was answered in the affirmative, (a) was the court bound to determine values and to assess compensation as at May 4, 1950, being the date of the advisory board's report, or (b) was it open to the appellants to establish that the advisory board had made an assessment at some date prior to May 4, 1950? The Supreme Court answered these questions as follows:—(1) (a) On the construction which the court placed on the proviso to s. 4 (4) (b) of the Act of 1907, the evidence was irrelevant because it was unnecessary; (1) (b) Since the duty of the Land and Valuation Court was to assess the value of the estate as at the date of resumption and not on the basis of 1942 values, this evidence was inadmissible; (2) (a) No; (2) (b) Yes; (2) (c) No; (3) This question does not arise. The High Court of Australia, on appeal by the present respondent, answered the questions as follows: (1) (a) No; (1) (b) No; (2) (a) Yes; (2) (b) No; (2) (c) No; (3) This question does not arise.

Sir Garfield Barwick, Q.C. (of the Australian Bar), *J. G. Le Quesne* and *J. E. Saywell* for the appellants.

M. F. Hardie, Q.C., *R. Elsc-Mitchell* (both of the Australian Bar) and *Anthony Cripps* for the respondent.

LORD PORTER : This is an appeal by special leave from an order of the High Court of Australia allowing three appeals (consolidated by order of the High Court) by the Minister for Lands of the State of New South Wales from orders of the Full Court of the Supreme Court of New South Wales and answering in a contrary sense to the Supreme Court certain questions of law in Cases Stated by the Land and Valuation Court of New South Wales (SUGERMAN, J.) dated May 28, 1952.

A The question involved is the proper measure of compensation to be paid in respect of the resumption (i.e., compulsory acquisition) of land in New South Wales, which was formerly the freehold property of the appellants, but was resumed by the Governor of New South Wales on Sept. 1, 1950, under the provisions of the Closer Settlement (Amendment) Act, 1907, as amended by subsequent Acts. Before that date the appellants were the respective owners in fee simple of three parcels of land in New South Wales which were worked together as one estate known as Ghoolendaadi, and it is this estate which (except for an area of less than one-tenth of the whole) was resumed under the Act of 1907. The substantial question for their Lordships' decision is to determine whether the compensation payable to the owners on the compulsory acquisition of their land is to be based on its value in February, 1942, or on its current value on or about the date of resumption. Admittedly, the current value very greatly exceeds the value in February, 1942.

C In the Land and Valuation Court, SUGERMAN, J., held that, on the true construction of the relevant legislation, the value of the resumed land must be determined, not as at Sept. 1, 1950, which was the date of the resumption, but as at Feb. 10, 1942. The appellants appealed to the Supreme Court by way of Case Stated, and the decision of SUGERMAN, J., was reversed. The Minister for Lands being dissatisfied with this decision, appealed to the High Court which, in its turn, reversed the decision of the Supreme Court and restored that of SUGERMAN, J.

D The resumption was effected under the provisions of the Closer Settlement (Amendment) Act, 1907, which has been many times amended. That Act may be referred to as the Act of 1907. Section 4 (4) makes provision as to the compensation payable in respect of resumptions under the Act. The decision of the present appeals, therefore, depends on the true construction of that section in conjunction with the other provisions of the Act. In particular, it depends on the construction of a proviso which was inserted by the Act No. 48 of 1948 and amended by the Act No. 14 of 1950.

E Before they deal with the construction of the Act, however, their Lordships think it essential to recount the sequence of certain changes in it and the reasons for which they were made, but do not think it necessary to set out all the amendments. That task has been fully and accurately performed by the Supreme Court and need not be repeated. The first Act of 1904 is still referred to as the principal Act and provided authority to the governor, on taking the prescribed steps, either to purchase or to resume land privately owned, i.e., to acquire land for closer settlement. The relevant terms of that Act, as amended, will require to be set out at a later period, but, for the moment, their Lordships, in order to clarify the position, need only mention in passing that, in 1941, the legislature passed a War Service Land Settlement Act which, by s. 3, empowered the Minister, by notification published in the Gazette, to set apart any area of land acquired under the Closer Settlement Acts, as amended by subsequent Acts, to be disposed of exclusively to any one or more of the following classes of persons: (a) members of the forces; (b) discharged members of the forces; (c) discharged soldiers; (d) other eligible persons.

H In their Lordships' view, it is not necessary to deal with the form of the provisions of the Closer Settlement Acts in their earlier stages, but in order to explain the course taken by the New South Wales Government, the relevant

provisions in force up to the amending Act of 1946 have been conveniently assembled in a document provided for their Lordships' use and at the date in question contained the following provisions:

"2. (1) The governor may, for the purposes of this Act, constitute three boards to be called Closer Settlement Advisory Boards, and may dissolve and reconstitute any such board. Any such board is hereinafter in this Act referred to as an 'advisory board' . . . 3. (1) Every such board shall, at the request of the Minister and within such time or extended time as he may appoint, report to him as follows: (a) Whether any, and if so what, land within an area to be specified by the Minister is suitable to be acquired for closer settlement. (b) The estimated value of such land. (c) The price at which the board recommends the acquisition of the land, and the method of arriving at such price . . . (f) On any matter as to which the Minister requires a report . . . 4. (1) Where an advisory board reports that any land is suitable to be acquired for closer settlement, the governor may, (a) subject to this Act, purchase it by agreement with the owner; or (b) resume it under this Act. (2) Every purchase or resumption shall be subject to approval by resolutions of both Houses of Parliament. (3) Before resuming any land, the governor shall, by proclamation in the Gazette, notify that he proposes to consider the advisableness of acquiring such land for the purposes of closer settlement . . . 7. (1) The resumption of land under this Act shall be effected by notification in the Gazette. On such notification being made, the land shall, subject to the right of retainer hereinafter provided, vest in His Majesty for the purposes of the Closer Settlement Acts and be dealt with thereunder . . . 9. (1) Where any land is resumed under this Act, any person interested in such land who is dissatisfied with the value of the land as assessed by the advisory board may appeal to the Land and Valuation Court against such assessment in accordance with rules of court of that court. (2) Notice of appeal shall be lodged within twenty-eight days after the date of publication in the Gazette of the notification of resumption or within such further time as the Land and Valuation Court may, either generally or in any particular case, allow. 10. The Land and Valuation Court shall have jurisdiction to hear and determine the appeal."

There does not appear to have been any express provision in the Act then in force providing the amount to be paid as compensation to the owner of resumed land, though in s. 5, which is concerned with land the value of which is to be increased by the construction of public works, there is a sub-s. (7) (c) enacting

"The compensation to be paid on any such resumption shall, unless an agreement is entered into under s. 11 of this Act, be the value of the land as assessed by the advisory board or as determined by the Land and Valuation Court on Appeal",

and s. 11 gave the governor power, notwithstanding the resumption of any land and any proceedings consequent thereon, at any time to agree with the owner as to the price to be paid for the land. No doubt, the intention was that in other cases the price recommended by the advisory board should be adopted. Under this scheme no difficulty in carrying out its provisions arose. The value as fixed by the board or, in case of an appeal, that fixed by the Land Court, would be the compensation payable unless an agreement with the owner was reached. The necessary steps preceding resumption would then be: (i) the Minister's request to the board to report; (ii) the report; (iii) proclamation in the Gazette by the governor that he proposes to consider the advisableness of acquiring the land for closer settlement; (iv) resumption; (v) approval by resolution of both Houses of Parliament; (vi) notification of resumption in the Gazette.

On Oct. 5, 1945, while this scheme was still in force, there was published in the

New South Wales Government Gazette, No. 102 of that date, a proclamation by the governor of his intention to consider the advisableness of acquiring the appellants' estates for closer settlement under s. 4 of the Closer Settlement (Amendment) Act, 1907, and on Nov. 8, 1945, before any further steps were taken, the Commonwealth purported to enter into an agreement with the State to provide for the settlement of ex-servicemen and other eligible persons and to bear a portion of the expense. Under the scheme so made, the State was to resume land for such closer settlement—the actual provision, so far as is relevant, is contained in cl. 11 (ii) (b) of the scheme and was in the following terms:

“The State shall acquire compulsorily or by agreement and at a value not exceeding that ruling on Feb. 10, 1942, private land or lands held under lease from the Crown comprised in an approved plan of settlement.”

This agreement was approved and ratified by the Government of New South Wales by the War Service Land Settlement Agreement Act, 1945, passed on Jan. 7, 1946.

Act No. 14 of 1946, of which the short title was “War Service Land Settlement and Closer Settlement (Amendment) Act”, was then enacted by which certain additions and amendments were made to the Closer Settlement (Amendment) Act, 1907. Those material to the present dispute were in the following terms:

“4 (4) (b) The compensation to be paid in respect of any such resumption shall . . . be the value of the land as assessed by an advisory board, or where an appeal has been made in terms of s. 9 of this Act, as determined by the Land and Valuation Court: Provided that where any such resumption is made for the purposes of the scheme contained in the agreement approved and ratified by the War Service Land Settlement Agreement Act, 1945, the value of the land as so assessed or determined shall not exceed the value which would have been so assessed or determined in respect of an identical resumption as at Feb. 10, 1942, excepting the value of any improvements effected on such land since that date.”

In 1948, further amendments were made by inserting a provision under s. 4 (4) (a) of the Act of 1907 permitting the price, in case of purchase, to be increased to a sum not exceeding fifteen per cent. over the price recommended by the advisory board, and in case of resumption to be increased to a like extent, provided that the owner agreed not to claim compensation in excess of the value of the land as assessed by the board but not otherwise.

In the present case, no report had been made to the Minister before the decision in the High Court of *P. J. Magennis Pty., Ltd. v. Commonwealth of Australia* (1), in which it was held that the provisions in the agreement between the Commonwealth and the State providing for the assessment of compensation for resumed property on the basis of 1942 values was contrary to the “just terms” provision of the Commonwealth Constitution, and that the agreement was ultra vires the Commonwealth; that there was, accordingly, no valid agreement on which the State War Service Land Settlement and Closer Service Settlement (Amendment) Act, No. 14 of 1946, could operate and that the State Act was to that extent ineffective. The War Service Land Settlement Agreement Act, 1945, was then repealed by the War Service Land Settlement and Closer Settlement Validation Act, 1950 (Act No. 14 of 1950), which was, by s. 1 (2), to be read and construed with the War Service Land Settlement Act, 1941, and the Closer Settlement Acts and was to be deemed to have commenced on Jan. 7, 1946. The substantial result of these changes was to throw back the State on its own Act of 1941, and to strike out all reference to and dependence on the agreement with the Commonwealth.

The result was that, so far as is material, s. 4 of the Act of 1907 took the following form:

“4. —(1) Where an advisory board reports that any land is suitable to

be acquired for closer settlement, the governor may . . . (b) resume it under this Act. (2) Every . . . resumption shall be subject to approval by resolutions of both Houses of Parliament. (3) Before resuming any land, the governor shall, by proclamation in the Gazette, notify that he proposes to consider the advisableness of acquiring such land for the purposes of closer settlement . . . (4) (a) The price to be paid in respect of any such purchase shall not exceed the price at which an advisory board has recommended the acquisition of the land: Provided that where any such purchase is made for the purpose of s. 3 of the War Service Land Settlement Act, 1941, as amended by subsequent Acts, the price at which an advisory board recommends the acquisition of the land shall not exceed by more than fifteen per centum the price which it would have recommended in respect of an identical purchase as at Feb. 10, 1942, excepting the value of any improvements effected on such land since that date. (b) The compensation to be paid in respect of any such resumption shall, unless an agreement is entered into in terms of s. 11 of this Act, be the value of the land as assessed by an advisory board, or where an appeal has been made in terms of s. 9 of this Act, as determined by the Land and Valuation Court: Provided that where any such resumption is made for the purposes of s. 3 of the War Service Land Settlement Act, 1941, as amended by subsequent Acts, the value of the land as so assessed or determined shall not exceed the value which would have been so assessed or determined in respect of an identical resumption as at Feb. 10, 1942, excepting the value of any improvements effected on such land since that date."

A further change, however, was made by the War Service Land Settlement and Closer Settlement (Amendment) Act, No. 48 of 1948, which amended s. 4 (4) (b) by striking out in the proviso to that paragraph the words from " the value of the land as so assessed or determined ", to the end of the proviso, and inserting in lieu thereof the following:

" the following provisions shall apply: (i) In the case of any such resumption where the owner has agreed not to claim compensation in excess of the value of the land as assessed by an advisory board the value of the land as so assessed shall not exceed by more than fifteen per centum the value which would have been so assessed or determined in respect of an identical resumption as at Feb. 10, 1942, excepting the value of any improvements effected on such land since that date; (ii) In the case of any such resumption other than a resumption where the owner has agreed not to claim compensation in excess of the value of the land as assessed by an advisory board, the value of the land as so assessed or determined shall not exceed the value which would have been so assessed or determined in respect of an identical resumption as at Feb. 10, 1942, excepting the value of any improvements effected on such land since that date."

The Act of 1950 received the royal assent on May 3, 1950. Up to this time the advisory board seems to have made some attempts to come to terms with the appellants and also to have held their hand pending a settlement of the legal position, but on May 4 of that year they valued the lands, subject to an agreed retention of 3,631 acres by Richard Anthony Pye on a freehold basis inclusive of improvements, in accordance with s. 4 (4) (b) (ii) of the Closer Settlement (Amendment) Act, 1907, as amended, as at Feb. 10, 1942, and recommended their resumption accordingly. Thereupon, on Sept. 1, 1950, there was published in the New South Wales Government Gazette, a declaration by the governor that the lands in question were resumed, and that (as the fact was) both Houses of the Parliament of New South Wales had approved of the resumption of these lands.

On Sept. 28, 1950, the appellants lodged notices of appeal to the Land and Valuation Court, against the assessments of value of the resumed land made by

the Closer Settlement Advisory Board. Each of these notices of appeal set out the grounds of appeal as follows:

"1. That the value of the land assessed by the Closer Settlement Advisory Board is too low. 2. That the said advisory board arrived at the value of the land on an incorrect basis. 3. That the said advisory board did not have proper regard to the items going to make up the value of the land in accordance with the relevant Act. 4. That the said advisory board in arriving at the value of the land did not have proper regard to the productive capacity of the land."

At the hearing before the Land and Valuation Court certain evidence was sought to be given, viz.: (i) questions with the object of establishing the value of the land at the date of resumption, and (ii) questions for the purpose of showing that the appellants were not given an opportunity under s. 4 (4) (b) (ii) of agreeing not to claim compensation in excess of the value of the land as assessed by the advisory board. Both these classes of evidence were rejected, the first on the ground that only 1942 values could be considered, and the second on the ground that, under the terms of s. 4 (4) (b) (ii) the owner was not entitled as of right to be given the option of agreeing not to claim compensation in excess of the valuation put on his land by the advisory board, though possibly he might be entitled to an increase limited to fifteen per cent. if he claimed to exercise such an option.

Before SUGERMAN, J., as indeed before the three courts in Australia and before their Lordships, the argument turned on whether the statute in the present form was workable.

On behalf of the appellants, leading counsel forcefully and analytically contended that it was unworkable. The prescribed sequence of events would not, it was said, permit a valuation based on 1942 values. Substantially, the argument ran in following form: (i) The Minister prescribes an area from which the advisory board may select all or any parts and, until they have done so, the land which will be resumed and its owner are both unknown. (ii) Two at least of the duties which the board must perform are to report the estimated value of the land and the price at which it recommends its acquisition and the method of arriving at such price. (iii) At that time the board cannot tell the purpose for which the governor may resume the land except that it is for some form of closer settlement, nor can they tell what portion of the prescribed area will be resumed or who will be the owner affected. (iv) *Prima facie* their duty is to estimate the current value of the land and, until a notification is published in the Gazette under s. 7 (1) and that notification is declared under s. 4 (4) (c) to be for the purpose of s. 3 of the War Service Act, 1941, there is no assurance that the resumption will be for the purpose of that Act and, indeed, even then the resumption is still subject to approval of both Houses of Parliament. (v) The board, therefore, in ignorance of the purpose of the resumption and of what land will be chosen for war settlement or other closer settlement, and accordingly ignorant of who the relevant owner may be, will have no means of deciding what land is to be valued at 1942 values or what owner is affected. (vi) How, then, until resumption has actually taken place, is it possible to determine which land is to be valued at current and which at 1942 values. (vii) There is no provision in the Act for the estimation of value to be deferred or for a second valuation to be made. (viii) Moreover, even if an owner could be ascertained s. 4 (4) (b) (i) and (ii) contemplate an opportunity for the owner to agree before the report is made, whereas, having regard to the ignorance of the court as to the purpose of the resumption, no such opportunity is possible, nor in the particular instance was such an opportunity given.

In face of these arguments, the learned judge put aside the problem as so presented and distinguished between the position of the board and that of the Land and Valuation Court. Let it be assumed, he said, that if the matter had

stopped at the report of the board, the provisions of s. 4 (4) (b) (i) and (ii) are unworkable. But it has not stopped there. There has been an appeal to the Land and Valuation Court against the assessment and that court has jurisdiction to hear it—see s. 9 (1) and (2). The jurisdiction given to that court is called an appeal, but it is, in fact, a re-hearing at which evidence (if relevant) and argument can be presented. When the matter reaches that stage, the resumption has taken place, the owner is known and the purpose is conclusively evidenced by s. 4 (4) (c). The argument against workableness, therefore, falls to the ground, and the court is not faced with any difficulty in applying the sections, nor does any question of evidence arise, inasmuch as the court is compelled to adopt 1942 values. Moreover, although the government may give the owner the opportunity of agreeing not to appeal, it is not obliged to do so, and, in any case, having appealed against the assessment, he has thereby chosen not to accept the assessed value.

At the hearing in the Land and Valuation Court, the judge was requested to state a Case for the opinion of the Supreme Court on a number of questions all directed to the basis on which compensation is payable on the true construction of the Act of 1907. None of these questions dealt specifically with the contention that the owners should have been given an option under s. 4 (4) (b) to elect to accept the value assessed by the board, nor is such a contention to be found in the grounds of appeal, but undoubtedly the question was raised and dealt with by the learned judge in annexure A to the Case Stated. He, however, was of opinion that the wording of s. 4 (4) (b) (ii) applied exactly to the case in issue, that under that sub-section 1942 values plus an increase up to fifteen per cent. of those values was the utmost that could be given, and that, in appealing to the court, the owners were appealing on the basis that their case came under s. 4 (4) (b) (ii) and could only appeal on that basis.

The appellants appealed to the Supreme Court from the judgment of SUGERMAN, J., in the Case Stated. In that court, the judgment was reversed, but on narrow grounds. It is true that the Supreme Court accepted the argument that the board's assessment must take place prior to resumption, and that the taking of 1942 values could only operate after a resumption had been made and made for a purpose which could not be known until a notification of resumption had been published in the Gazette. Accordingly, they say:

"the proviso cannot apply to an advisory board when making an assessment and report, and that board's only duty is, therefore, to assess on the basis of the general law, viz., on the basis of the values current at the date of its report . . . The proviso appears to have been drafted upon the erroneous assumption that the assessment of value by the board comes after, and not before, resumption, whereas the true position is that its only power is to assess before resumption . . . The appellants then submit that when an appeal is brought to the Land and Valuation Court after notification of resumption, that court must put itself in the same position as the board and do what it should have done, viz., fix a value on the basis of the values current at the date of the board's assessment."

On the other hand, they agree with SUGERMAN, J., as to the duties of the Land Valuation Court. Their words are:

"It is at this point that we find ourselves in disagreement with this line of argument. It is true that the matter reaches the Land and Valuation Court under the name of an 'appeal' from the board's assessment, but what the Land and Valuation Court is required to do is to fix the compensation payable on a resumption which has by that time taken place. On this 'appeal' the basis on which the advisory board at some earlier preresumption date assesses the value is irrelevant. The function of the court is to fix the amount payable by way of compensation, and not to inquire whether the board, in making its assessment, went right or wrong. This was clearly

A the position under s. 9 of the Act of 1907 in its original form. Though instituted in name by a 'notice of appeal,' the right given to an owner who was dissatisfied with the board's valuation was to apply to have the 'fair market value of the land and improvements' determined by the court constituted under that Act. An appeal in the strict sense is an inquiry by the appellate court whether the order of the tribunal from which the appeal is brought was correct on the materials which that tribunal had before it. Under this legislation there is now no prior hearing in open court or at all and no record of what materials the board had before it except so far as may appear from its report. The Land and Valuation Court cannot even re-hear the case, since there has been no prior hearing. Its duty is to inquire and determine for itself, regardless of the board's views as reported to the Minister, what is the true value for resumption purposes of the property in question, paying due attention to any statutory directions given in that regard and in the light of the facts then existing."

B So far the Supreme Court agree with SUGERMAN, J., but they disagree with him in the result because, in their view, it is a condition precedent that the owner should be given an opportunity of electing whether he would accept the board's valuation or not. The board, as they construe the section; (i) must give this opportunity before it enters on the task of assessing values; (ii) must make its report before any resumption takes place; and (iii) the 1942 basis of valuation introduced by the proviso is applicable only after a resumption has been made and made for the purpose stated in the proviso.

C Their view is, perhaps, most clearly expressed when they say:

D "It is implicit in the legislative scheme that the owner should first be given an opportunity of deciding whether he will accept the valuation which the board is later to make, since it is not until the board knows whether or not the owner is prepared to accept its assessment as final and abandon his right of 'appeal' in exchange for the possibility of obtaining an additional fifteen per cent. on the 1942 values, that it can know what standard of values it is to apply. Yet this condition precedent to the application of 1942 values cannot be fulfilled, because by the very terms of the Act in which the proviso appears the board must make its assessment before, and not after, resumption, and therefore before the purpose for which the resumption is made can be known."

E In support of this view the Supreme Court pointed out that s. 4 (4) (b) (i) and (ii) form part of a general scheme and must be read together, and that under para. (b) (i) an owner has to be given an opportunity of agreeing to accept the compensation assessed by the advisory board, not that determined by the Land and Valuation Court. As they had already indicated in their opinion, the values given by the advisory board must necessarily be exercised prior to resumption, and until the board knew of the purpose of the resumption no such opportunity could be or was in fact given. The grounds of this decision were, as their Lordships think, accurately expressed by the High Court in the words (87 C.L.R. at p. 480):

F "The value to be stated in the report must be the value at the date of the report. The assessment of that value by the advisory board having necessarily been completed before the resumption, the proviso attempts to achieve an impossibility when it purports, after the resumption has been effected, to give the advisory board a direction as to the manner in which it shall go about a task already performed."

H The Supreme Court, accordingly, held that

"Some of the language used by Parliament is so intractable that it cannot be given any operative effect"

and answered question (2) of the Stated Case, (A) No, (B) Yes, (C) No, i.e., that the compensation payable was the value at the date of resumption.

From that decision an appeal was taken to the High Court which allowed the appeal, and held that compensation was payable on the values taken by the board, i.e., the values on Feb. 10, 1942. They resolved the difficulty posed by the Supreme Court by holding that the proviso is not in the nature of a command to the advisory board prescribing the basis on which it shall perform its duty of valuation, but a notice to the board that, unless it limited its assessment by reference to 1942 values, the assessment would not be effective. Their words are (87 C.L.R. at p. 483):

"the solution which the draftsman adopted was to add a proviso to the sub-section which fixed the owner's compensation at the amount of the value as assessed by the advisory board, and to rely upon the practical effect which this would necessarily have upon the mind of the board when making its valuation. Thus the key to the problem was found in the fact that in actual practice the advisory board would be certain to know the purposes for which the resumption was likely to be made, and a proviso added to s. 4 (4) (b), while not a command obligatory upon the board when valuing, would nevertheless operate as notice to the board at that time that unless it limited its assessment by reference to the 1942 value, (or that value plus fifteen per centum if the owner had agreed not to appeal), the assessment would not be effective to determine the compensation in the event of the resumption being in fact made for the stated purposes."

As to the alleged necessity of giving an opportunity to the owner, they held that this provision was inserted for the benefit of the Crown, so that, if so minded, it might offer an inducement to the owner to refrain from appealing. In their view, it was an option which the Crown might or might not exercise and, if it did not, the owner had no ground of complaint. From that judgment the appellants appeal to their Lordships' Board.

Their Lordships agree with the decision of SUGERMAN, J., and of the High Court, though they do not wholly adopt the grounds of their judgments. That decision depends entirely on the construction of the Closer Settlement Act, as now amended, and the Act in its present form must be read as a whole.

In approaching their decision their Lordships have borne in mind the warning contained in *Mayor & St. Mellons Rural District Council v. Newport Corpn.* (2), that the duty of the court is limited to interpreting the words used by the legislature and that it has no power to fill in any gaps disclosed, but in the meaning which they have put on the Act as now framed their Lordships have refrained from adopting any such course and have confined themselves strictly to interpretation.

In reaching a conclusion as to the meaning to be placed on an Act of Parliament, it must always be remembered, as LORD DUNEDIN stated in *Murray v. Inland Revenue Comrs.* (3) ([1918] A.C. at p. 553):

"It is our duty to make what we can of statutes, knowing that they are meant to be operative, and not inept, and nothing short of impossibility should in my judgment allow a judge to declare a statute unworkable."

A similar view was expressed by VISCOUNT SIMON, L.C., in *Nokes v. Doncaster Amalgamated Collieries, Ltd.* (4) ([1940] 3 All E.R. at p. 554), in the words:

"... if the choice is between two interpretations the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility, and should rather accept the bolder construction, based on the view that Parliament would legislate only for the purpose of bringing about an effective result."

With these principles in mind their Lordships approach the interpretation of the statute which in the hearing before them has been elaborately analysed.

The gravamen of the charge that it is unworkable lies in two contentions already referred to, viz.: (i) that the compensation is to be determined by the

advisory board in its report before the purpose of the resumption is finally determined by the governor and confirmed by Parliament; and (ii) the owner must be given an opportunity of electing to accept the value in the report or rejecting it and no such opportunity can be or has been given in the present case.

The second of these objections may, in their Lordships' opinion, be shortly dealt with. They agree that, where the Minister informs the advisory board that his intention is to resume the land for closer settlement on behalf of those who have been engaged on war service, that body must make the valuation on the basis of the prices which prevailed on Feb. 10, 1942, and before issuing their report must give the owner the opportunity of electing whether he will accept or refuse the figure arrived at, but, as has been already indicated in the present instance, a contention that they failed to do so forms no part of the Case Stated by the Land and Valuation Court, and, even if it did, the appellants, having proceeded to that court, cannot now retain the right to contend that the option given by s. 4 (4) (b) (ii) is still open for them to exercise.

The first contention, however, has still to be considered. Technically, it presents some difficulty, but, in practice, no actual difficulty has been encountered.

In the present case, the advisory board obviously knew of the intention of the Minister and assessed the compensation accordingly, and the requisite subsequent steps were taken in due course. Except for the contention that the board were obliged to take current values, no criticism of the procedure gives rise to complaint. In their Lordships' view, the argument that the board could not know the purpose of the resumption, until it had finally been effected, is not justified. The Minister can have a purpose which he can intimate to the board so soon as he makes his request under s. 3 (1) of the Act. No doubt it is conceivable that he or the governor might change their intention, but in such a case the proper course, if it were intended to resume the land for other closer settlement purposes, would be to withdraw the original request and resubmit the matter to the advisory board.

It is true that the Minister prescribes the general area from which a choice of the land to be resumed is made, but the advisory board are the body by whom both the actual land to be resumed and its value are to be determined. They, therefore, (i) know when they are making their report the purpose for which the land is to be resumed and the owner, (ii) can make their assessment of value on that basis, and (iii) can give the owner his option under s. 4 (4) (b) (ii). The objection is theoretical only. In fact, the advisory board do, and in this case did, know both the purposes of the resumption and the owners concerned.

But it is contended that the wording of the proviso to s. 4 (4) (b) " Provided that where any such resumption is made " shows that the 1942 value can only be applied after resumption has taken place, and it is urged that this expression should be read as equivalent to " where any such resumption has been made. " In their Lordships' opinion, no such meaning need be, or should be, ascribed to it. The words, in their view, are descriptive of the purpose of resumption and have no temporal connotation. It is not " has been made ", although the High Court in one passage so transcribe it, nor is it " in course of being made " as the respondent appears at one time to have argued. The simplest and most accurate paraphrase, to their Lordships' minds, is to substitute the words

" in a case where the resumption is made for the purposes of s. 3 of the War Service Land Settlement Act, 1941, as amended, "

i.e., it indicates the object for which the resumption is made, and does not mean that the value is not to be assessed until after resumption has taken place.

It follows that the wording of the proviso gives no support to the contention that the value of the land to be resumed cannot be assessed until after the resumption is accomplished. Nor does any difficulty arise from the fact that the approbation of the governor and of Parliament is required. The Minister represents the government, and the governor acts as Governor in Council:

there is, consequently, no dichotomy between the Minister who requires a report and the governor who resumes. Parliament in its turn will be presented with a scheme for resumption for the purpose of the War Service Land Settlement Act, 1941, and it will be for that body to approve or disapprove that scheme.

For these reasons, their Lordships are of opinion that the case was rightly determined by the High Court. The grounds of their decision leaves it unnecessary to pronounce on the view held by SUGERMAN, J., (i) that, whatever the value assessed by the advisory board, it is the duty of the Land and Valuation Court to embark on a fresh inquiry as to values in no way trammelled by the value assessed by the advisory board, or (ii) that the facts known when an appeal is made entitles that court to adopt a different basis of valuation from that adopted by the board. If that were the only ground on which a 1942 valuation could be supported, then, if the advisory board were under a duty or entitled to insert current values in their report, the owner who had been given the advantage of such a valuation might well avoid any appeal, and in such a case it is difficult to envisage any course which the government could take, except under the power given by s. 6 (2) to cancel the proclamation made under s. 4 (3).

It will be observed that their Lordships have placed no reliance on the provisions of s. 3 (1) (f) of the Closer Settlement (Amendment) Act, 1907. In their view, that paragraph enables the Minister to request a report on matters additional to paras. (a) to (e), but does not confer a power to omit or change the requirements of those paragraphs. Nor do their Lordships think that, on its true interpretation, the Act provides for the making of two or more reports or for the alteration or amendment of one already made.

For the reasons which they have set out above, however, their Lordships are of opinion that the case has been rightly decided by the High Court, and will humbly advise Her Majesty that the appeal be dismissed. The appellants must pay the costs incurred by the respondent before their Lordships' Board.

Appeal dismissed.

Solicitors: *Waterhouse & Co.* (for the appellants); *Light & Fulton* (for the respondents).
[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

FOX v. FOX.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Karminski, J.), November 3, 1954.]

Justices—Domestic proceedings—Procedure—Party appearing in person and giving evidence—Unable effectively to cross-examine—Party's case not put to witnesses on other side—Duty of court—Magistrates' Courts Act, 1952 (c. 55), s. 61.

By s. 61 of the Magistrates' Courts Act, 1952, where in any domestic proceedings it appears that a party who is not legally represented is unable effectively to examine or cross-examine a witness, "the court shall ascertain from that party what are the matters about which the witness may be able to depose or on which the witness ought to be cross-examined . . . and shall put . . . to the witness such questions in the interests of that party as may appear to the court to be proper".

At the hearing of a complaint by the wife under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, that the husband had deserted her, the wife was legally represented but the husband was not. The wife gave evidence that the husband had left the flat where they were living together in August, 1953, that he had returned in April, 1954, and left again on July 17, 1954, taking with him two-thirds of the furniture. The husband asked only one question of the wife in cross-examination; he then himself gave evidence to the effect that he had returned in April, 1954, on condition that they moved to another flat, but that when he had found one she refused to move with him, and that

he wanted her back. These matters were not put to the wife. The court found the wife's case proved and made a maintenance order in her favour.

On appeal by the husband,

HELD: in the circumstances, it was the bounden duty of the court, under the Magistrates' Courts Act, 1952, s. 61, to put the husband's case to the wife, to see what her answers were, and then to adjudge the case on all the information before the court; the present case had not, therefore, been duly tried, and the order for maintenance must be set aside and the case must be remitted for re-hearing by a fresh panel of justices.

FOR THE MAGISTRATES' COURTS ACT, 1952, s. 61, see 32 HALSBURY'S STATUTES (2nd Edn.) 469.

APPEAL by the husband against an order dated Sept. 2, 1954, of the Chelsea Domestic Proceedings Court, presided over by one of the metropolitan magistrates.

The parties were married on Oct. 1, 1950, and there was one child of the marriage born in 1951. On Sept. 2, 1954, the wife's complaint that her husband had deserted her was heard by the Chelsea Domestic Proceedings Court. The wife, who was represented by a solicitor, stated in evidence, *inter alia*, that the husband left her in August, 1953, and went back to his mother for about eight months, returning to her in April, 1954, and that on July 17, 1954, he had taken his personal belongings and two-thirds of her furniture away in a lorry leaving her a settee, a table and two chairs but no bed, and that she had not seen him since. The husband, who was not legally represented, asked one question of the wife in cross-examination to which she replied that the furniture which the husband took had been paid for. The wife's step-father then gave evidence that he and his wife (the wife's mother) lived in the same house as the wife. At the conclusion of the wife's case the husband gave evidence and stated, *inter alia*:

"On July 17, 1954, I asked my wife to come to another flat. She refused to come. I did take some of the furniture away. I told my wife she could come. There was a flat there for her. I want her back. I went back last time on condition that we should find another flat. When I found it she wouldn't come."

In cross-examination, he stated:

"The address I gave is the flat I got for my wife. I asked my wife to come there. I agree I didn't ask her about the flat. If she had come with me she would have had a bed to sleep on. I told my wife I was going to move the furniture. I didn't merely say I was going."

The justices found the case proved giving as their reasons:

"The court was satisfied that the husband intended to bring the marriage to an end. His evidence that he wanted his wife to continue to live with him was not accepted, and was felt to be inconsistent with the facts which were proved that he had left her on a previous occasion, and that on July 17 he left again, taking with him his personal belongings and two-thirds of the furniture."

The husband appealed.

Leonard Halpern for the husband.

D. R. Ellison for the wife.

LORD MERRIMAN, P.: The short point in the present case is, in my opinion, of vital importance. The wife was represented by a solicitor, the husband was not represented at all. In those circumstances s. 61 of the Magistrates' Courts Act, 1952, comes into play. It reads:

"Where in any domestic proceedings . . . it appears to a magistrates' court that any party to the proceedings who is not legally represented is unable effectively to examine or cross-examine a witness, the court shall ascertain from that party what are the matters about which the witness may be able to depose or on which the witness ought to be cross-examined, as

the case may be, and shall put, or cause to be put, to the witness such questions in the interests of that party as may appear to the court to be proper."

Without going into the background or expressing any opinion on the merits, the husband's case first emerged after the wife had left the witness-box, and had called one other witness whose evidence did not add much to her own. It is common ground that there had been a parting between August, 1953, and April, 1954, when the husband had gone to his parents, leaving the wife in the matrimonial home, which at or up to that time had been with her mother and step-father, and that there was a reconciliation in April, 1954. It is part of the husband's case, that when he came back (in April, 1954) it was a condition that he was to find a flat, that is to say, a flat which was not at either of the respective rival parents' homes. I express no opinion, let it be plainly understood, whether the husband's case is a true case or not. It is also common ground that furniture was being obtained for the spouses on the hire-purchase system. I gather that it is common ground (but again I am not saying that the facts are so) that a good deal of the furniture had already been paid for by the wife, in part at any rate, out of money given to her weekly by the husband; but that some of it, including, apparently, the bed, was still not fully paid for. The justices have found that the husband took away with him approximately two-thirds of the furniture, leaving, according to the wife's own case, the remaining third, which did not even include a bed, though it is fair to say that it did include a settee.

The husband's case was that, although he had not previously consulted her about the particular flat which he did take, he did ask her to go with him to that flat, and she refused to go. Then, in court, he repeated that he had told his wife that she could come, there was a flat for her, and he stated that he wanted her back. [His LORDSHIP referred to the justices' reasons and continued:] Counsel for the wife who has dealt with this case with his customary frankness, acknowledges, quite properly, that the reasoning of the justices may be subject to the qualifications which are given in the husband's own evidence; for it may be that the significance of taking two-thirds of the furniture, including the bed, instead of telling heavily against the husband, as it has with the justices, may support his story, or it may lead to an inference, which might legitimately be derived from it, that his taking the furniture which had been paid for and which he would, therefore, be entitled to move, with the bed, so far from showing an intention of leaving the wife, might be with the intention of inducing her to go with him. Moreover, to decide the case against him on the footing that he had left her on a previous occasion, in view of the husband's evidence appears to ignore altogether the consideration that it was his case that he had come back in April, 1954, on the express condition that he should find a flat, that he had done so and had asked his wife to go with him, and that she would not. It is clear that with that issue, at any rate, the justices' reasons do not deal at all. The difficulty in this trial is perfectly plain. The moment the husband had developed that story, I go so far as to say, it was the bounden duty of the court, through the chairman, to put that case to the wife and to see what her answers to it were, and then to adjudge the case on all the information before the court. I regret to have to say that in my opinion the present case has not been tried, and it is inevitable that the order must be set aside. The appeal must be allowed, the order set aside, and the case referred to a fresh panel of the Chelsea Domestic Proceedings Court. When I say a fresh panel I am glad to know that there is no difficulty about a reconstitution of the court, because all the metropolitan magistrates have jurisdiction anywhere within the metropolis, so that there will be no difficulty in getting another chairman, and as regards the other members of the court different members must sit, and the case be heard afresh.

KARMINSKI, J.: I agree.

Appeal allowed.

Solicitors: *Harry Rose* (for the husband); *Samuel Coleman* (for the wife).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

WOOLLETT v. MINISTER OF AGRICULTURE AND FISHERIES.

[COURT OF APPEAL (Denning, Jenkins and Morris, L.JJ.), October 15, 18, 19, November 9, 1954.]

Agricultural Land Tribunal—Appointment of members—Two nominated members appointed by civil servant in Ministry of Agriculture employed as secretary of tribunal—Validity of proceedings—Agriculture Act, 1947 (c. 48), sched. IX, para. 15, para. 20 (2).

Agriculture—Compulsory acquisition of agricultural land—Proposed certificate for retention of land in the interests of agricultural production—Reference to agricultural land tribunal—"Defect in the appointment" of tribunal—Minister's certificate issued—Application to court not within six weeks of notice of certificate—Acquisition of Land (Authorisation Procedure) Act, 1946 (c. 49), s. 1, sched. I, para. 16—Agriculture Act, 1947 (c. 48), s. 85, s. 92, sched. IX, para. 20 (2).

The plaintiff was the owner of a plot of agricultural land of about three acres which had been requisitioned by the Minister of Agriculture in 1941. On June 16, 1951, the Minister with a view to purchasing the land compulsorily under the provisions of the Agriculture Act, 1947, gave notice in writing to the plaintiff that under s. 85 (2) of the Act he proposed to issue a certificate certifying that he was satisfied that it was necessary, for the purpose of enabling him to secure and maintain the full and efficient use of the land for agriculture, that possession of the land should be retained by him or on his behalf. In accordance with s. 85 (5) of the Act the plaintiff required that the Minister's proposal should be referred to the agricultural land tribunal. On Sept. 24, 1951, the reference was heard by the tribunal, which consisted of the chairman and two nominated members, one of whom was from the panel nominated by the National Farmers' Union and the other from the panel nominated by the Central Landowners' Association, these being the two bodies which appeared to the Minister to represent the interests of farmers and the interests of owners of agricultural land, respectively, within para. 15 of sched. IX to the Act of 1947. The two nominated members, who were required by para. 15 of sched. IX to be appointed by the Minister, were requested to act by C., the secretary of the tribunal, in consultation with the chairman of the tribunal. C. was a civil servant employed as an assistant land commissioner in the Ministry of Agriculture, and in 1950 he had been asked to take over, in addition to his usual duties, the office of secretary of the tribunal from S., another official of the Ministry. C. received no specific instructions in regard to his duties as secretary of the tribunal, and neither the Minister nor anyone acting on behalf of the Minister had expressly delegated to C. the Minister's power of appointing the nominated members of the tribunal, but it had been the practice of S. to find two persons from those whose names were on the panels to act as members, and C., having been asked by his superior officer in the Ministry "to carry on in the same way as" S., and having ascertained from S. what his duties were, continued to make the arrangements. The letters of appointment sent out by C. were on paper headed with the name and address of the tribunal and signed by C. with the word "secretary" after his signature. On Oct. 12, 1951, the tribunal issued its report confirming the Minister's proposal in regard to the plaintiff's land. On Sept. 30, 1952, a certificate was issued by the Minister and on Oct. 6, 1952, notice of the certificate was served on the plaintiff. The plaintiff did not apply to the court to quash the certificate within the six weeks after service allowed by para. 15 of sched. I to the Acquisition of Land (Authorisation Procedure)

Act, 1946. On Oct. 15, 1953, a notice to treat was served on the plaintiff. On Nov. 11, 1953, the plaintiff commenced an action for declarations that the certificate of Sept. 30, 1952, and the notice to treat were void and of no effect.

HELD: (i) if C. was not authorised to appoint the two members of the tribunal who by the Act of 1947 were to be nominated by the Minister, or if C. failed to do so effectively, either because he purported to act in the capacity of secretary to the tribunal instead of acting on the Minister's behalf or for other reasons, there was a defect in the appointments within para. 20 (2) of sched. IX to the Act of 1947, and the acts of the tribunal were validated by that paragraph.

(ii) the plaintiff's action, not being an application within the time allowed by para. 15 of Part IV of sched. I to the Acquisition of Land (Authorisation Procedure) Act, 1946, was barred by para. 16 of that schedule as applied to s. 85 of the Agriculture Act, 1947, by s. 92 (2) of the Act of 1947; para. 16 imposed an absolute bar to litigation including litigation designed to establish the contention that the certificate in the present case was a nullity.

Per DENNING, L.J.: there was a defect in the appointment of the two nominated members of the tribunal because the Minister did not specifically authorise C. to make the appointment on the Minister's behalf and C. did not purport to do so (see p. 535, letter H, p. 536, letter A, post).

Per JENKINS, L.J.: C. must be taken to have been effectively authorised to appoint the two nominated members of the tribunal on behalf of the Minister, and pursuant to that authority he appointed them, in effect, within the meaning of para. 15 of sched. IX to the Act of 1947 (see p. 539, letter A, post).

Per MORRIS, L.J.: C. was authorised to act on behalf of the Minister in appointing the nominated members, but C. exercised the delegated authority in an erroneous manner (see p. 551, letters A and C, post).

Decision of STABLE, J. ([1954] 2 All E.R. 776), reversed.

EDITORIAL NOTE. Paragraph 15 of sched. IX to the Agriculture Act, 1947, has been replaced by the Agriculture (Miscellaneous Provisions) Act, 1954, sched. 1, which provides that the two members of an agricultural land tribunal other than the chairman shall be nominated for each reference by the chairman from panels drawn up by the Lord Chancellor: see s. 4 of the Act of 1954, HALSBURY'S STATUTES (2nd Edn.), Interim Service, 145, 146, 155. These enactments were brought into force on Sept. 29, 1954, by the Agriculture (Miscellaneous Provisions) Act, 1954 (Commencement) Order, 1954 (S.I. 1954 No. 1137).

AS TO THE CONSTITUTION OF AGRICULTURAL LAND TRIBUNALS AND THE RETENTION OF REQUISITIONED AGRICULTURAL LAND, see 1 HALSBURY'S LAWS (3rd Edn.) 492, para. 961, and 357, para. 735.

AS TO THE DELEGATION OF MINISTERIAL FUNCTIONS, see 7 HALSBURY'S LAWS (3rd Edn.) 390, para. 824.

FOR THE AGRICULTURE ACT, 1947, s. 85, s. 99, and sched. IX, paras. 15 and 20 (2), see 1 HALSBURY'S STATUTES (2nd Edn.) 198, 214, 226, 227.

FOR THE ACQUISITION OF LAND (AUTHORISATION PROCEDURE) ACT, 1946, s. 1 and sched. I, paras. 15 and 16, see 3 HALSBURY'S STATUTES (2nd Edn.) 1065, 1079, 1080.

Cases referred to:

- (1) *Carltona, Ltd. v. Works Comrs.*, [1943] 2 All E.R. 560; 2nd Digest Supp.
- (2) *Lewisham Metropolitan Borough & Town Clerk v. Roberts*, [1949] 1 All E.R. 815; [1949] 2 K.B. 608; 113 J.P. 260; sub nom. *Roberts v. Lewisham Borough Council*, [1949] L.J.R. 1318; 2nd Digest Supp.
- (3) *Armory v. Delamirie*, (1722), 1 Stra. 505; 93 E.R. 664; 3 Digest 64, 75.

(4) *Keighley, Maxsted & Co. v. Durant*, [1901] A.C. 240; 70 L.J.K.B. 662; 84 L.T. 777; 1 Digest 400, 1009.

(5) *Martin-Smith v. Smale*, [1954] 1 All E.R. 237.

A APPEAL by the defendant, the Minister of Agriculture and Fisheries, from an order of STABLE, J., dated July 21, 1954, and reported [1954] 2 All E.R. 776, in an action for declarations that a certificate issued by the Minister on Sept. 30, 1952, and a notice to treat, dated Oct. 15, 1953, were null and void. The facts are set out in the judgment of DENNING, L.J.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.) and B. S. Wingate-Saul for the Minister.

A. P. Marshall, Q.C., and G. C. Dare for the plaintiff.

Cur. adv. vult.

B Nov. 9. The following judgments were read.

DENNING, L.J.: At Woodham Ferrers in Essex before the war there were two building estates which had been laid out in building plots but had not been developed. Much of the land was unused in 1939 when the war broke out and it was essential to turn it to productive use. Therefore, the Minister of Agriculture on July 1, 1941, requisitioned it. In all he requisitioned 217 acres, much of it being in small plots owned by different owners. He told the owners that possession could be retained by him (the Minister) for the duration of the war and three years afterwards. One of the owners was a Mrs. Morss, who owned a bungalow called "Claremont" and a plot of nearly four acres next to it. The Minister took possession of the four acres and paid a small annual sum for it. In June, 1947, whilst the land was still under requisition Mrs. Woollett, the plaintiff, bought the bungalow, together with the four acres. Her idea was that she and her husband would work up a small-holding. They went into occupation of the bungalow but they could not at that time take possession of the four acres as it was still under requisition. On Sept. 2, 1949, the Minister told all the owners that, as a matter of general principle, it had been decided by the Minister that requisitioned land would be released as soon as possible after Michaelmas, 1950; but in the plaintiff's case the Minister did release some of the land earlier. On Oct. 11, 1949, the Minister released to the plaintiff one acre of her land and told her that the remainder (three acres) would probably be relinquished in December, 1950. The plaintiff and her husband thereupon set to work getting ready for the time when they would have their three acres handed over to them. They bought a rotary hoe and various other implements, built an agricultural store and cultivator shed, laid a roadway, and so forth. Six months later, however, the Minister changed his mind about releasing the land to the various owners. On June 16, 1950, he put a public notice in the local paper saying that he proposed to retain it: and on July 15, 1950, he sent a statutory notice to the plaintiff, among others, saying that he proposed to give a certificate with a view to acquiring her land by compulsory purchase but giving her an opportunity of making representations on the matter. On July 25, 1950, the plaintiff and others made written representations objecting to the compulsory purchase of their land, and followed it up by verbal representations at a hearing before the provincial land commissioner. The Minister decided, however, to proceed with the purchase. On June 15, 1951, he gave another statutory notice saying that, having considered the representations made by the plaintiff, he now proposed to give the statutory certificate, but he notified her that she could appeal to the agricultural land tribunal. The plaintiff promptly gave notice of appeal. So did several other owners. In all twenty-five owners of plots appealed. The appeals came on for hearing at Chelmsford on Sept. 24, 1951, before a tribunal composed of Sir Cecil Oakes, Mr. Elliott and Mr. Soper. The hearing lasted a full day. The tribunal inspected the property on Oct. 6, 1951, and on Oct. 12, 1951,

issued their decision. In the result, out of the twenty-five appeals, six were allowed, and in those cases the land was returned to the owners. Nineteen appeals were dismissed. The plaintiff was one of those who had their appeals dismissed. The tribunal decided that the statutory conditions had been fulfilled and confirmed the proposal of the Minister, but they gave no reasons for their decision. They made a bald report confirming the Minister's proposal.

A year later, on Sept. 30, 1952, the Minister gave the statutory certificate by which he certified that he was

"satisfied that it is necessary for the purpose of enabling him to secure or maintain the full and efficient use for agriculture of the said land that possession of the said land should be retained by him or on his behalf."

By virtue of this certificate, under the Agriculture Act, 1947, s. 85 (2), the Minister was empowered to purchase the land compulsorily. On Oct. 6, 1952, the Minister duly gave notice to the plaintiff that he had issued his certificate, but he did not take any action on it for a long time. We were told that in some cases he has released land even after issuing a certificate: but he did not release the three acres belonging to the plaintiff. The Minister let another year slip by until, on Oct. 15, 1953, he served notice to treat on the plaintiff. Thereupon the plaintiff, on Nov. 4, 1953, asked to see the report which the tribunal made to the Minister. It is a report which, by statute, the plaintiff was entitled to see*: but, as it turned out, it told her nothing. It gave no reasons to justify the decision to take her land, but was a bare confirmation of the Minister's proposal. A little later, on Nov. 11, 1953, the plaintiff's solicitors issued a writ claiming that the certificate was void and of no effect, and also that the notice to treat was likewise void.

What I desire to emphasise at the outset is that this court has nothing to do with the merits or demerits of the Minister's action. These humble folk, the plaintiff and her husband, had bought this small piece of land (it was only three acres) intending to work up a small-holding on which to live. It does seem strange that a government department should compulsorily take it from them when they were ready and anxious themselves to put it to food production. All the more so when it is remembered that the government department had led them to believe that the land would be released to them, and they had expended much money on the faith of that belief. There may be good reasons for the proposal of the Minister and for the decision of the tribunal confirming it, but I must say that it is a pity that the tribunal gave no reasons. It may be that the tribunal were not bound to give reasons, although I am not so sure about this. The statute gives to the plaintiff a right to see their report, and what is the point of her seeing it if it tells her nothing when she gets it. If the tribunal had given reasons, they might have done something to remove the sense of grievance which the plaintiff must inevitably feel, and to allay the disquiet which must disturb the public conscience because of what has happened. Moreover, if they had given reasons, these courts could have inquired into their validity in point of law: but as it is, with no reasons given, no such inquiry is permissible. This court is precluded from considering the case on its merits. It has, perforce, only to consider it on technical grounds; for the only points which counsel have been able to raise against these proceedings are, I fear, technicalities. I do not say that they are trivial, only that they are technical.

Let me explain what the points are. First, it is said that the tribunal was not validly constituted, because two of the people who sat on it had never been appointed to it at all. Under the Agriculture Act, 1947, sched. IX†, an agricultural

* See the Agriculture Act, 1947, s. 74 (1): 1 HALSBURY'S STATUTES (2nd Edn.) 190.

† See paras. 13 (1), 14 (1), and 15 of sched. IX to the Act: 1 HALSBURY'S STATUTES (2nd Edn.) 226.

land tribunal must consist of a chairman to be appointed by the Lord Chancellor, and two other members to be appointed by the Minister of Agriculture. Both the Lord Chancellor and the Minister are, however, limited in their choice of men. The Lord Chancellor must appoint as chairman a barrister or solicitor of not less than seven years' standing. The Minister must appoint one member from a panel nominated by the Central Landowners' Association and the other member from a panel nominated by the National Farmers' Union. The three men who sat on the tribunal did, in fact, have the necessary qualifications. The chairman, Sir Cecil Oakes, was a solicitor of more than seven years' standing. Mr. C. P. Elliott was one of the panel nominated by the Central Landowners' Association. Mr. W. J. Soper was one of the panel nominated by the National Farmers' Union. No one suggests that they were not suitable and proper men to sit on the tribunal, but it is said that the two nominated members were appointed, not by the Minister himself, but only by the chairman or the secretary of the tribunal.

It happened in this way. There was in the Ministry of Agriculture a civil servant named Mr. Comins, who held the position of land service assistant in the office of the provincial land commissioner at Cambridge. In addition to his work as land service assistant, he was in 1950 attached to the agricultural land tribunal in the capacity of secretary of the tribunal. This appointment did not carry any additional salary. It was just part of his work additional to his other duties. He did his work as secretary in the same office as he did his work as a servant of the Ministry. When he took over the work, his predecessor, Mr. Smithies, handed him two lists of names constituting the panels from which the nominated members were to be chosen: and Mr. Comins carried on the same procedure as Mr. Smithies. The procedure was this. When a case was to be heard, he selected two names, one from each panel, and telephoned to see if those persons could manage to sit on a particular date, and when he found two who could, he wrote confirming the arrangement. He did not, as a rule, consult the chairman before selecting the names, but he did on this particular occasion because it was an important case. He told the chairman that he proposed to ask Mr. Elliott. The chairman approved. Thereupon, Mr. Comins orally arranged with Mr. Elliott to sit on the proposed date. The same happened with Mr. Soper. After the oral arrangements were made Mr. Comins wrote letters to each of them, of which the following to Mr. Soper will serve as an example:

"Agricultural Land Tribunal, Eastern Province. Aug. 8, 1951. Dear Sir, I wish to confirm that you have kindly agreed to sit on the tribunal to be held at Chelmsford on Sept. 24. The case to be heard concerns land at Woodham Ferrers which the Minister proposes to purchase, under s. 85 of the Agriculture Act, 1947. Further details and copies of relevant documents will be sent to you in due course. Yours faithfully . . ."

It is signed "P. R. Comins, secretary."

In pursuance of these arrangements, the chairman (Sir Cecil Oakes), Mr. Elliott and Mr. Soper, sat at Chelmsford on Sept. 24, 1951. At the beginning of the proceedings the solicitor for the Minister explained that the chairman was a distinguished member of the legal profession, appointed by the Lord Chancellor, and that the other two members were taken from panels nominated by the National Farmers' Union and the Central Landowners' Association respectively. Whereupon the Reverend Eric Marsh, the vicar of Over, Cambridgeshire, who was present, rose and said:

"Would the solicitor for the Ministry please say who appointed the nominated members?"

No reply was forthcoming, and Mr. Marsh turned to the body of the hall and said:

" I will tell you. The Ministry of Agriculture appoints the two nominated members."

Mr. Marsh's purpose—as he frankly admitted—was to show that the Minister, who was a party to the dispute, had appointed two out of the three members. Mr. Marsh was, of course, in a sense on firm ground, because the Act of 1947 expressly says that the two members are to be appointed by the Minister, but his words carried the suggestion that the tribunal was weighted in favour of the Minister. In order to refute that suggestion the chairman intervened with this observation: " Mr. Marsh, you need not concern yourself. I myself selected the two members ", or words to that effect. In making that observation the chairman was, apparently, in his own mind, drawing a distinction between " selecting " the two members and " appointing " them. He was emphasising that it was he who had selected them, although he had not appointed them. I do not think that his hearers would appreciate that nice distinction, unless he explained it to them, which he did not do. From his words they would think that the chairman had himself appointed the two members. At any rate, both Mr. Woollett and Mr. Marsh gained that impression. And from those words springs the principal complaint in this action, because it is said that, if the chairman appointed the other two members, or, indeed, if the secretary of the tribunal appointed them, they were never appointed at all, because under the Act neither the chairman nor the secretary had any power to appoint them, and only the Minister had that power.

It was, I think, unfortunate that the chairman gave those present the impression that he himself had appointed the other two members of the tribunal. It is true that he was consulted about them, but he did not appoint them. If he did not, who did? Did Mr. Comins, the secretary, appoint them? I doubt it. I do not know that anyone really appointed them. All that happened was that Mr. Comins arranged for these two members to sit. Mr. Comins at that time filled the dual role of land service assistant to the Ministry, and secretary to the tribunal. It was he who made the arrangements, but in what capacity did he make them? No one can say with any certainty. He could not even say himself. He was asked in cross-examination:

" In this choice and getting the people to sit as additional members, you were acting as the secretary? A. -I could not say that. I probably should not think who I was at the time; that would come automatically."

It is to be noted that, when he wrote the confirming letter, he wrote as secretary of the tribunal. In these circumstances it seems to me that Mr. Comins was acting much as a clerk to the justices does, who arranges for the magistrates to sit, but does not appoint them. He was acting in the comparatively humble capacity of secretary or clerk, and nothing else.

In support of this view I would point out that Mr. Comins did not have any express authority from the Minister to make appointments on his behalf. He could produce none, and Mr. Smithies, his predecessor, produced none. Indeed, Mr. Smithies was not called. The Attorney-General invoked the maxim that everything is presumed to have been rightly done, but I am not prepared to apply the maxim in this case. Quite enough took place here to call for inquiry. The public statement of the chairman threw the whole matter open for investigation. The Minister acknowledged this by calling evidence before the judge and the evidence fell far short of showing any authority in Mr. Comins to make the appointments. In the result I do not think that anyone in authority ever appointed the two nominated members to sit. The simple fact is that they were on the panels and the secretary of the tribunal arranged for them to sit without anyone appointing them as the Act required.* This was an irregularity which is

* See para. 15 of sched. IX to the Act of 1947.

regrettable. These tribunals deal with matters which are just as important to the people of this land as many of the matters which come before the courts of law. Often they are more important. These tribunals pronounce on the imperious act of compulsorily acquiring a man's property in which he has invested all his capital, or of dispossessing a farmer from the land which he and his family have tilled for generations, and until recently they did it with complete finality. There is now an appeal on questions of law to the High Court.* Yet the members of the tribunals undertake these high tasks without the sanction of a judicial oath and without so much as a formal appointment: and they can decide by a majority vote in which the two nominated members can outvote the legal chairman.

A I am quite aware that the Act does not require any formalities and that the Minister can act by any servant in his department, at any rate so long as the servant uses the magic words "I am directed by the Minister" to do it: see *Carltona, Ltd. v. Works Comrs.* (1) and *Lewisham Metropolitan Borough & Town Clerk v. Roberts* (2); but in this case not even those words were used, and, in the absence of them, the procedure was irregular, to say the least about it. There is, I think, some virtue in expecting a civil servant, when duly authorised, to use the words "I am directed by the Minister" and so forth: for that should bring home to him the significance of what he is doing and should make him realise that if he does anything wrong he will be implicating the Minister. The words may have some legal significance too. Supposing, for instance, that in this case Mr. Comins had written a letter of appointment professing to act on behalf of the Minister, then, even though Mr. Comins had no authority, in fact, to write the letter, the Minister could have ratified his action. Indeed, the statutory certificate would have amounted to a ratification, because the Minister could not have given the certificate except on the footing that the tribunal had been validly appointed. Ratification, however, is not admissible in law unless the agent professed to act on behalf of the principal: see the notes on *Armory v. Delamirie* (3), in SMITH'S LEADING CASES, 11th edn., vol. 1, p. 356, et seq., and *Keighley, Marsted & Co. v. Durant* (4). So here, without some words by Mr. Comins professing to act on behalf of the Minister, there was nothing capable of ratification.

D How, then, does the matter stand? The root mistake was that no one was authorised to write a letter of appointment on the Minister's behalf and no one did so. If a letter had been written on the Minister's behalf, everyone would have known where they stood. Mr. Marsh's question at the hearing would not have remained unanswered, and the chairman would not have made his unfortunate intervention. The absence of writing would, no doubt, only be an informality, but the absence of any actual or professed authority to appoint on behalf of the Minister was, I think, more than an informality. It was a defect which is fatal unless it is cured by the other provisions of the Agriculture Act, 1947.

This brings me to sched. IX, para. 20 (2), which reads:

G "All acts done at any meeting of any such body shall, notwithstanding that it is afterwards discovered that there was a defect in the appointment or disqualification of a person purporting to be a member thereof, be as valid as if that defect had not existed."

H It seems to me that that paragraph exactly covers this case. The absence of authority in Mr. Comins was certainly a defect, but it was no more than a defect. It is not as if Mr. Comins was a mere meddler or intruder. He was a civil servant who was doing a task which it was very proper for a civil servant to do, namely, to discuss with the chairman who would be the suitable people to appoint from the panel, and then to ask them to sit. The only trouble was that the Minister

* See the Agriculture (Miscellaneous Provisions) Act, 1954, s. 6: HALSBURY'S STATUTES (2nd Edn.), Interim Service (1954) 147.

did not specifically authorise Mr. Comins to make the appointment on the Minister's behalf and Mr. Comins did not purport to do so. It is not as if the wrong men were appointed to sit. The right men were appointed but mistakes were made in the method of their appointment. That was a defect, but no more than a defect, and it was cured by the terms of para. 20 (2) of sched. IX to the Act. Even if the chairman himself had appointed the two members, I should consider that, so long as they came from the panels, that would only be a defect which would be cured by the Act. I cannot help remarking that it would be most unfortunate if we came to any other conclusion. The members of the land tribunals in the eastern province have been appointed in this way for several years. They have made decisions in a great many disputes and people have acted on the faith of their decisions. Indeed, we have had cases in this court where these tribunals have given consent to notices to quit by landlords to tenants, and many landlords have recovered their lands on the basis that the decisions are valid: see *Martin-Smith v. Smale* (5). If all the decisions were now invalidated by a technical defect, it would produce great confusion and injustice. It is just the thing which para. 20 (2) of sched. IX to the Act of 1947 was made to avoid.

That is sufficient to decide this case, but I go on to consider the position on the footing that the judge was right in thinking that the supposed tribunal was no tribunal at all. Even in that case the Minister has still a powerful defence at his disposal. He says that he has given his statutory certificate certifying that it is necessary that the land should be retained by him, and that, whatever was done wrong before it was given, his certificate cannot now be questioned in the courts. He says that the plaintiff had six weeks in which to question the certificate. The six weeks started to run on Oct. 6, 1952, when she was served with notice of the certificate, and expired on Nov. 17, 1952. It is clear that the plaintiff cannot be blamed for not acting within the six weeks. No one told her about it. The Minister gave her no notice that she was subject to the time limit and she can hardly have been expected to find out for herself. Nevertheless, as she did not act within that time, the Minister says that she is not able to challenge the certificate in the courts or to resist the compulsory purchase of her land. I think that the Minister is right in his law on this point. The statutes which produce the result are exceedingly complicated and riddled with cross-references. I will not embark on the tedious task of construing them. Suffice it to say that the certificate has effect as if it was a compulsory purchase order,* and, as such, it is protected by the Acquisition of Land (Authorisation Procedure) Act, 1946, sched. I, paras. 15 and 16, which say that a compulsory purchase order shall not "be questioned in any legal proceedings whatsoever" except within six weeks of notice being given. However much disposed we might have been to question the Minister's certificate, the plain words of para. 16 of sched. I to the Act of 1946 forbid us to do so. We cannot even extend the time. I admire the ingenuity with which counsel for the plaintiff endeavoured to escape from this result, but I fear that there is no escape. The plaintiff is caught in the net of the statute.

There was one other point. It was suggested that the statutory certificate was not validly issued by the Minister on his behalf, but this point failed on the evidence of Mr. Garside, that he was duly authorised. This brings me to the end of the case. It is, no doubt, hard on the plaintiff to have her little piece of land taken from her. She spent much money in the reasonable expectation that it would be released to her, only to find afterwards that the Minister decided to retain it. There is, however, nothing that can be done about it. The Minister has certified that it is necessary for him to retain the land and no one can say him nay. In my opinion, the appeal should be allowed and judgment entered for the Minister.

* See the Agriculture Act, 1947, s. 92 (2): 1 HALSBURY'S STATUTES (2nd Edn.) 206.

JENKINS, L.J.: The questions arising in this appeal are substantially these. (i) Was it competent to the Minister of Agriculture to authorise a member of the staff of his Ministry to exercise his power, or perform his duty, of appointing the two nominated members of the agricultural land tribunal under the provisions of para. 15 of sched. IX to the Agriculture Act, 1947? (ii) If so, was Mr. Comins authorised by the Minister to exercise that power or perform that duty? (iii) If so, did Mr. Comins in pursuance of that authority appoint for the reference here in question the two nominated members who, with the chairman, formed the tribunal by which this reference was heard? (iv) If the answer to all or any of the foregoing questions is in the negative, were the acts of the tribunal so constituted nevertheless validated by the provisions of para. 20 (2) of sched. IX to the Agriculture Act, 1947? (v) Finally, was the plaintiff in any case precluded from bringing this action by the joint effect of s. 92 of the Agriculture Act, 1947, and paras. 15 and 16 of sched. I, Part IV, to the Acquisition of Land (Authorisation Procedure) Act, 1946, inasmuch as the period of six weeks within which any application to the court must be made under para. 15 aforesaid had long since expired when she issued her writ in this action? I shall deal with these five questions in the above order.

(i) It was not disputed that it was competent to the Minister to authorise a member of the staff of the Ministry to exercise his power, or perform his duty, of appointing the nominated members of the tribunal. That question is settled, so far at all events as this court is concerned, by *Carltona, Ltd. v. Works Comrs.* (1).

(ii) The effect of Mr. Comins' evidence bearing on his authority to appoint the nominated members of the tribunal on behalf of the Minister may be thus summarised. He is and has been since 1944 an official of the Ministry of Agriculture. At the period material to the present case he was attached to the staff at Cambridge of Mr. A. J. Rowell, the provincial land commissioner of the eastern province, a province being one of the major areas into which the country is divided for the purposes of the land service. In June, 1950, Mr. Comins on the instructions of Mr. Rowell took over from Mr. A. J. Smithies (another official of the Ministry on Mr. Rowell's staff at Cambridge) the office of secretary to the agricultural land tribunal for the eastern province. On taking over this office Mr. Comins ascertained from Mr. Smithies what his duties were, and thereafter he carried on the same procedure as Mr. Smithies had previously carried on. When he took over, he was furnished with a list containing the names of the panels of persons eligible for appointment as nominated members under para. 15 of sched. IX to the Act of 1947. He never had any written authority from the Minister or any express instructions saying that he was to appoint on behalf of the Minister. The papers and the lists of members and other books and documents were handed to him and he was told how to carry on. There was no specific authority (that is to say, authority for him to appoint the nominated members on behalf of the Minister), but he understood that he was performing his duty. To a suggestion made to him in cross-examination that when he chose persons from the panels and got them to sit as nominated members he was acting in his capacity as secretary of the tribunal, his answer was:

"I could not say that. I probably should not think who I was at the time; that would come automatically. It [the appointment of nominated members] comes on very early in the proceedings. As the case comes nearer one forgets the Minister and thinks more of the tribunal."

In re-examination he was asked:

"Q.—When you first took over the position as the secretary of the tribunal, from where did you get your instructions as to appointing members of the tribunal or selecting, choosing? A.—I do not know that I got any

specific instructions, except from Mr. Rowell. I had a long talk with him. He said, 'I want you to take on this work as secretary of the land tribunal. He [Mr. Smithies] made his own arrangements, carried on rather on his own. I want you to try and do the same'. Then I started to go to one or two hearings with Mr. Smithies and gradually took over from him in that way. Mr. Rowell did have a long talk with me, saying, 'I want you to carry on in the same way as Mr. Smithies'."

What is one to make of this evidence? It is surprising that no document could be produced conferring on Mr. Smithies or on Mr. Comins the Minister's authority to appoint the nominated members of the tribunal. On the other hand, it is clear that Mr. Comins, and Mr. Smithies before him, consistently took it on themselves with respect to each and every reference to arrange for two of the persons on the panels to sit as nominated members of the tribunal; and it must be assumed that their superiors in the Ministry knew that they were doing this. Mr. Smithies and Mr. Comins either had or did not have the Minister's authority to appoint these nominated members. If they did have the Minister's authority, then *cadit quaestio* so far as this part of the plaintiff's case is concerned. If they did not have the Minister's authority, then their superiors in the Ministry either completely misapprehended the effect of para. 15 of sched. IX to the Act of 1947 or else knowingly permitted Mr. Smithies and Mr. Comins to act in a wholly irregular manner.

I find nothing in Mr. Comins' evidence which makes it necessary to impute to responsible officials of the Ministry charged with the implementation of the provisions of the Act of 1947 such ignorance of the terms of the Act with which they were dealing or, alternatively, such a dereliction of duty. It may well have been decided at a high level in the Ministry that the officer or servant of the Ministry appointed to the office of secretary to an agricultural land tribunal should exercise the power or perform the duty conferred or imposed on the Minister by para. 15 of sched. IX of appointing for each reference to the tribunal the two nominated members of the tribunal required by that paragraph. Such a decision, coupled (to take the case of the particular agricultural land tribunal here in question) with instructions to Mr. Smithies that he was to act as secretary of the tribunal and was to appoint for each reference to the tribunal the two nominated members required by para. 15 of sched. IX would, I apprehend, constitute a sufficient authorisation to Mr. Smithies to make these appointments on the Minister's behalf. Further, such a decision, followed by instructions to Mr. Smithies to the above effect, and action by him in accordance with those instructions during his tenure of office as secretary to the tribunal, and followed later by instructions to Mr. Comins to take over from Mr. Smithies the office of secretary to the tribunal and to carry on as Mr. Smithies had done in relation to the tribunal, would, I apprehend, constitute a sufficient authorisation to Mr. Comins to make the necessary appointments of nominated members. I do not think it would have been essential to the effective authorisation of Mr. Smithies or Mr. Comins that they should have been told in so many words that they were to make these appointments on the Minister's behalf. If they were simply told that they were to appoint—or for that matter to choose or select, although much play was made with the distinction between these three expressions—the nominated members for each reference, it would be manifest from the terms of para. 15 of sched. IX (with which they and their superiors must be assumed to have been familiar) that the intention was that they were to exercise or perform the Minister's power or duty of appointing the nominated members under para. 15, for no power or duty in that behalf is assigned by that paragraph or any other provision of the Act to anyone but the Minister. I conclude, therefore, that it was possible for Mr. Comins to have been effectively authorised to exercise or perform the Minister's power or duty of appointing the nominated members without ever having been told, either orally or in writing, expressly or

specifically, that he was authorised to make these appointments on the Minister's behalf. Accordingly, I cannot regard Mr. Comins' inability to point in his evidence to any document or conversation expressly or specifically authorising him to appoint the nominated members on the Minister's behalf as necessarily showing that he had no such authority, and I think he must be taken to have been effectively authorised to do so. I am fortified in this view by *Lewisham Metropolitan Borough & Town Clerk v. Roberts* (2), where the defendant questioned the authority of one O'Gara, a member of the staff of the Ministry of Health, to write on the Minister's behalf a letter delegating to the town clerk of Lewisham the Minister's functions under the Defence (General) Regulations, 1939, reg. 51, for the purposes of requisitioning a particular building. O'Gara gave evidence in the county court to the effect that he had never been expressly or specifically authorised to write such letters of delegation of requisitioning powers, but that it had been part of the duties of his predecessor in the position in the Ministry held by him at the material time, and that he had simply taken over from his predecessor and continued to do as his predecessor had done, writing as many as ten of such letters a week. On this evidence it was contended for the defendant that O'Gara should be held to have had no authority to write the letter in question, but that view was rejected both by the county court judge and in this court. O'Gara's evidence is not fully set out in the report of the case, but I was a member of the court which heard the appeal and have the effect of his evidence well in mind; and I think it affords a striking parallel to Mr. Comins' "take over" from Mr. Smithies in the present case.

(iii) The next question is whether Mr. Comins did, in pursuance of the authority which, in my view, he should be taken to have possessed, appoint the two nominated members who sat with the chairman of the tribunal to hear the reference with which we are now concerned. The course of procedure followed by Mr. Comins was eminently practical but decidedly informal. His usual practice when a reference was in prospect was to telephone to two of the persons on the panels (one from each of the two categories of nominated persons mentioned in para. 15 of sched IX to the Act of 1947) and ask them whether they could sit, giving the proposed date and other particulars of the reference. When a person thus approached intimated that he was able and willing to sit, Mr. Comins would write to him (apparently on paper headed with the name and address of the agricultural land tribunal and signing himself as "secretary") confirming that the person concerned had agreed to sit as a member of the tribunal on the date in question. He always chose himself the persons on the panel who should be asked to sit, but occasionally in cases concerned with compulsory acquisition under s. 85 of the Act of 1947, which he regarded as of special importance, he would tell the chairman, Sir Cecil Oakes, what people he intended asking to sit and ask the chairman whether he agreed. This only happened on three or four occasions, and the chairman, in fact, agreed in every case to the names proposed by Mr. Comins.

The two nominated members who sat as members of the tribunal for the reference with which this case is concerned were Mr. C. P. Elliott, one of the persons on the panel nominated by the Central Landowners' Association (that being the body designated by the Minister under para. 15 of sched. IX as appearing to him to represent the interests of owners of agricultural land) and Mr. W. J. Soper, one of the persons on the panel nominated by the National Farmers' Union (that being the body designated by the Minister under the same paragraph as appearing to him to represent the interests of farmers). It appears that Mr. Elliott had been present at a previous reference, when it occurred to Mr. Comins, who was beginning to think about the composition of the tribunal to sit on the reference with which we are now concerned, that Mr. Elliott might be available. Mr. Comins, according to his evidence, said to the chairman (in effect): "I propose to ask Mr. Elliott, sir; don't you think it would

be a good idea to get him booked up now ? ” because they were so busy that it was not always easy to get members for every appeal. The chairman replied (in effect) “ Yes, I think that would be a good idea ”. Mr. Comins then went up to Mr. Elliott and said “ The date of the hearing is Aug. 20, it is a s. 85 appeal. Could I get you booked for that date ? ” Mr. Elliott provisionally agreed to sit, and the following letters subsequently passed between them. On July 18, 1951, from Mr. Comins to Mr. Elliott:

“ Dear Sir, I wish to confirm that you have provisionally agreed to sit on the tribunal to be held at Chelmsford on Aug. 20, and that you will notify me should you find that you are unable to do so. Yours faithfully,
[signed] P. R. Comins, secretary.”

The letter heading was that of the agricultural land tribunal. Then on July 23, 1951, Mr. Comins writes again to Mr. Elliott:

“ Dear Sir, The date of hearing of the above matter originally arranged for Aug. 20, has been altered to Sept. 24. Would you be good enough to let me know whether you can be available on the later date as the earlier one is cancelled.”

To that Mr. Elliott replied to Mr. Comins:

“ Dear Sir, Thank you for your letter of July 23. I note this tribunal has been postponed until Sept. 24. I will be available on Sept. 24.”

Finally, there was a letter from Mr. Comins to Mr. Elliott dated Sept. 13, 1951:

“ Dear Sir, I enclose copies of documents relating to the case that you have kindly agreed to hear at Chelmsford on Sept. 24, details of which are as follows.”

Then the details of the appeal were set out and the time given “ Commencing at 11 a.m.” The letter concludes: “ The other member of the tribunal will be ” and a space is left blank.

As regards the place on the tribunal ultimately taken by Mr. Soper, it appears that a Mr. R. F. Sinclair (one of the persons on the panel nominated by the National Farmers' Union) was approached in the first instance, but in the end found he could not undertake to sit in view of the postponement of the date from Aug. 20 to Sept. 24. Mr. Comins then thought that Mr. Soper might be asked. His evidence regarding the selection of Mr. Soper was to the effect that Mr. Soper lived in Essex and that the usual practice was not to choose as a nominated member of the tribunal anyone who lived in the county in which the land involved in the reference was situated, but that on this occasion there was no other eligible person within a reasonable distance, and that he, therefore, thought that Mr. Soper might be asked as he came from right the other side of the county. Having chosen Mr. Soper as a suitable person to ask, Mr. Comins thought that, as Mr. Soper was in the same county and he (Mr. Comins) knew of the chairman's preference for going outside the county, it would be right to ask the chairman whether he would mind Mr. Comins' asking Mr. Soper. He therefore asked the chairman who agreed to Mr. Soper being invited to sit. Mr. Comins then telephoned to Mr. Soper asking him to sit and Mr. Soper agreed to do so. Mr. Comins followed up this telephone conversation with two letters to Mr. Soper. The first, dated Aug. 8, 1951, was in these terms:

“ Dear Sir, I wish to confirm that you have kindly agreed to sit on the tribunal to be held at Chelmsford on Sept. 24. The case to be heard concerns land at Woodham Ferrers which the Minister proposes to purchase, under s. 85 of the Agriculture Act, 1947. Further details and copies of relevant documents will be sent to you in due course. Yours faithfully,
[signed] P. R. Comins, secretary.”

The letter heading, as in all the other letters written by Mr. Comins in regard to these appointments, was that of the agricultural land tribunal, eastern

province. The second letter, dated Sept. 14, 1951, was in the same terms as the letter from Mr. Comins to Mr. Elliott of the same date, to which I have already referred. All Mr. Comins' letters to Mr. Elliott and Mr. Soper were on paper headed with the name and address of the tribunal and signed "P. R. Comins, secretary".

In the result the tribunal which sat to hear the reference in this case was to all appearances properly constituted, consisting as it did of the chairman and two nominated members, one from the persons on the panel nominated by the National Farmers' Union, and the other from the persons on the panel nominated by the Central Landowners' Association; and in all probability the validity of its constitution would never have been challenged, and the present litigation would never have ensued, had it not been for the unfortunate reply made by the chairman to the intervention of the Rev. Marsh, who attended the reference as chairman of the Farmers and Smallholders Association. At an early stage in the proceedings Mr. Marsh, according to his evidence, said:

"Would the solicitor for the Ministry please say who appointed the nominated members?"

As the solicitor did not reply Mr. Marsh followed this up by saying:

"I will tell you. The Ministry of Agriculture appoints the two nominated members."

His object was, in effect, to discredit the tribunal on the ground that it was so constituted as to make the Minister judge in his own cause. Then (according to Mr. Marsh) the chairman rose to his feet and said:

"Mr. Marsh, this has no more to do with the Minister of Agriculture than it has with you. I appointed the two nominated members."

At the mid-day adjournment (again according to Mr. Marsh) he "buttonholed" the chairman and showed him para. 15 of sched. IX to the Act of 1947, and the chairman said to him: "Have I dropped a brick?" Mr. Marsh then said: "Well this is what it says here". The chairman replied: "Well, I always appoint them". The plaintiff's husband, Mr. T. Woollett, who was also present at the reference, bore out in his evidence Mr. Marsh's version of what passed between Mr. Marsh and the chairman while the tribunal was sitting. The chairman denied using the words attributed to him by Mr. Marsh, but he did admit to having said of the two nominated members "I chose them", or words to that effect, and in this he was borne out by the solicitor for the Ministry, Mr. Curnock. I find it a little difficult to believe that the chairman did actually say that he appointed the nominated members. The learned judge, however, accepted Mr. Marsh's evidence in preference to that of the chairman, and I think it must be assumed that, whatever his exact words, the chairman did use language which Mr. Marsh and Mr. Woollett understood, and reasonably understood, as amounting to an assertion that he (the chairman) had appointed the nominated members.

That, of course, if true, would have been a manifest departure from the provisions of the Act. On the other hand, if the truth was that Mr. Comins, having the necessary authority, had, in fact, appointed the nominated members, an untrue assertion by the chairman that he (the chairman) had done so would be immaterial. The importance, however, of the part played by this episode in the history of the case is brought out by the fact that the allegation in the statement of claim was that

"the said tribunal was not validly constituted in that the members of the said tribunal other than the chairman, Sir Cecil Oakes, were not appointed by the Minister in accordance with the provisions of the said Act but were nominated and appointed by the said Sir Cecil Oakes."

It is to my mind quite clear on the evidence that the nominated members were not, in fact, appointed by Sir Cecil Oakes, who, in a few cases only (although,

as it happens, in the cases of both the two nominated members with whom we are here concerned) was merely asked by Mr. Comins whether he approved the persons whom Mr. Comins proposed to invite to sit for the purposes of some particular reference. It remains to consider whether on the footing that (as I have held above) Mr. Comins must be taken to have had authority to appoint the nominated members, his informal procedure above described did amount to appointing them within the meaning of the Act. I think that it did. Given that Mr. Comins had the authority to appoint, then I think that his invitations to persons on the panel to sit, followed by their agreeing to do so and in fact sitting, did have the effect of appointments of the persons concerned as nominated members, although the actual word "appoint" may never have been used.

As I have said before, much play was made in the course of the argument with the distinction between "choosing" or "selecting" and "appointing". To my mind, in relation to what had to be done under para. 15 of sched. IX to the Act of 1947, there is really nothing in this distinction. Appointment was limited to a panel of busy men serving without remuneration (as distinct from expenses) and under no obligation to sit unless they chose. The problem was to find eligible persons who were prepared to sit on any given reference, and from a practical point of view Mr. Comins' method of finding nominated members was the natural one to adopt. It was argued that the appointment of a person to sit as a member of a judicial tribunal such as this was a solemn act requiring due formality in its performance. This, I think, overlooks the fact that the choice of nominated members was limited to a panel so picked as to secure that the persons named in it were representative of the interests of farmers and of owners of agricultural land, and further limited by the provision which required that one from each of these two categories should be appointed for every reference. The task of appointment thus really resolved itself into finding two eligible persons who would be available to sit on a given day, the conditions of eligibility being such as to ensure that on each occasion one of the nominated members would be representative of the interests of farmers, and the other representative of the interests of owners of agricultural land. An argument was founded on Mr. Comins' practice of confirming that a given person had agreed to sit by a letter on notepaper headed with the name and address of the tribunal and signing himself as secretary, and it was suggested that this showed that Mr. Comins thought that he was appointing (or selecting) the nominated members on behalf of the tribunal as distinct from the Minister. Given that he did in fact have authority to appoint the nominated members on behalf of the Minister, I cannot regard this point as of any substance. Accordingly, I hold that if, as in my view must be taken to be the case, Mr. Comins had authority to appoint the nominated members on behalf of the Minister, he did pursuant to that authority appoint them within the meaning of para. 15 of sched. IX to the Act of 1947.

(iv) If I am right so far, it follows that the Minister is entitled to succeed in this appeal without recourse to para. 20 (2) of sched. IX to the Act of 1947. If, however, I am wrong and Mr. Comins was not effectively authorised to appoint the nominated members, or, being so authorised, failed through the informality of his procedure in this regard to appoint them effectively, it seems to me that these shortcomings could properly be classed as "defects" in the appointments of nominated members within the meaning of para. 20 (2). Clearly the ministerial intention was that the nominated members should be appointed in accordance with para. 15 of sched. IX. Clearly it was believed by Mr. Comins' superiors in the Ministry that he had been empowered to appoint them in accordance with that paragraph, and that nominated members appointed by him would be duly appointed members of the tribunal for the purpose of the Act. Nothing was done which could not have been done in strict conformity with the Act, and the composition of the tribunal so far as the qualification of the nomin-

ated members was concerned accorded with the requirements of the Act. The informality of Mr. Comins' procedure involved no aberration of substance. There is not and could not be any charge of mala fides on the part of the Minister or of anyone in the Ministry. Accordingly, I think that the acts of this tribunal were in any case validated (if and so far as they may have been in need of validation) by para. 20 (2) of sched. IX to the Act of 1947.

A (v) Even if all the conclusions above expressed are wrong, it seems to me that the combined effect of s. 92 of the Agriculture Act, 1947, and paras. 15 and 16 of sched. I, Part IV, to the Acquisition of Land (Authorisation Procedure) Act, 1946, must be fatal to the plaintiff's case. Section 92 of the Act of 1947 provides:

B " (1) Subject to the provisions of this section, where under any provision of this Act power is conferred on the Minister or a smallholdings authority to purchase land compulsorily, the power shall be exercisable for the purchase of any particular land on the Minister or the authority, as the case may be, being authorised so to purchase the land in accordance with the provisions of the Acquisition of Land (Authorisation Procedure) Act, 1946, and that Act shall apply accordingly—(a) as if s. 1 (1) (b) thereof (which refers to the compulsory purchase of land by the Minister of Transport under certain enactments) included a reference to any compulsory purchase of land by the Minister under this Act, and (b) as if this Act had been in force immediately before the commencement of the said Act of 1946."

C Then there is a proviso which I do not think is material. Then s. 92 (2) reads:

D "Where under any provision of this Act power is conferred on the Minister to purchase any particular land compulsorily on the giving of a certificate by him, the certificate shall have effect as if it were a compulsory purchase order made under s. 1 of the said Act of 1946, and . . . (c) in the application to the certificate of Part IV of sched. I to the said Act of 1946 (which relates to the validity and coming into operation of compulsory purchase orders) for references to the first publication of notice of the making of an order there shall be substituted references to the service of notice of the giving of the certificate, and for references to the requirements of the said sched. I and of regulations made thereunder there shall be substituted references to the requirements of this Act as to the proceedings to be taken before the giving of the certificate."

E Paragraphs 15 and 16 of sched. I to the Act of 1946 provide:

F " 15. (1) If any person aggrieved by a compulsory purchase order desires to question the validity thereof, or of any provision contained therein, on the ground that the authorisation of a compulsory purchase thereby granted is not empowered to be granted under this Act or any such enactment as is mentioned in s. 1 (1) of this Act, or if any person aggrieved by a compulsory purchase order or a certificate under Part III of this schedule desires to question the validity thereof on the ground that any requirement of this Act or of any regulation made thereunder has not been complied with in relation to the order or certificate, he may, within six weeks from the date on which notice of the confirmation or making of the order or of the giving of the certificate is first published in accordance with the provisions of this schedule in that behalf, make an application to the High Court, and on any such application the court—(a) may by interim order suspend the operation of the compulsory purchase order or any provision contained therein, or of the certificate, either generally or in so far as it affects any property of the applicant, until the final determination of the proceedings; (b) if satisfied that the authorisation granted by the compulsory purchase order is not empowered to be granted

as aforesaid, or that the interests of the applicant have been substantially prejudiced by any requirement of this schedule or of any regulation made thereunder not having been complied with, may quash the compulsory purchase order or any provision contained therein, or the certificate, either generally or in so far as it affects any property of the applicant. (2) . . . *

16. Subject to the provisions of the last foregoing paragraph, a compulsory purchase order or a certificate under Part III of this schedule shall not, either before or after it has been confirmed, made or given, be questioned in any legal proceedings whatsoever, and shall become operative on the date on which notice is first published as mentioned in the last foregoing paragraph."

The combined effect of these enactments appears to be that the Minister's certificate under s. 85 (2) of the Act of 1947 is to be treated for the purposes of paras. 15 and 16 of sched. I, Part IV, to the Act of 1946 as if it was a compulsory purchase order and that service of notice of the giving of the certificate is to be treated for those purposes as if it were the first publication of notice of the making of an order, and that references to the requirements of sched. I to the Act of 1946 are to be treated as references to the requirements of the Act of 1947. The result, in my judgment, is that under para. 15 of sched. I, Part IV, to the Act of 1946, as applied by s. 92 of the Act of 1947, the plaintiff in this case had six weeks from the service on her of notice of the giving of the Minister's certificate under s. 85 (2) of the Act of 1947 within which to apply to the court for the purpose of questioning the validity of the certificate

"on the ground that the authorisation of a compulsory purchase thereby granted [was] not empowered to be granted under "

the Act of 1947; and that, under para. 16 of sched. I, Part IV, to the Act of 1946, subject to the provisions of para. 15 a certificate under s. 85 (2) of the Act of 1947 cannot be questioned in any proceedings whatsoever. The relevant period of six weeks had, admittedly, expired in this case long before the writ in this action was issued, and, accordingly, it seems to me that the action is barred by the plain effect of para. 16 of sched. I, Part IV, to the Act of 1946 as applied to s. 85 of the Act of 1947 by s. 92 of the Act of 1947. The argument that paras. 15 and 16 of sched. I, Part IV, to the Act of 1946 cannot be intended to apply where the certificate is a mere nullity seems to me to be misconceived. The point is that, subject to the right of applying to the court under para. 15 within the prescribed period of six weeks, para. 16 imposes an absolute bar to all litigation including litigation designed to establish a contention to the effect that the certificate is a nullity. It is a bar which operates in limine irrespective of the nature of the objections sought to be advanced.

I need not deal with the plaintiff's subsidiary contentions to the effect that the certificate was void because it was made, not by the Minister personally, but by the Minister acting through an official of the Ministry named Garside, and because it related to the land of various persons in addition to the plaintiff's land. The learned judge, in my view, rightly rejected those contentions, of which the first was not pressed and the second was not even opened before us.

While I have reached a different conclusion from the learned judge and think that the Minister's appeal should succeed, I cannot part from this case without saying that this litigation seems to me to have been largely caused by the absence of any adequate method or system in the arrangements made by the Ministry for the appointment of nominated members of agricultural land tribunals. It is not the function of this court to advise Ministers how the duties of their departments should be carried on, but it seems to me that this litigation would, in all probability, have been avoided, or, at all events, much curtailed, if the Ministry had

* Paragraph 15 (2) of sched. I to the Act of 1946 was repealed by the Town and Country Planning Act, 1947, s. 113 (2), and sched. IX.

adopted the simple practice of giving written instructions to the following effect to any official appointed to the office of secretary to a tribunal:

"(i) In addition to acting as secretary to the tribunal you will on behalf of the Minister appoint for every reference the two nominated members in accordance with para. 15 of sched. IX to the Agriculture Act, 1947.

(ii) You will, before the tribunal enters on any reference, furnish to each nominated member appointed for that reference a letter signed by yourself to the effect that you, on behalf of the Minister, thereby appoint him to be a nominated member of the tribunal for the purposes of that reference."

As an alternative to (ii) above, the secretary could have been provided with a common form letter of appointment for him to complete and sign and give to each nominated member for any reference. It is obvious that if a regular procedure on the above lines has been adopted the Minister would have had ready to hand a short, complete and convincing answer to attacks on the validity of the constitution of the tribunal such as those made in the present case. Moreover (and this, too, is important) the victims of compulsory purchase could by such means have been readily satisfied that the tribunal on whose judgment the fate of their land depended had been appointed strictly in accordance with the relevant law. This, however, is by the way, for, while I cannot regard the present case as reflecting any credit on the efficiency of the Ministry, the result in my opinion is that, for the reasons which I have endeavoured to state, this appeal should be allowed.

MORRIS, L.J.: This case illustrates the importance of ensuring, in cases where, by statute, there is a duty of appointing a person to an office or to perform certain functions, that there should be such measure of formality, even though not expressly required by statute, as will avoid doubt whether an appointment has been made, or when and by whom and in what manner it has been made. An agricultural land tribunal has very important functions. Under para. 15 of sched. IX to the Agriculture Act, 1947, there was a requirement that the two nominated members should "for each reference to the tribunal, be appointed by the Minister", and there was a further requirement that one of the two should be appointed from a panel of persons nominated by persons appearing to the Minister to represent the interests of farmers and that the other should be appointed from a panel of persons nominated by persons appearing to the Minister to represent the interests of owners of agricultural land. There is no doubt that nominations to the panels were made in accordance with statutory requirements. Two panels came into existence. Included in one panel was the name of Mr. Elliott: included in the other was the name of Mr. Soper. It was, therefore, perfectly competent for the Minister to have appointed these two gentlemen to be members of the agricultural land tribunal to deal with the "reference" to the tribunal which was required by the plaintiff in accordance with s. 85 (5) of the Act. These two gentlemen in fact sat: they sat with a chairman duly qualified and duly appointed. They were requested to sit, to use a neutral expression, by Mr. Comins: from him they received in advance the documents referable to the matters on which they were to adjudicate and which they were to determine. There is nothing to suggest that they thought otherwise than that everything was in order. There is nothing whatsoever to suggest that when the chairman and these two gentlemen applied themselves to the issues presented for their consideration they were in any way influenced by anyone: there is no room for any suspicion that they acted other than impartially, judicially and with complete independence. When, therefore, the point is taken that, although the two gentlemen were qualified to be "appointed" for the reference in question and although they were requested to sit, yet they were not "appointed by the Minister" in compliance with the Act, this might at first seem to be rather a bare technical point not sponsored by merits. Although

there does not lurk in this case any element of high-handed conduct, yet the matter raised are of much consequence. Where individual rights are in issue, it is of far reaching importance that the requirements of law, as laid down by Parliament, should be faithfully observed.

The determination of the question whether there was an appointment by the Minister must depend on what was done. Statements as to what anyone may have thought cannot affect the matter save to such extent, if any, as they may throw light on what was done. When the Rev. Marsh intervened at an early stage in the proceedings of the tribunal, he had the point in mind that it was a proposal of the Minister's that was in issue before the tribunal and that, by statute, it was the duty of the Minister to appoint two members of the tribunal. That intervention may have been designed to point out what the statute provided and to suggest that there was some unfairness in the enacted procedure. It seems to have been based on the view that, if a Minister appoints certain members of a tribunal, then such members are likely to decide in a way which they think might be acceptable to the Minister. This, I think, involves a wholly unwarrantable assumption and, although perhaps unintentionally, also involves an implication against the integrity of persons whom a Minister may appoint. The answer to the inquiry of the Rev. Marsh that might have been expected would have been: (a) that the appointments had been made by the Minister; (b) that the Minister had appointed from amongst the nominated members of the two panels; (c) that this had to be so by law; and (d) that resentment was felt at the implication that the nominated members appointed by the Minister were not there to decide fairly and with judicial impartiality. Instead of this it is found that the recollection of the Rev. Marsh is that the chairman said:

"Mr. Marsh, this has no more to do with the Minister of Agriculture than it has with you. I appointed the two nominated members."

The recollection of the chairman is that he said that it was he who had in that particular case chosen or selected the two members. The chairman denied that he had used the word "appointed" or had said that he had appointed the two members. The secretary does not appear to have made any statement. Had the secretary said that the Minister acting through his servants had made the appointments, the inquiry made by Mr. Marsh would have been satisfactorily answered. Had there been an appointment by the Minister contained in or evidenced by some document (even though the provisions of sched. IX to the Act of 1947 do not expressly require the appointments to be in writing), then it would have been very easy to reply to the inquiry of Mr. Marsh. The evidence as to what happened, and particularly the evidence as accepted by the learned judge, leads me to the view that, in the arrangements which resulted in the presence of Mr. Elliott and Mr. Soper, there was forgetfulness of the provisions of para. 15 of sched. IX.

It is said on behalf of the Minister that there is no evidence that the two members were not appointed by the Minister: it is said that Mr. Comins acting for and on behalf of the Minister appointed them: it is further said that there is room for the application of the maxim "*Omnia praesumuntur rite esse acta.*" At the close of the evidence called for the plaintiff in the court below there was no submission that there was no case to answer. No criticism of anyone can be made because of this and, indeed, I think that it would have been a matter for regret if in a case of this kind evidence had not been submitted to the court. In the very proper exercise of discretion, evidence on behalf of the defendant was called. Mr. Comins was among the witnesses. In the result, therefore, the court had before it not only the documents but the testimony of Mr. Comins who gave his account of what had been done. It then became necessary for the court, after having ascertained the facts, to decide as to their interpretation. The maxim to which I have referred cannot be used to assert that everything has been regularly

done if the facts are ascertained and, when ascertained, show that everything has not been regularly done.

It is, I think, quite possible, from the evidence of Mr. Comins, to form a clear view as to the way in which the tribunal came into being. The learned judge made it very plain that, from first to last, there has been no kind of hint or suggestion against the good faith and integrity of Mr. Comins. As a witness he was "perfectly, transparently accurate and careful". He was a civil servant in the Ministry and pursuant to para. 22 (2) of sched. IX to the Agriculture Act, 1947, he was attached as secretary of the tribunal. His work in that capacity was additional to other duties. In connection with the reference of the plaintiff, Mr. Comins thought of Mr. Sinclair as one to sit on the tribunal and, without any discussion with the chairman, communicated with Mr. Sinclair. Mr. Comins thought of Mr. Elliott as the other member of the tribunal, and, having consulted the chairman, who indorsed Mr. Comins' idea, Mr. Comins then communicated with Mr. Elliott. When at a later time, owing to a postponement of the date of sitting of the tribunal, Mr. Sinclair found that he could not attend, Mr. Comins thought again. He decided that it would be appropriate to ask Mr. Soper to sit. Having consulted the chairman, Mr. Comins then communicated with Mr. Soper. In regard to the consultations between Mr. Comins and the chairman, it does not seem to me that they show that the chairman did more than approve of the course which Mr. Comins had in mind, and I do not think that there was anything inappropriate or irregular in seeking and considering the opinion of the chairman.

The evidence of Mr. Comins must be read as a whole and considered as a whole. Some questions and answers may, however, be noted. Mr. Comins was asked by the learned judge:

"We have got to be so careful about choice of words, Mr. Comins, and if I use the wrong one, correct me. Who appointed you to the post of secretary, the tribunal or the Minister or who; or, if you prefer it, who selected you for the job? A.—Mr. Rowell, the provincial land commissioner on whose staff I was. I think the procedure was that, when the first secretary was appointed—that was Mr. Smithies—Mr. Rowell was asked to let the Ministry in London know whom he had selected from his staff to act as secretary, and then, when Mr. Smithies left, he notified them that he had selected me to carry on."

Then learned counsel asked:

"When you took over from Mr. Smithies, did you ascertain from him what your duties were? A.—Yes. Q.—Did you, so far as you understood it, carry on the same procedure as Mr. Smithies had previously carried on? A.—Yes. Q.—Have you remained the secretary of that tribunal since your appointment in June, 1950? A.—Yes. Q.—Before we come to the specific case we are concerned with, what first of all was the practice after you took over as to the appointment of the members of the tribunal other than the chairman? A.—In nearly all cases I selected two names from the list, from the panel which I had, and if either of those members was unable to sit, which happened quite often, then I took two more."

Mr. Comins was later asked:

"I thought you might be able to help me about Mr. Webb. Do you know Mr. Webb? A.—No, I do not. As I say, although I am in Mr. Rowell's office, I did not come into these proceedings until the appeals were received, and then I dealt with them as secretary of the land tribunal. . . . Q.—The point is this: you never consulted the Minister in any of these appointments? A.—No, I was given my panel. Q.—You had never any written authority from the Minister? A.—No. Q.—You did not even have any instructions

saying that you were appointing on behalf of the Minister? A.—No. Q.—You merely took up a practice that had grown up before you came in? A.—Yes. The papers and the lists of members and other books and documents were handed to me and I was told how to carry on . . . Q.—They had got the panel, of course, but the panel, we know, is a list of something like a hundred names altogether? A.—Forty on my list. Before I had that list, of course, I do not know what happens as regards how they got on to the list and so on, but it was handed to me at the time I took over in 1950, and I am confined, of course, to that list. It usually narrows down to about two or three names in the end. I understand those names had been looked at before I ever received the list. Q.—It has never been suggested that there shall be reference to the Minister personally or to any high official who can authenticate his seal, if I may put it in that way, concerning who shall sit on a particular tribunal as additional members for a particular reference? A.—You mean to say that two names sent up from me—no. Q.—Nothing at all; just chosen, and in this case under the system chosen without any specific authority from the Minister at all. That is quite clear, is it not? A.—There is no specific authority, but I understood I was performing my duty.”

Then, finally, at the end of cross-examination, Mr. Comins was asked:

“Do you regard as your duty in this work to act under the instructions of the chairman? A.—Yes, as secretary of the tribunal I regard myself as the servant of the tribunal. Q.—As a servant of the tribunal? A.—I am really trying to work for two masters. Q.—It is not the first time in history or in morals that a man has served two masters. Then the position is quite clear, and your frankness is commendable; all that you did in this matter was as the servant of the tribunal? A.—I do not quite follow that question. Q.—I thought you told me that in acting as the secretary of the tribunal you acted as the servant of the tribunal? A.—Yes. Q.—And in this choice and getting the people to sit as additional members you were acting as the secretary? A.—I could not say that. I probably should not think who I was at the time; that would come automatically. It comes on very early in the proceedings. As the case comes nearer one forgets the Minister and thinks more of the tribunal. Q.—I am putting to you quite plainly that, though you might well be a servant of the Minister in another capacity, when you act for the tribunal you act as the servant of the tribunal and not as the servant of the Minister? A.—Yes. Q.—And all that you do in your capacity as secretary is done as the servant of the tribunal? A.—Yes.”

Then followed the question in re-examination which has already been read by JENKINS, L.J. [ante, pp. 537, 538], followed by the question:

“Was Mr. Rowell in any way a servant of the tribunal? A.—No. Q.—He was an official of the Minister? A.—Yes, my chief.”

I consider that it is essential, however, not to isolate any parts of Mr. Comins' evidence, but to read it in its entirety. Having endeavoured to do so, I have formed the conclusion that what happened was that when Mr. Comins made arrangements for the presence of Mr. Elliott and Mr. Soper he purported to be functioning in his capacity as the secretary of the tribunal. When, after those two gentlemen had received telephone messages from Mr. Comins, they agreed to sit, Mr. Comins in his capacity as secretary of the tribunal wrote letters of confirmation to them. The fact that it was in his capacity as secretary of the tribunal that Mr. Comins confirmed the acceptance is evidence of the capacity in which the invitations which met with acceptances were issued.

It is said that, as a tribunal consists of a chairman and of two members appointed for the particular reference, Mr. Comins could not act as secretary of the tribunal until it was constituted by the appointment of the two nominated members. It is said that Mr. Comins must have been acting other than as secretary of the tribunal and that he must, in the result, have been acting for the Minister, even though he may not have realised it. It is submitted, therefore, that the Minister made the appointments. It is, however, provided by s. 73 (1) of the Agriculture Act, 1947, that the Minister is to constitute areas and that

“for each area so constituted there shall be established an agricultural land tribunal, which shall be charged with the duty of determining matters referred to them under this Act.”

Further, by para. 22 (2) of sched. IX to the Act, the Minister is required to attach such officers and servants to agricultural land tribunals as he may, with the approval of the Treasury, determine to be required. Although for each reference the tribunal has to be constituted, there is a tribunal which is established: it has a chairman, who holds office for three years, and a secretary, who is attached.* When Mr. Comins was in communication with Mr. Elliott and Mr. Soper, he was, in my judgment, purporting to act as the secretary of the tribunal. He did not state that he was acting on behalf of the Minister and did not purport to act on behalf of the Minister: and it would not seem that he gave thought as to whether or not he was acting on behalf of the Minister. The matter must, however, depend on determining what was, in fact, done and what was the effect of what was done, and what anyone thought cannot be decisive.

Mr. Comins' evidence shows that it was Mr. Rowell, on whose staff he was, who selected him to succeed Mr. Smithies as secretary of the tribunal. The Ministry in London were notified as to this. Mr. Comins ascertained from Mr. Smithies what his duties were, and Mr. Comins continued the procedure previously carried on by Mr. Smithies. Mr. Comins was given the names on the two panels. In this connection it is to be observed that, under para. 15 of sched. IX, it is for the Minister to decide which bodies appear to represent the interests of farmers and of the owners of agricultural land, respectively. The Minister did so decide. Then it was for those bodies to nominate persons to the panels. Those nominated are, therefore, not chosen by the Minister, but are independently chosen. Once they have been independently chosen they are all on an equality, and it is not to be supposed that some are to be deemed to be better qualified than others. The appointment of one from each panel to sit to determine a reference is not, therefore, in the scheme as laid down, a step of very special or particular importance.

There would be nothing surprising in assigning to someone of the status of Mr. Comins the duty of being the delegate of the Minister, within the internal administration of the Ministry, to cause appointments to be made by and in the name of the Minister. If those acting for the Minister deputed Mr. Comins to be the official to make appointments to the tribunal, then no complaint can be made to the court in regard to this. In *Carltona, Ltd. v. Works Comrs.* (1) LORD GREENE, M.R., said ([1943] 2 All E.R. at p. 563):

“In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them. To take the example of the present case, no doubt there have been thousands of requisitions in this country by individual ministries. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers

* See para. 14 (2) and para. 22 (2) of sched. IX to the Act of 1947.

by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them."

The duty is one that might well be delegated to the officer of the Ministry who is selected to act as secretary of the tribunal. Indeed, this seems to have been the effect of what took place. Mr. Comins was told to carry on the procedure which was being followed prior to his succeeding Mr. Smithies. Mr. Comins thought that he was doing his duty. The position is indicated in a passage from his evidence to which I have referred above.

The way in which the matter is pleaded in the defence is as follows:

"5. The two members of the said tribunal other than Sir Cecil Oakes were appointed by the defendant acting by one Percival Rupert Comins, who, in addition to being the secretary of the said tribunal, was at all material times assistant land commissioner on the staff of the Minister of Agriculture and Fisheries, and as such, acted for and on behalf of the defendant. The said two members were appointed respectively from a panel of persons nominated in the case of one such member by persons appearing to the defendant to represent the interests of farmers and in the case of the other by persons appearing to the defendant to represent the interests of owners of agricultural land in accordance with para. 15 of sched. IX to the Agriculture Act, 1947."

Some particulars were asked for under para. 5 as follows:

"Of the allegation that the said Comins acted for the defendant stating whether the authority of the said Comins so to act was conferred orally or in writing, if orally stating when and how such authority was conferred and the terms of such authority, if in writing identifying the documents."

Particulars supplied in answer to that request were:

"The said authority was not expressly conferred on the said Comins either orally or in writing. The said Comins made the said appointments in the course of his duties as assistant land commissioner on the staff of the defendant and in accordance with the prevailing practice."

The evidence of Mr. Comins supports the view that he did follow the "prevailing practice", and that he was instructed and required by Mr. Rowell, his superior, to do so. This must, I think, mean that he was told that he must convene a tribunal in the way that had been usual, and in doing so in this instance he was, therefore, doing as he was instructed to do. It appears to me, however, that the instructions given were lacking in precision and ought to have been more ample. It is because of this that there was, as I think, a forgetfulness of the provisions of para. 15 of sched. IX. If this paragraph had been in mind I feel confident that there would have been some communications in writing (even though writing is not expressly stipulated for), addressed in the name of the Minister, informing Mr. Elliott and Mr. Soper that they had been appointed by the Minister. Furthermore, I consider that, after the question of the Rev. Marsh, there should have been an intervention by Mr. Comins which would completely have explained and clarified the position.

A The view of the evidence which I have formed is that the Minister, acting by and through his servants in the Ministry, permitted and authorised the procedure which became the prevailing practice, under which it was left to that officer of the Ministry who was deputed to be secretary of the tribunal to convene or constitute the tribunal from time to time, which meant appointing in the name of the Minister the two nominated members. The instructions to such person were, however, so general and so imprecise as to make possible a situation like the one now under review with all its doubts and difficulties. One view of the result is that the authority given to Mr. Comins was such that acting for the Minister he did, in fact, appoint Mr. Elliott and Mr. Soper, although he may not fully have appreciated the effect of what he did. The view of the matter which I have formed, however, is that, although Mr. Comins was endowed with the authority to act on behalf of the Minister to make appointments for a reference and although Mr. Comins did appoint Mr. Elliott and Mr. Soper for the particular reference, in the actual appointing Mr. Comins acted in his capacity as secretary of the tribunal. Mr. Comins really had two capacities, and through inadequate instruction or coaching he did not sufficiently distinguish between the two. In one capacity he was agent of the Minister: in another he was secretary of the tribunal. In the former he could and should have made appointments of nominated members to deal with a reference: in the latter capacity he would have communicated with the nominated members after appointment.

C In my view, it would be unreal to hold that Mr. Elliott and Mr. Soper were not appointed at all: they were asked to sit and they did so. They were asked by someone who, in fact, had a delegated authority from the Minister: when that delegated authority was exercised it was exercised in erroneous manner. Communications were made in the capacity of secretary of the tribunal when they should have been made in the capacity of agent for the Minister, which capacity was, in fact, possessed, even though this may have been imperfectly appreciated. At most, there was some defect in the method of making an appointment, and, in my judgment, any defect that existed in this case was a "defect in the appointment" as that phrase is used in para. 20 (2) of sched. IX to the Act of 1947 which provides that all acts done at any meeting of (inter alia) an agricultural land tribunal

E "shall, notwithstanding that it is afterwards discovered that there was a defect in the appointment or disqualification of a person purporting to be a member thereof, be as valid as if that defect had not existed."

F I do not think that it can be doubted that the Minister did issue a certificate under s. 85 (2) of the Agriculture Act, 1947—which certificate, as a certificate, cannot be regarded as being void or a nullity. The provisions of s. 85 (4) met with compliance. Then there was the reference to the agricultural land tribunal. Thereafter was the sitting of the tribunal. The tribunal purported to determine the matters specified in s. 74 (2) of the Act of 1947. Subject only to the issue whether the tribunal was validly constituted, there was observance of the provisions of s. 74 (3), (4) and (5). There came, therefore, into existence a certificate apparently regular and in order which purported to be a certificate issued under s. 85 (2). The provisions of s. 92 of the Act, therefore, became applicable and by s. 92 (2) the certificate had "effect as if it were a compulsory purchase order made under s. 1" of the Acquisition of Land (Authorisation Procedure) Act, 1946. That means as though the certificate had been made in accordance with the provisions of sched. I to the Act of 1946. By para. 15 of that schedule there are certain rights of questioning the validity of a compulsory purchase order. It can be questioned on the ground that the authorisation of a compulsory purchase order is not empowered to be granted under the Act of 1946. Furthermore, (a) any person aggrieved by a compulsory purchase order, and (b) any person aggrieved by a certificate under Part III of sched. I to the Act of 1946, may question the validity of the order or certificate on the ground that

any requirement of the Act of 1946, or any regulation made thereunder, has not been complied with in relation to the order, or the certificate, as the case may be. Such questioning may be by application to the High Court within six weeks from

“the date on which notice of the confirmation or making of the order or of the giving of the certificate is first published in accordance with the provisions”

of sched. I. As JENKINS, L.J., has already read s. 92 (2) (c) of the Act of 1947, I do not read it again.

The result, in my judgment, is that it was open to the plaintiff (as a person aggrieved by a compulsory purchase order) to question the validity of the order (the certificate under s. 85 (2) of the Act of 1947 having effect as a compulsory purchase order) on the ground that the requirements of the Act of 1947 as to the proceedings to be taken before the giving of the certificate under s. 85 (2) were not complied with. It was open to the plaintiff to question the validity of the order within six weeks from the service of notice of the giving of the certificate under s. 85 (2). The plaintiff could have questioned the validity of the order on the ground that there was no proper tribunal constituted, that there was, accordingly, no hearing, and that, as a result, there had not been satisfaction of the requirements of the Act of 1947 as to the proceedings to be taken before the giving of the certificate under s. 85 (2). The plaintiff, however, did not question the validity of the order within six weeks and para. 16 of sched. I to the Act of 1946 provides as JENKINS, L.J., has already read. The result follows that the plaintiff was not entitled, in this action, to question the compulsory purchase order, which became operative as from the service of the notice of the giving of the certificate. For these reasons the plaintiff should, in my judgment, have failed in her action.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor, Ministry of Agriculture and Fisheries* (for the defendant); *Lucien Fior* (for the plaintiff).

[Reported by PHILIPPA PRICE, Barrister-at Law.]

MOUSLEY AND OTHERS v. RIGBY AND ANOTHER.

[CHANCERY DIVISION (Roxburgh, J.), November 2, 16, 1954.]

Will—Gift to issue—Substitutional or original gift—Gift to children living at death of life tenant and issue of any then dead—Whether issue must survive life tenant.

A By his will a testator gave his residuary and personal estate to trustees on trust to pay the income thereof to his grand-daughter E. for life and directed that in case (as happened) E. should die without leaving lawful issue then from and after her death, subject to the payment of a legacy, his residuary real and personal estate should be held on trust for S. and J. equally. In case the said S. and J. or either of them should be then dead, the testator gave, devised and bequeathed the share of him or them so dying "unto and equally between all his or their children who shall be then living and the issue of such of them as shall be then dead leaving issue in equal shares as tenants in common and not as joint tenants but such issue to take only amongst them in equal shares the share or shares his her or their parent or parents would have been entitled to if living". On July 13, 1872, J. died leaving five children surviving of whom one S.C. died in 1890, leaving one child B., who died in 1910. On Jan. 29, 1945, E., the life tenant, died. On the question whether B. was entitled to participate in the testator's residuary estate, it being conceded that the word "issue" in the will was not confined to children of the children of S. and J.,

D HELD: the gift to the issue of the children of S. and J. was contingent on such issue surviving E. and, as B. predeceased E., B. was not entitled to participate.

Re Orton's Trust (1866) (L.R. 3 Eq. 375), not followed.

Re Embury (1913) (109 L.T. 511), followed.

As to ASCERTAINMENT OF CLASS, see 34 HALSBURY'S LAWS (2nd Edn.) 316, para. 364; and FOR CASES, see 44 DIGEST 861, 7158 et seq.

E Cases referred to:

- (1) *Martin v. Holgate*, (1866), L.R. 1 H.L. 175; 35 L.J.Ch. 789; 44 Digest 1228, 10,627.
- (2) *Re Orton's Trust*, (1866), L.R. 3 Eq. 375; 36 L.J.Ch. 279; 16 L.T. 146; 44 Digest, 1080, 9317.
- (3) *Re Embury*, (1913), 109 L.T. 511; 44 Digest 859, 7135.

F PETITION for payment out of court.

G The Reverend William Mousley ("the testator") by his will dated Feb. 7, 1863, gave all the residue of his real and personal estate to Samuel Rigby and James Rigby on trust in the event which happened to pay the income to the testator's grand-daughter Elizabeth Lucy Morris Mousley for life and in case, which happened, she should die without issue to Samuel Rigby and James Rigby beneficially and in case they or either of them should be then dead, and as events happened both were dead, then the testator gave

H "the share of him or them so dying unto and equally between all his or their children who shall be then living and the issue of such of them as shall be then dead leaving issue in equal shares as tenants in common and not as joint tenants but such issue to take only amongst them in equal shares the share or shares his her or their parent or parents would have been entitled to if living . . ."

The testator died on Sept. 12, 1871. Samuel Rigby died on Mar. 12, 1869 leaving issue one daughter, Esther Underwood, who died on Feb. 7, 1950. James Rigby died on July 13, 1872 leaving issue five children: Marie Louise, James Augustus, Samuel Claudius, Emma and William, who died respectively

on Oct. 30, 1918, Nov. 16, 1943, Mar. 12, 1890, May 13, 1893 and Dec. 22, 1926. Emma died unmarried, but the remaining four children of James Rigby married and left children surviving. Of such children, Percival and Gladys (both children of James Augustus) died on Mar. 10, 1934, and Jan. 7, 1898, respectively, and Bertha (the only child of Samuel Claudius) died on Aug. 23, 1910. Gladys and Bertha left no issue, but Percival left one child, the second respondent, Kathleen Creamer. On Jan. 29, 1945, Elizabeth Lucy Morris Mousley, the tenant for life, died.

On the petition for the payment out of court of funds representing the testator's residuary estate, the question arose whether issue of children of James Rigby who had predeceased the tenant for life were entitled to participate in the fund.

T. A. C. Burgess for the petitioners, grandchildren of James Rigby.

Robert S. Lazarus for the first respondent, one of the trustees of the will.

E. M. Winterbotham for the second respondent, a child of a deceased grandchild of James Rigby.

Cur. adv. vult.

Nov. 16. **ROXBURGH, J.**, read the following judgment: The testator devised and bequeathed his residuary estate, in case (as happened) his granddaughter Elizabeth should die without issue, to Samuel and James Rigby in equal shares, and in case they or either of them should be then dead (and in fact both were), then he devised and bequeathed the share of him or them so dying

"unto and equally between all his or their children who shall be then living and the issue of such of them as shall be then dead leaving issue in equal shares as tenants in common and not as joint tenants but such issue to take only amongst them in equal shares the share or shares his her or their parent or parents would have been entitled to if living . . ."

No question arises as to Samuel Rigby's moiety.

When the testator's grand-daughter Elizabeth died, all the five children of James Rigby were already dead. Four of them had died leaving issue, viz., (i) Mrs. Sammons, (ii) James Augustus Rigby, (iii) Samuel Claudius Rigby, and (iv) William Reginald Rigby. Accordingly James Rigby's moiety is divisible into four stirpital shares and each of his said four children was the founder of a stirps.

The first question is (or might have been) whether "issue" of a stirps is restricted to "children" of a stirps by the context. But it has been conceded that it is not; and I regard this as a vital factor in the solution of the second question, which is whether a grandchild of James Rigby, i.e., a child of the head of a stirps, who predeceased Elizabeth can participate in the distribution of residue.

Now, it was conceded (and this was decided by *Martin v. Holgate* (1), that, where children of a stirps are alone concerned, a direction that, if the founder of the stirps should be dead at a given time leaving issue, the issue (i.e., children) should take the share which their parent would have taken if then living, does not involve an implication that the children must be living at the date of distribution. This is because the gift to the children is construed as "an original gift" (per LORD CHELMSFORD in *Martin v. Holgate* (1) (L.R. 1 H.L. at p. 186)) or "an independent bequest" (per LORD WESTBURY (ibid., at p. 188)) under which the children of the founder of a stirps who predeceased the tenant for life take "an immediate vested interest" although the amount of the share is uncertain until the death of the tenant for life. This interpretation is inappropriate where "issue" is not restricted to "children", because there may be substitutions not only of a child for the founder of the stirps (which has been held to be an original or independent gift), but of remoter issue for a child. It seems impossible to doubt that the substitution of the remoter issue for the

child must be at the date of the death of the tenant for life—the remoter issue take the share which their parent would have taken if then living—and this must be a contingent gift to the remoter issue, and it would be difficult in these circumstances to regard the gift to the children of the founder of the stirps as not subject to the same contingency of surviving the tenant for life.

A The difference between the two cases did not occur to SIR RICHARD MALINS, V.C., in *Re Orton's Trust* (2), because although he was concerned with issue more remote than children he felt “obliged” (L.R. 3 Eq. at p. 380) to reach the same conclusion as in *Martin v. Holgate* (1). *Re Orton's Trust* (2) is, in my view, indistinguishable from the present case, and if it had stood alone I might have felt bound to follow it. However, SARGANT, J., in *Re Embury* (3) (not embarrassed by *Re Orton's Trust* (2) because it was not cited to him) said (109 L.T. at p. 514):

B “If the gift had been confined to children the contingency would not be imported into the gift over: (*Martin v. Holgate* (1)). But since I have construed the word ‘issue’ in its ordinary sense it follows that the gift to issue must be construed as a contingent gift and not as a vested gift . . .”

C Accordingly, he reached a decision which is admittedly in conflict with *Re Orton's Trust* (2).

Between these two conflicting decisions I prefer that of SARGANT, J., for the reasons which I have attempted to give. The result is that no issue can take unless he or she survived Elizabeth. This conclusion certainly seems to accord with the good sense of the matter.

Declaration accordingly.

Solicitors: *Kingsford, Dorman & Co.*, agents for *W. F. & W. Willoughby*, Daventry (for all parties).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

BOWLER *v.* JOHN MOWLEM & CO., LTD.

[COURT OF APPEAL (Denning, Hodson and Romer, L.JJ.), November 15, 1954.]

Fatal Accident—Writ—Indorsement of claim—Claim by widow—Description as “administratrix” in title of writ—Letters of administration not granted when writ issued—No statement of representative capacity in indorsement—Validity of proceedings—Fatal Accidents Act, 1864 (c. 95), s. 1.

Writ—Representative capacity of plaintiff—Stated in title of writ—Effect—Representative capacity should be stated in indorsement.

On Feb. 12, 1951, the deceased, who was employed by the defendants, died as the result of an accident which occurred in the course of his employment. On Oct. 19, 1951, the plaintiff, the widow of the deceased, issued a writ against the defendants, the title of the action being “Between Winifred Bowler (administratrix of Thomas Henry Bowler deceased) plaintiff, and John Mowlem & Co., Ltd., defendants.” The indorsement on the writ read: “The plaintiff’s claim is for damages for negligence and/or breach of statutory duty under the Fatal Accidents Acts, 1846 to 1908, and under the Law Reform (Miscellaneous Provisions) Act, 1934.” A grant of letters of administration was not made to the plaintiff until Nov. 10, 1952. On trial of the action, a jury having found the defendants guilty of negligence, the defendants contended that, as the plaintiff was not administratrix at the date of the issue of the writ, the writ and all subsequent proceedings were a nullity.

Held (ROMER, L.J., dissenting): the plaintiff must be taken, as regards her claim under the Fatal Accidents Act, 1864, s. 1, to be suing in her capacity as widow and not in a representative capacity as administratrix, because the indorsement on the writ did not state that she was suing as administratrix and its language was wide enough to cover her claim as widow of the deceased; therefore, the writ was valid, and judgment must be entered for the plaintiff.

Per DENNING, L.J.: in the title of the writ the plaintiff is described as administratrix, but . . . that is simply a description of her status as it was believed to be. The indorsement on the writ is the crucial matter. Under R.S.C., Ord. 3, r. 4 (1) the indorsement must show the plaintiff’s representative capacity . . . The statement of claim does not in law affect the matter one way or the other . . . (p. 558, letters A and C, post).

Appeal allowed.

EDITORIAL NOTE. The Law Reform (Limitation of Actions, etc.) Act, 1954, s. 3, extends to three years the period of twelve months prescribed by the Fatal Accidents Act, 1846, s. 3, as the period after the death of the deceased person within which an action under that Act must be brought.

AS TO INDORSEMENT ON WRIT OF REPRESENTATIVE CAPACITY, see 26 HALSBURY’S LAWS (2nd Edn.) 24, para. 28.

Cases referred to:

- (1) *Ingall v. Moran*, [1944] 1 All E.R. 97; [1944] K.B. 160; 113 L.J.K.B. 298; 170 L.T. 57; 2nd Digest Supp.
- (2) *Hilton v. Sutton Steam Laundry*, [1945] 2 All E.R. 425; [1946] K.B. 65; 115 L.J.K.B. 33; 174 L.T. 31; 2nd Digest Supp.
- (3) *Burns v. Campbell*, [1951] 2 All E.R. 965; [1952] 1 K.B. 15; 3rd Digest Supp.

(4) *Finnegan v. Cementation Co., Ltd.*, [1953] 1 All E.R. 1130; [1953] 1 Q.B. 688; 3rd Digest Supp.

(5) *Stebbins v. Holst & Co., Ltd.*, [1953] 1 All E.R. 925; 3rd Digest Supp.

APPEAL by the plaintiff from an order of ORMEROD, J., dated May 14, 1954.

On Feb. 12, 1951, the deceased, Thomas Henry Bowler, an employee of the defendants, John Mowlem & Co., Ltd., died as the result of an accident which occurred in the course of his employment. On Oct. 19, 1951, his widow, Winifred Bowler, issued a writ against the defendants, the title of the action being:

“Between Winifred Bowler (administratrix of Thomas Henry Bowler deceased) plaintiff, and John Mowlem & Co., Ltd., defendants.”

The indorsement on the writ was as follows:

“The plaintiff’s claim is for damages for negligence and/or breach of statutory duty under the Fatal Accidents Acts, 1846 to 1908 and under the Law Reform (Miscellaneous Provisions) Act, 1934.”

Paragraph 1 of the statement of claim which was delivered on the same day as the writ, read:

“The plaintiff is the administratrix and lawful relict of Thomas Henry Bowler deceased, . . . and brings this action for the benefit of the deceased’s estate under the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934, and for the benefit of his dependants under the Fatal Accidents Acts, 1846 to 1908.”

The persons on whose behalf the action was brought were then particularised as the widow, the son aged fourteen years and the daughter aged seven years, and the prayer was:

“And the plaintiff claims: Under the Law Reform (Miscellaneous Provisions) Act, 1934, damages: Under the Fatal Accidents Acts, 1846 to 1908, damages.”

At the date of the issue of the writ, Oct. 19, 1951, the plaintiff was not the administratrix of the deceased’s estate, and a grant of letters of administration was not in fact made to her until Nov. 10, 1952.

At the trial of the action, ORMEROD, J., with a jury, found that the defendants were liable for negligence. It was, however, then contended on behalf of the defendants that, as the plaintiff was not the administratrix of the deceased at the date of the issue of the writ, the writ and all the subsequent proceedings were a nullity.

ORMEROD, J., accepting this argument, gave judgment for the defendants.

N. R. Fox-Andrews, Q.C., and *R. E. Hopkins* for the plaintiff.

Marven Everett, Q.C., and *N. G. L. Richards* for the defendants.

DENNING, L.J., stated the facts and continued: At the date when the writ was issued the plaintiff was not the administratrix of the estate of Thomas Henry Bowler. Letters of administration were not in fact taken out until Nov. 10, 1952. It is said on that account that the writ and all the proceedings are a nullity. The writ is said to be incurably bad because it cannot be amended, and a new writ would be of no avail in regard to the Fatal Accidents Acts, 1846 to 1908, because proceedings under those Acts had at all material times to be brought within one year of the matters complained of, and the year has long since passed.

The law on this subject, as laid down by several decisions of this court, is

this: If a plaintiff brings an action in a representative capacity as administratrix, then that action is a nullity if she was not at that date administratrix by law with a proper grant. Even if she obtains a grant within a week, a month or a year afterwards it does not relate back. The writ is a nullity from the date of its issue. The decisions of this court which establish that are *Ingall v. Moran* (1); *Hilton v. Sutton Steam Laundry* (2); *Burns v. Campbell* (3), and *Finnegan v. Cementation Co., Ltd.* (4).

The whole question in this case is: Was this action brought by the plaintiff in a representative capacity as administratrix of her husband? In the title of the writ she is described as administratrix, but, in my opinion, that does not denote a representative capacity. That is simply a description of her status as it was believed to be. The indorsement on the writ is the crucial matter. Under R.S.C., Ord. 3, r. 4 (1), the indorsement must show the plaintiff's representative capacity. That rule provides:

"If the plaintiff sues . . . in a representative capacity, the indorsement shall show . . . in what capacity the plaintiff . . . sues . . ."

In this indorsement it is nowhere said that the plaintiff claims as administratrix. In the previous cases in this court which I have mentioned, the indorsements clearly said that the plaintiffs claimed "as administratrix", but there is no mention here of any representative capacity in the indorsement. The statement of claim does not in law affect the matter one way or the other, but even there it is not said that the plaintiff brings the action as administratrix. It simply says that she is the

"administratrix and lawful relict of the said Thomas Henry Bowler."

That is a description of her status and not a statement of any representative capacity.

In those circumstances I am of opinion that this writ was not a nullity from the date of its issue, because the indorsement is completely clear of any suggestion of representative capacity. It is true that the plaintiff described herself as administratrix in the title of the action and in the statement of claim, but a misdescription in the title is not fatal; it does not make a writ a nullity any more than does a misdescription of a woman as a spinster when she is in fact a married woman. A misdescription in the title is never fatal; it can be always cured by amendment in the same way as a misnomer. The thing which cannot be cured is the bringing of an action in a representative capacity when that capacity does not exist. In my opinion, the point which has been raised on behalf of the defendants does not succeed. The appeal should be allowed and judgment entered for the amount ordered by the learned judge.

HODSON, L.J.: I have come to the same conclusion. By s. 3 of the Fatal Accidents Act, 1846, it is provided that:

" . . . every such action shall be commenced within twelve calendar months after the death of such deceased person."

That section relates to actions brought by personal representatives (see s. 2). The action if brought in a representative capacity, which the plaintiff did not possess, must necessarily fail. That has been made clear by this court in *Hilton v. Sutton Steam Laundry* (2) and *Finnegan v. Cementation Co., Ltd.* (4). In other words, a wrong capacity cannot be cured by amendment so as to destroy the defendants' right to rely on the Statute of Limitations. In the two cases which I have mentioned, it was abundantly clear from the indorsement on the writ that the plaintiff was claiming as administratrix of the estate of her husband for damages under the Fatal Accidents Acts.

The sole question which arises in this case is whether it is true that the plaintiff in this case is so claiming, the materiality being that under the Fatal Accidents Act, 1864, s. 1, where there is no personal representative

" . . . in every such case such action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been, if it had been brought by and in the name of such executor or administrator ; and every action so to be brought shall be for the benefit of the same person or persons, and shall be subject to the same regulations and procedure, as nearly as may be, as if it were brought by and in the name of such executor or administrator."

This section enables the plaintiff to sue as widow where, as here, there was no personal representative. I have said already that in the two authorities to which I have referred there was no question but that the plaintiff's claim was as administratrix. In the second of those cases (*Finnegan's case* (4)) reference was made to a decision of DONOVAN, J., in *Stebbings v. Holst & Co., Ltd.* (5), which was on its facts very near the case now before this court, but no disapproval of it was expressed in *Finnegan's case* (4), the distinction being, as MORRIS, L.J., pointed out in his judgment ([1953] 1 All E.R. at p. 1138) that there was a variation in the language of the indorsement. Instead of the plaintiff's claim being indorsed as administratrix, as in the case of *Hilton* (2) and *Finnegan* (4), in *Stebbings v. Holst & Co., Ltd.* (5) the words were ([1953] 1 All E.R. at p. 926):

" The plaintiff's claim is for damages under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934, as widow and administratrix of the estate of Alfred Stebbings, deceased . . . "

I compare that with the language of the indorsement here:

" The plaintiff's claim is for damages for negligence and/or breach of statutory duty under the Fatal Accidents Acts, 1846 to 1908, and under the Law Reform (Miscellaneous Provisions) Act, 1934."

There is no reference in the indorsement in this case either to the plaintiff as the widow or to the plaintiff in her capacity as administratrix.

The question is whether that indorsement ought, as the defendants contend, to be treated as an indorsement by a plaintiff suing in her capacity as administratrix. I have come to the conclusion that it ought not to be so construed. I recognise that it is not an easy case, for, indeed, in the title of the action the plaintiff was wrongly described as administratrix. In the statement of claim, which cannot cure defects in capacity shown on the indorsement and similarly ought not to be allowed to detract from the indorsement, she is described as administratrix and lawful relict. The vital matter to be construed is the indorsement itself. In my judgment, the language of that indorsement is wide enough to cover the plaintiff's claim as widow. She was the widow of the deceased and there being no administratrix she was entitled to bring this action under the Fatal Accidents Acts. In my judgment there is no technical objection to her so doing, and I am of opinion that the appeal should be allowed.

ROMER, L.J.: I confess that if this matter were to be decided by myself unaided, I should have found great difficulty in reaching the conclusion that the appeal should be allowed. I do not propose to elaborate the grounds of my doubts because I understand that questions of this kind are not likely to arise again. I feel that there is considerable force in at least one of the submissions which counsel made on behalf of the defendants when he put it

in this way: He said that when a defendant receives a writ he is entitled to know, because it is the object of the writ to tell him, what he is being sued for and by whom. The defendants on receiving this writ and looking at it would see the plaintiff was Winifred Bowler, and then in brackets "Administratrix of Thomas Henry Bowler, deceased". Then the defendants are required to enter an appearance in the action at the suit of Winifred Bowler, again "administratrix of Thomas Henry Bowler, deceased". If they looked to see what relief was claimed they would find a claim under two statutes, the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act. Of those two Acts, relief under the second one can only be sought by a personal representative, and that relief, therefore, conforms to the description of the plaintiff. The other relief, damages under the Fatal Accidents Acts, 1846 to 1908, is relief which may be sued for by a personal representative. Again, therefore, there is nothing inconsistent with relief under that Act with the description of the plaintiff. There is no reference in the indorsement to the plaintiff's widowhood. I feel myself, therefore, that the natural conclusion of the defendants to be derived from the writ framed in that way would be that they were being sued by the plaintiff in a representative capacity, and none the less because the requirements of R.S.C., Ord. 3, r. 4, had not been expressly complied with. That, in brief, is the submission which counsel made, and which for my part I think is an attractive one, and if I had had to decide this case unaided I think I would have accepted it. As, however, my brethren take a different view, the appeal must be allowed.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *J. H. Fellowes* (for the plaintiff); *E. P. Rugg & Co.* (for the defendants).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

NOTE.Re APPLICATIONS BY BRIXHAM URBAN DISTRICT
COUNCIL AND OTHERS.

[QUEEN'S BENCH DIVISION (Hilbery, Lynskey and Parker, J.J.), October 4, 1954.]

Rates—Local valuation court—Appeal—Withdrawal by appellant valuation officer—Rating authority intending to appear in support—Withdrawal valid—Local Government Act, 1948 (c. 26), s. 48 (4).

APPLICATIONS for leave to apply for orders of mandamus directed to a local valuation court of Plymouth and South Devon Local Valuation Panel to hear and determine certain appeals.

The applicants, Brixham Urban District Council, Salcombe Urban District Council and Totnes Rural District Council, made the applications as the rating authorities for their districts. On Mar. 29, 1950, Mar. 29, 1951, Oct. 26, 1951, and Mar. 27, 1952, the valuation officer of the Board of Inland Revenue for their rating areas made proposals for the insertion in their valuation lists of assessments relating to the gas undertaking of the South Western Gas Board, the ratepayers. Assessments of the hereditaments were not at any of those dates included in the lists. The board objected to the proposals and the valuation officer appealed against the objections. Being in agreement with the proposals, the rating authorities took no steps in regard to them. At the hearing of the appeals by the local valuation court on June 29, 1954, the rating authorities appeared by counsel to be heard as parties, but the clerk of the court reported that the valuation officer had written purporting to withdraw each of the appeals and the proposals out of which they arose. The grounds of withdrawal were that to ascertain the rateable values of the hereditaments would necessitate computing a cumulo valuation of the gas undertaking and an apportionment thereof among the several hereditaments which had not been undertaken in view of negotiations for a new method of determining the rate liability of gas boards between the Ministry of Housing and Local Government, the local authorities' associations and the Gas Council. The valuation officer was, therefore, not in a position to support the appeals. The court refused to hear the rating authorities as parties, or to hear or determine the appeals.* The rating authorities submitted as grounds of their applications that they were fully entitled to appear and be heard as parties to the appeals and could not be deprived of their right by the purported withdrawal. The withdrawal deprived them of any opportunity of endeavouring to secure payment of any rates in respect of the hereditaments for the periods for which the proposals were made.

G. D. Squibb for the applicants.

[HILBERY, J.: Is the court asked to say that, though the appellant withdrew his appeal, the court ought to force him to appear? Is not this case covered by a similar point under the Rent Control Acts†?]

G. D. Squibb: Other parties were concerned. The question turned on s. 48 of the Local Government Act, 1948. [He read sub-ss. (1) (2) (3) and (4).] In reliance on the valuation officer's proceedings the rating authorities did nothing

* Comparison may be made with *R. v. East Norfolk Local Valuation Court, Ex p. Martin* ([1951] 1 All E.R. 743), where it was held that once an objection to a proposal was withdrawn nothing remained on which the valuation court could adjudicate; that decision illustrates the converse of the present case, but lacks the element that enabled the question to be raised in the present case whether an application should continue when a party entitled to appear wished the application to be continued (see [1951] 1 All E.R. at p. 745, letter E.).

† In *R. v. Hampstead & St. Pancras Rent Tribunal, Ex p. Goodman* ([1951] 1 All E.R. 170), a Divisional Court held that the tenant of a flat could withdraw an application to a rent tribunal to determine a reasonable rent for his premises at any time before the tribunal gave its decision.

and relied on their right of appearance as parties under sub-s. (3). Even if the valuation officer did not want to appear, the appeal was still there because notice of appeal had been given. By inference, once notice of appeal had been given, a duty to hear it was imposed by sub-s. (1) and a right to have it heard by sub-s. (3).

[HILBERY, J.: The appellant is in control of whether he wants to go on or not. The sub-section does not say there is a right to have it heard but only that on the hearing (i.e., presupposing there is one) the parties shall have certain rights.] A

G. D. Squibb: The duty arose under sub-s. (1). The chairman had a duty to arrange for the convening of the court. The valuation officer's letter was not an effective withdrawal and he had no power to withdraw. There were other appellants, namely, the rating authority, who could have appeared on whichever side they liked and had been lulled into a sense of false security because they could have made proposals themselves. B

[HILBERY, J.: They could have given a cross-notice of appeal.]

G. D. Squibb: There was nothing to cross-appeal about. There was agreement with the valuation officer's proposal and there was no point in making another. A new proposal would only date back to Apr. 1 this year. In the rent tribunal case, the borough council could have appeared but this was different because the rating authority were themselves aggrieved. C

[LYNSKEY, J.: Section 48 (4) empowers the court to give effect to the contentions of the appellant and if he withdraws there is no contention of the appellant. The sub-section distinguishes between the appellant and parties.] D

G. D. Squibb: The rating authority could appear as parties as respondents or appellants and if they appeared as appellants effect would be given to their contentions. This was not a case of a local valuation court acting in the absence of the appellant valuation officer and the rating authority. The valuation officer had no right to abandon an appeal once other persons had an interest in it. He would not put it on the footing of estoppel. The regulations made no difference. The valuation officer was given certain powers and duties and no power of withdrawal at all was given. If he was the only person interested he could secure the same effect merely by not attending. E

HILBERY, J.: We are of opinion that this application must be refused. F

Application refused.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Clerk of the urban district council, Brixham.*

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

COMPANIA NAVIERA MAROPAN S.A. v. BOWATERS
LLOYD PULP AND PAPER MILLS, LTD.

[QUEEN'S BENCH DIVISION (Devlin, J.), July 19, 20, 21, 22, 23, October 4, 5, 6, 7, 8, 11, November 8, 1954.]

A Shipping—Charterparty—Safe port—"Approved loading place"—Warranty of safety of berth—Right of charterers to order loading at two safe loading places—Ship grounded at unsafe loading place—Liability of charterers—*Volenti non fit injuria*.

Shipping—Charterparty—Contract—Application of general law of contract.

B By a charterparty dated Oct. 17, 1951, the defendants chartered the steamship *Stork*, which was owned by the plaintiffs, to load a cargo of logs from the East coast of Newfoundland. The charterparty provided that the ship should "proceed to not more than two approved loading places as ordered in Newfoundland on the East coast . . . or so near thereunto as she may safely get". The charterparty also provided: "charterers have the right to order the ship to load at two safe berths or loading places". The ship was directed by the defendants to load at a berth in an inlet of the sea known as "Tommy's Arm" on the East coast of Newfoundland. On C Oct. 26, 1951, the *Stork*, having taken the pilot on board, proceeded to Tommy's Arm and moored in the customary way, i.e., with her head held by her anchors and with her stern held by lines secured to ring bolts on an island. On the port side were some rocks called the "Five Foot Rocks" and on the starboard quarter were the "Seal Rocks". In the evening D of Oct. 29 a severe south to southwesterly gale sprang up which continued throughout the night. During the night one of the stern lines parted and by dawn the ship had slipped her position considerably towards the Seal Rocks. On the following morning the master of the *Stork*, thinking that his ship was in danger, cut the stern lines and steamed ahead to try to find a safe anchorage. The *Stork* was taken by a gust of wind, grounded off the E Five Foot Rocks and sustained damage. In an action for the damage due to the grounding, the court having found that the loading place was unsafe and that there was no negligence or imprudence on the part of the master,

HELD: (i) the terms of the charterparty imposed an obligation on the defendants to nominate a loading place, which should be safe for the particular ship chartered at or about the time when she was to use it. The F words "approved loading place" meant approved in the sense of being generally acceptable in the trade (see p. 566, letter A, post).

(ii) the defendants having, in breach of their obligation, nominated a loading place which was unsafe, but which was not obviously unsafe, the plaintiffs were entitled to proceed to anchorage at the loading place and, in accordance with the ordinary law of contract which applied to the charterparty, to affirm the charterparty and claim, as damages for breach of G contract by the nomination of an unsafe loading place, the amount of the damage to the *Stork* which was the natural and probable consequence of the breach of contract.

G. W. Grace & Co., Ltd. v. General Steam Navigation Co., Ltd. ([1950] 1 All E.R. 201), followed.

H *Reardon Smith Line, Ltd. v. Australian Wheat Board* ([1954] 2 Lloyd's Rep. 148), not followed.

(iii) on the facts, although the master had substantial fear that Tommy's Arm did not constitute a safe anchorage for his vessel and allowed his fear to be overridden by those with local knowledge, the defence of *volenti non fit injuria* could not be sustained.

AS TO CONSEQUENCES OF NAMING AN UNSAFE PORT, see 30 HALSBURY'S LAWS (2nd Edn.) 518, 519, para. 670; and FOR CASES, see 41 DIGEST 521, 3497-3500.

Cases referred to:

- (1) *Grace (G. W.) & Co., Ltd. v. General Steam Navigation Co., Ltd.*, [1950] 1 All E.R. 201; [1950] 2 K.B. 383; 2nd Digest Supp.
- (2) *Reardon Smith Line, Ltd. v. Australian Wheat Board*, [1954] 2 Lloyd's Rep. 148.
- (3) *West (Samuel), Ltd. v. Wright's (Colchester), Ltd.*, (1935), 51 Lloyd's Rep. 105; 40 Com. Cas. 186; Digest Supp.
- (4) *The Pass of Leny*, (1936), 155 L.T. 421; 54 Lloyd's Rep. 288; Digest Supp.
- (5) *Arel Brostrom & Son v. Louis Dreyfus & Co.*, (1932), 44 Lloyd's Rep. 136; 38 Com. Cas. 79; Digest Supp.
- (6) *Ogden v. Graham*, (1861), 1 B. & S. 773; 31 L.J.Q.B. 26; 5 L.T. 396; 121 E.R. 901; 41 Digest 522, 3509.
- (7) *British Oil & Cake Co., Ltd. v. Burstall & Co., Burstall & Co. v. Rayner & Co., Rayner & Co. v. Bouring & Co., Ltd.*, (1923), 39 T.L.R. 406; 39 Digest 684, 2701.
- (8) *Dobell (G. C.) & Co., Ltd. v. Barber & Garratt*, [1931] 1 K.B. 219; 100 L.J.K.B. 65; 144 L.T. 266; Digest Supp.
- (9) *Krüger & Co., Ltd. v. Moel Tryvan Ship Co., Ltd.*, [1907] A.C. 272; 76 L.J.K.B. 985; 97 L.T. 143; 41 Digest 403, 2503.
- (10) *Johnston Brothers v. Saxon Queen S.S.Co.*, (1913), 108 L.T. 564; 41 Digest 523, 3516.

ACTION for damages for the grounding of a ship.

The plaintiffs were the owners of the steamship *Stork* of 7,111 gross tonnage, length 441 feet and beam fifty-seven feet. The defendants were paper manufacturers, part of their business being the export of logs to England for the making of wood pulp into paper. On Oct. 17, 1951, the defendants chartered the *Stork* to load on the East coast of Newfoundland a cargo of logs for carriage to Rochester. The charterparty provided that the *Stork* should

"proceed to not more than two approved loading places as ordered in Newfoundland on the East coast . . . or so near thereunto as she may safely get."

Under "berth place" the charterparty provided:

"charterers have the right to order the ship to load at two safe berths or loading places."

The *Stork* was directed to load at an inlet known as "Tommy's Arm", a place from which the defendants were accustomed to export wood during the export season from May to November and which was considered suitable for the end of the season. Tommy's Arm was about one mile in length running east and west and was entered from the east. In the centre of the arm was an island called "Central Island" and there were three berths or loading places in the arm where vessels could be moored. In berth C a vessel's head was held by her anchor on a heading of about 280° her stern being held by lines secured to ring bolts on Central Island. In this berth a vessel would have some rocks called the "Five Foot Rocks" on her port side and the "Seal Rocks" on her starboard quarter, the distance between the two sets of rock when awash at low water being 1,040 feet. On Oct. 25, the *Stork* arrived at Great Dunder Island, about ten miles east of Tommy's Arm, where she was met by a Mr. Watkins in a motor boat. There was no compulsory pilotage and no certified pilots but Mr. Watkins usually acted as pilot and was recommended by the defendants to ships consigned to them. Mr. Watkins brought the *Stork* in about noon and was directed to berth C, but owing to the fact that there was an easterly wind blowing and because of a mishap with stern wires it was considered imprudent to moor the *Stork* on that day and she steamed out of Tommy's Arm. The *Stork* was brought back the following day and successfully moored in berth C, being

secured to Central Island by four stern lines. Loading began and continued till noon on Oct. 29 but it was stopped through bad weather. In the evening the weather deteriorated into a severe gale from the west or southwest. During the night one of the stern lines parted and by dawn the Stork had moved considerably to starboard in the direction of Seal Rocks. At 9 a.m., as the pilot had not arrived, the master, thinking that the position had become worse and that he was in danger of striking the Seal Rocks, decided to move. Accordingly he cut his stern lines, steamed ahead and picked up his anchors with the idea of getting to a safer anchorage at the western end of the Arm. As the Stork proceeded she was caught by a gust of wind and grounded on the Five Foot Rocks. His LORDSHIP found as a fact that the loading place was unsafe, and that the grounding was not due to any negligence or imprudence on the part of the master.

- A his stern lines, steamed ahead and picked up his anchors with the idea of getting to a safer anchorage at the western end of the Arm. As the Stork proceeded she was caught by a gust of wind and grounded on the Five Foot Rocks. His LORDSHIP found as a fact that the loading place was unsafe, and that the grounding was not due to any negligence or imprudence on the part of the master.
- B *Eustace Roskill, Q.C.*, and *H. V. Brandon* for the plaintiffs.
K. S. Carpmael, Q.C., and *T. G. Roche* for the defendants.

Cur. adv. vult.

Nov. 8. **DEVLIN, J.**, in a written judgment, stated the facts and continued: This leaves the question of law to be determined. The defendants contend that the charterparty contains no warranty of safety, express or implied; that if Tommy's Arm was unsafe the master ought to have known, and in fact did know, that it was unsafe and went there of his own choice. Therefore, it is submitted, the plaintiffs cannot recover for damage to the ship.

- C It is first necessary to see what the charterparty says about safety. It is usual for this type of charterparty to make provision in one place for the nomination of a safe port and in another place for the nomination of a safe berth within the port. As none of the loading places used by Bowaters on the East coast of Newfoundland can really be described as ports and only by courtesy as berths, this charterparty uses in both places the term "loading place". In what I may call the "port place" it provides that the ship shall
- D "proceed to not more than two approved loading places as ordered in Newfoundland on the East coast . . . or so near thereunto as she may safely get."

- E In the "berth place" it provides that

"charterers have the right to order the ship to load at two safe berths or loading places."

- F Leaving out of consideration for the time being the word "approved" (on which the plaintiffs found an argument) the defendants argue that they have the right, but not the obligation, to nominate a safe loading place. That does not mean, as I understand the argument, that under the charterparty the ship could be compelled to go to an unsafe loading place, but that the provision about safe loading places is in the nature of a condition precedent. If the charterer nominates an unsafe place, the ship is not obliged to go there, but cannot claim damages for any breach of obligation, because the charterparty merely gives the charterers a right to nominate and does not impose any duty on them.
- G This appears to me with respect to be an impossible argument. There must be an obligation, express or implied, to nominate a loading place of some sort; if the ship is not told where to load she cannot earn her freight, and so by failing to nominate or by nominating an obviously unsafe place the charterers could

- H defeat the object of the charterparty without being liable to damages. There must, therefore, be an obligation to nominate at least one loading place and there must be implicit in that some condition about safety to prevent the making of a derisory nomination. The obligation on the ship to proceed to a loading place "or so near thereunto as she may safely get" suggests strongly that the loading place itself must be safe. And when one finds the obligation on the charterers to nominate a loading place of some sort amplified by an express right to nominate one or two safe loading places, it does not require much effort of construction

to conclude that any loading place which is nominated must be safe. I think, therefore, that this charterparty is to be read in just the same way as one in the more usual form which provides that the ship should proceed to a safe port and load at a safe berth. "Safe" in this context means, it is well settled, that the place must be safe for the particular ship chartered, at or about the time when she is to use it.

I think that the parties would probably have inserted the word "safe" in what I have called the "port place", if they had not used the word "approved". I do not think that this latter word has anything to do with the approval or disapproval of the parties themselves. I think it means "approved" in the sense of being generally acceptable in the trade. No doubt a place would not be approved in this sense unless it was considered to be generally safe, but I do not think the expression can be construed as warranting safety for a particular ship at a particular time. I think that the word is used to give additional protection to the shipowner. It is intended to confine loading places to those that are recognised or regularly used, and to prevent the charterer naming any place anywhere, even though it is safe, at which he would like to load. Thus its use, I think, takes for granted that the approved place will be safe. Whether the use of the expression by itself would comprehend a warranty of safety I need not decide, since I am satisfied that this charterparty, construed as a whole in the way that I have already indicated, is to be read as if it referred to an approved and safe loading place as ordered in Newfoundland on the East coast.

The defendants put their point in two other ways. The first is based on a general proposition of law, which is that wherever a voyage charterer makes a nomination or gives an order which is beyond his powers under the charter, and the master obeys, he does so at his peril: he is free to disregard it, and if he chooses to obey, he must take the consequences. This proposition does not as a matter of law depend on the actual knowledge or means of knowledge of the master, though it can perhaps be supported by the consideration that a master is likely to be more alive than the charterers to the dangers of a port or berth or to those that may arise from any other order affecting the navigation or management of the vessel. As a matter of law in every case, whether the decision to obey or disobey involves maritime matters or turns on the construction of the charterparty, the proposition requires that the master must make up his own mind about it and make such inquiries as he thinks necessary for the purpose. Alternatively it is contended that, on the facts of this case, the master had actual knowledge of the full position, did indeed believe that Tommy's Arm was dangerous and did make up his mind to berth, and that in such circumstances the plaintiffs cannot recover.

I shall consider first the proposition of law, which is very similar to one which I rejected, at least implicitly, in *G. W. Grace & Co., Ltd. v. General Steam Navigation Co., Ltd.* (1). I have been invited to reconsider that decision. I should have done so even if counsel for the defendants' argument was the only *novus actus interveniens*, but in fact there has intervened also a very important decision of the High Court of Australia: in *Reardon Smith Line, Ltd. v. Australian Wheat Board* (2), the High Court, by a majority, accepted the proposition which I rejected. The earlier authorities are so fully discussed in that case that I need not now do more than mention them. The view I formed is certainly inconsistent with the decision of BRANSON, J., in *Samuel West, Ltd. v. Wright's (Colchester), Ltd.* (3) and probably also with that of BUCKNILL, J., in *The Pass of Lengy* (4). The contrary view is, I think, inconsistent with the decision of ROCHE, J., in *Axel Brostrom & Son v. Louis Dreyfus & Co.* (5): in this case the ship did not as a result of the compliance with the charterer's order incur physical damage, but she was held entitled to recover the cost of hiring tugs to avoid physical damage, which comes to the same thing. The contrary view is inconsistent also with several other earlier decisions unless they can be satisfactorily distinguished

on the ground that they concerned a time charter and not a voyage charter; and the controversy in *Reardon Smith's* case (2) turned very largely on this point. There is nowhere any clear decision binding on me; and so counsel for the defendants naturally relies strongly on the judgments of the High Court of Australia as affording the best guidance, while counsel for the plaintiffs prays in aid the powerful dissenting judgment of the Chief Justice.

A I have held that there was an obligation to nominate a safe port. It follows that it was broken by the nomination of an unsafe port. But the ship should, the defendants contend, have behaved in just the same way as she would perforce have done if no port had been nominated at all—i.e., she should have done nothing and claimed damages for failure to nominate a safe port. On the nomination of an unsafe port the ship's duties, rights and remedies are, the defendants say, just the same as if no port had been nominated at all. There lies, I think, at the heart of the defendants' proposition this fundamental idea—

B that to do an act badly is the same thing for all the purposes of the law of contract as not to do it at all. There is no doubt that for *some* purposes of the law of contract that is so. An act or omission either complies with the contract or it does not; if it does not comply, it does not for some purposes matter whether the non-compliance is due to bungling or to inaction; to do the act improperly means that you have omitted to do the proper act. Thus in *Ogden v. Graham* (6) where the charterers nominated an unsafe port, and the ship refused to go there, the ship recovered damages for detention on the basis that the charterers had failed to nominate a safe port within a reasonable time. In the present case, the bad nomination of berth C had two qualities, one of which on the defendants' argument is relevant and the other irrelevant. In the first place (since it is not suggested that there was room for a second nomination within a reasonable time, even if the charterers could have made a better one), it marked the end of the period within which the charterers had undertaken to nominate a safe berth and so marked the point of time at which the breach arose. Secondly, it invited the ship to an unsafe berth. The first is relevant, because the charterer had undertaken to nominate a safe berth and failed to do so; the second is irrelevant because the charterer had not undertaken not to invite the ship to an unsafe berth. The point is put by WEBB, J., and TAYLOR, J., who formed the majority in *Reardon Smith's* case (2) ([1954] 2 Lloyd's Rep. at p. 162):

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F “There is of course, ample authority for the proposition that a failure or refusal, pursuant to such a provision, to designate a safe port will sound in damages, and the nominating of an unsafe port may well be involved in such a failure or refusal. But it by no means follows that where the nominating of an unsafe port is involved in such a failure or refusal the shipowner may recover not only the damages which flow from the failure or refusal but also the damages sustained by the vessel after proceeding to the designated port and as the result of its unsafe nature or condition. Such damages do not flow from a refusal to nominate a safe port.”

G

H It is true that a term in a contract must either be fulfilled or broken, and that an unsuccessful attempt to fulfil it is as much a breach as is refraining from any attempt at all. Neither is perfection, and in determining whether or not there is a breach the degree of imperfection is irrelevant. But that is not to say that it is irrelevant in determining what are the damages for the breach. A man who acts in purported fulfilment of a contract is not for this purpose doing the same thing as a man who does not act at all. For when he so acts, he at least represents that what he is doing is in accordance with his contract. In my judgment, he does more than represent, he warrants, or, it would be truer to say, he acts under a warranty he has already given, that what he does will be in accordance with his contract. Let me illustrate this by reference to a simple contract for the sale of goods. If a seller agrees to deliver one pound of first quality beans and tenders second quality beans, it is a bad tender and the buyer can reject it.

Alternatively the buyer can accept it and sue for damages for breach of warranty. It is not then open to the seller to say: "My tender was a bad one; it is just the same as if I had never tendered at all; I am still within the contract time and I now propose to make a good delivery." Nor could he successfully contend that the measure of damages was that appropriate to non-delivery. Nor can he say: "I agreed to deliver first quality beans, but I never warranted that I would not tender second quality beans." He cannot say that, because he did in truth warrant that the beans he tendered would be first quality and that is why he is being sued for breach of warranty. A promise to deliver one pound of first quality beans is just the same as a promise to deliver one pound of beans, warranted first quality only. Likewise, an obligation to order a vessel to a safe port on the East coast of Newfoundland is just the same as an obligation to order a vessel to a port on the East coast of Newfoundland, warranted safe. There is no magic in the word "warranted"; every term in a contract is at heart a warranty. If this charterparty had in terms warranted that Tommy's Arm was safe, I do not suppose that anyone would ever have thought of arguing that the ship could not proceed there and obtain damages if Tommy's Arm was not safe.

Thus the defendants' proposition is one that strikes at the root of a fundamental principle in the law of contract. There is a difference between a contractor who does not discharge his obligation at all and one who does so imperfectly. In the latter case, the contract gives the other party the right to elect to treat the imperfect performance as if it were a fulfilment of the contract (even if he knows that in fact it is not), and to claim damages if any result from the imperfection. This is a right that is, I think, common to every class of contract. The general principle is that the other party is entitled to proceed just as he would have done if the contract had been properly fulfilled, and the risk of any damage that flows from that must be borne by the wrongdoer.

I think, therefore, that the real question is not so much whether a distinction can be drawn between a voyage and a time charter, as whether any charterparty, whether for voyage or for time, is exempt from the application of the ordinary law of contract. I see no reason in principle why it should be, and I do not think that business convenience requires it. Indeed, I think business, whether maritime or otherwise, might be gravely impeded if the ordinary principle were not allowed to operate freely—and by the ordinary principle I mean that, generally speaking, a man is entitled to act in the faith that the other party to a contract is carrying out his part of it properly. It does not lie in the mouth of the promisor to say that a promisee has no right to assume that a promise has been faithfully carried out and should make his own inquiries to see whether it is or not. If everything done under contract has to be scrutinised and tested by the other party before he can safely act on it, many transactions might be seriously held up—in doubtful cases, perhaps indefinitely. Even if the breach is clear, it is vital to the proper conduct of business that the promisee should be able, if he considers the breach a minor one, to proceed without sacrificing his right to be indemnified. That is just as important in a voyage charterparty as in any other sort of business. Suppose that the master thinks that the nominated berth is barely large enough and that he might scrape his vessel's sides and damage her paintwork. If, as is the case here, it is the only berth that can be nominated, is he to throw up the voyage? I am not asked to assess the damages in this case, so I do not know what was the cost of repairing the Stork. But it is certain that if the ship had sailed away from Tommy's Arm without carrying her freight, the cost of the time lost would have been considerable. It is possible even in this case that a prudent master, without knowing for certain whether he was right or not and so acting in the interests of all concerned, might have felt that the risk of damage to the vessel's bottom was outweighed by the certainty of time lost. A master under a voyage charterparty is often confronted with this sort of

problem, as, for example, when he has to decide whether to accept or reject cargo that may be dangerous, and there are, of course, many cases in which the ship has recovered for damage done to her by dangerous cargo.

To deny the defendants' proposition does not mean that a master can enter ports that are obviously unsafe and then charge the charterers with damage done. The damages for any breach of warranty are always limited to the natural and probable consequences. The point then becomes one of remoteness of damage; or, if it is thought better to put it in Latin, the expressions *novus actus interveniens* and *volenti non fit injuria* are ready to hand. There is also the rule that an aggrieved party must act reasonably and try to minimise his damage. A master who entered a berth which he knew to be unsafe (and which perhaps the charterer had nominated in ignorance of its condition) rather than ask for another nomination and seek compensation for any time lost by damages for detention, might find himself in trouble. So might a master who sought compensation for the time lost in sailing back across the Atlantic because he had not cared to risk damage to his paintwork. If I may return to the case of the sale of goods, from which I have already drawn an analogy, in a proper case in which sub-sales are contemplated, the plaintiff may recover as part of his damages his liability to a third party: but if he passed on to a third party goods which he knew to be dangerous or defective, or if he incurred damage himself by recklessly using such goods, he could not claim to be reimbursed: see *British Oil & Cake Co., Ltd. v. Burstall & Co.* (7), per ROWLATT, J. (39 T.L.R. at p. 407) and *G. C. Dobell & Co., Ltd. v. Barber & Garratt* (8), per LAWRENCE, L.J. ([1931] 1 K.B. at p. 238). Again in *Kröger & Co., Ltd. v. Moel Tryvan Ship Co., Ltd.* (9), the EARL OF HALSBURY, speaking of the obligation put by the charterparty in that case on the master to sign bills of lading, said ([1907] A.C. at p. 278):

"If the bill of lading tendered is manifestly inconsistent with the charter-party, I think it would be his duty to refuse . . ."

Of course, cases at either extreme are easy to solve. The difficult ones are those in which the risk is doubtful or the danger concealed. There is a tendency in such a case, as I have noted earlier, to feel that the master is often better equipped than the charterers to deal with such a situation. But the solution must be found in the parties' own agreement. As DIXON, C.J., pointed out in *Reardon Smith's case* (2) ([1954] 2 Lloyd's Rep. at p. 153), the charterer can, if he likes, name the loading place in the contract and then the shipowner must satisfy himself about its safety; if the charterer wants the advantage of naming, generally at the last moment, a place of his own choice, it is fair that he should take the responsibility of seeing that it is safe.

I turn now to the third way in which the point is put which is in effect that this is a case of *volenti non fit injuria*. On the facts I do not think that it is. The defendants rely on the master's admission that on Oct. 25, he came to the conclusion that Tommy's Arm was not a safe anchorage; and after he had moored again on Oct. 26 he wrote to his owners:

"This is a very dangerous place in the winter for steamers of our size and

I hope we may be fortunate enough to load quickly without bad weather."

In his evidence, he said that he was in a dilemma; he could not foresee that the wind would blow with such force and he could not delay the ship.

It is clear, therefore, that the master had substantial fears and that he allowed them to be overridden. I do not think that in making his choice in what he truly says was something of a dilemma he was acting in a foolhardy or unreasonable way. The defendants rightly emphasise that he had had, so to speak, a trial trip on Oct. 25 and yet decided to enter again. Nevertheless, the safety of a place like Tommy's Arm cannot be judged entirely by appearance; it must depend on the sort of weather conditions that are likely to be experienced. It is peculiarly a case in which a master, whatever his own feelings, might think it

wise to defer to those with local experience. The pilot gave evidence of his conversation with the master when they first entered on Oct. 25:

"When we got going to Tommy's Arm he said the chart looked small. I said no doubt it did to a great many men, look small, but don't get worried, just leave it to me and nothing will happen to your ship going in there."

Later he said that he told the master:

"I have brought ships in here so large as this one and I know it looks funny to you but we have nothing to worry about."

I find, therefore, that there was a warranty of safety of Tommy's Arm, that it was broken and that the damage to the Stork was the natural and probable consequence of the breach. There must therefore be judgment for damages to be ascertained on inquiry.

The incident of Oct. 25 has given rise to a minor claim put forward by the plaintiffs. They say that as a result of it they lost a day for which they are entitled to be compensated. If I had found that the Stork's failure to moor on that day was due to the negligence of the defendants' servants, the loss of the day might have been a consequence of it. In the absence of such a finding and on the basis that the incident was due to a mishap, the plaintiffs say they are entitled to recover in that the port was not safe at the time of the ship's arrival. It is common ground that she was prevented from mooring that day because of the easterly wind. The law does not require the port to be safe at the very time of the vessel's arrival. Just as she may encounter wind and weather conditions which delay her on her voyage to the loading port, so she may encounter similar conditions which delay her entry into the port and the charterer is no more responsible for the one than for the other. If the wind and weather conditions are such as to affect the character of the port, as in *Johnston Brothers v. Saron Queen S.S. Co.* (10), the position may be different. If the evidence in this case showed that the weather to be expected at this time of year was such as might, in effect, close the port to vessels of the size of the Stork for a substantial period, the plaintiffs' argument might succeed. But the evidence falls far short of that and the delay actually occasioned was only one day. In my judgment, this part of the claim fails.

Judgment for the plaintiffs on the main issue.

Solicitors: *Stokes & Mitcalfe* (for the plaintiffs); *Lawrence Jones & Co.* (for the defendants).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

LANG v. LANG.

[PRIVY COUNCIL (Lord Porter, Lord Oaksey, Lord Reid, Lord Tucker and Lord Asquith of Bishopstone*), July 19, 20, 21, 22, 26, 27, 28, 29, 30, November 10, 1954.]

Privy Council—Australia—Divorce—Desertion—Constructive desertion—Conduct equivalent to expulsion of other spouse—Inference of intention to end consortium—Husband's persistent cruelty to wife—Persistence despite wife's threats to leave matrimonial home—Marriage Act, 1928 (Victoria) (No. 3726 of 1928), s. 75 (b), (d).

The parties were married in South Australia in November, 1924. For a number of years the matrimonial relationship was fairly happy, but from 1942 (when the husband returned from the Middle East where he had been serving in the armed forces) until 1948 the husband grossly ill-used and insulted the wife. In April, 1943, she left him for a period of about two months, but was induced to return by promises of amendment, which were, however, promptly and continuously thereafter violated. In July, 1948, after being treated with such violence that the police had to be called in, she asked him to leave, which he did, returning, however, in August, 1948. A few days after his return he forced sexual intercourse on her in circumstances of calculated and revolting indignity, and told her that he was going to use her for the same purpose whenever he wanted to and as often as he wanted to. She then finally left him and, ignoring various letters in which he begged her to return to him but did not express any intention to treat her differently if she did, in October, 1951, presented a petition for divorce on the ground that the husband had without just cause or excuse wilfully deserted her and had continued in desertion for three years and upwards. In September, 1952, she was granted a decree nisi. On appeal by the husband,

HELD: prima facie, a husband who treats his wife with gross brutality may be presumed to intend the consequences of his acts, though the inference may be rebutted; and if the whole of a husband's conduct is such that a reasonable man must know that it will probably result in the departure of his wife from the matrimonial home the fact that the husband did not wish this consequence to ensue does not rebut the inference that he intended the probable consequences of his acts and thus intended his wife to leave the home: in the present case, the husband must have known that his conduct would necessitate his wife leaving him if she acted as a reasonable being, and, therefore, he had constructively deserted her.

Sickert v. Sickert ([1899] P. 278), and *Edwards v. Edwards* ([1948] 1 All E.R. 157), approved.

Appeal dismissed.

AS TO CONSTRUCTIVE DESERTION—WIFE FORCED OUT OF MATRIMONIAL HOME, see 10 HALSBURY'S LAWS (2nd Edn.) 654, para. 964; and FOR CASES, see 27 DIGEST (Repl.) 350-352, 2897-2913.

Cases referred to:

- (1) *Sickert v. Sickert*, [1899] P. 278; 68 L.J.P. 114; 81 L.T. 495; 27 Digest (Repl.) 350, 2897.
- (2) *Edwards v. Edwards*, [1948] 1 All E.R. 157; [1948] P. 268; [1948] L.J.R. 670; 112 J.P. 109; 2nd Digest Supp.
- (3) *Dickinson v. Dickinson*, (1889), 62 L.T. 330; 27 Digest (Repl.) 351, 2902.
- (4) *Koch v. Koch*, [1899] P. 221; 68 L.J.P. 90; 81 L.T. 61; 27 Digest (Repl.) 351, 2906.
- (5) *Boyd v. Boyd*, [1938] 4 All E.R. 181; 108 L.J.P. 25; 159 L.T. 522; 102 J.P. 525; 27 Digest (Repl.) 351, 2908.

* LORD ASQUITH OF BISHOPSTONE died on Aug. 24, 1954.

- (6) *Bartholomew v. Bartholomew*, [1952] 2 All E.R. 1035; 117 J.P. 35; 3rd Digest Supp.
- (7) *Moss v. Moss*, (1912), 15 C.L.R. 538; 19 A.L.R. 249.
- (8) *Baily v. Baily*, (1952), 86 C.L.R. 424; [1952] A.L.R. 715; 26 A.L.J. 295.
- (9) *Dearman v. Dearman*, (1916), 21 C.L.R. 264.
- (10) *Bain v. Bain*, (1923), 33 C.L.R. 317; [1923] V.L.R. 693; 29 A.L.R. 461.
- (11) *Deery v. Deery*, [1954] A.L.R. 262.
- (12) *Hosegood v. Hosegood*, (1950), 66 (pt. 1) T.L.R. 735; 2nd Digest Supp. A
- (13) *Buchler v. Buchler*, [1947] 1 All E.R. 319; [1947] P. 25; [1947] L.J.R. 820; 176 L.T. 341; 111 J.P. 179; 2nd Digest Supp.
- (14) *Simpson v. Simpson*, [1951] 1 All E.R. 955; [1951] P. 320; 115 J.P. 286; 2nd Digest Supp.
- (15) *Pike v. Pike*, [1953] 1 All E.R. 232; [1954] P. 81 n.; 3rd Digest Supp.
- (16) *Sharah v. Sharah*, unreported. B
- (17) *Farmer v. Farmer*, (1884), 9 P.D. 245; 53 L.J.P. 113; 27 Digest (Repl.) 347, 2878.
- (18) *Pizzala v. Pizzala*, (1896), 68 L.J.P. 91 n.; 27 Digest (Repl.) 351, 2904.
- (19) *Garcia v. Garcia*, (1888), 13 P.D. 216; 57 L.J.P. 101; 59 L.T. 524; 52 J.P. 584; 27 Digest (Repl.) 339, 2809.
- (20) *Donelly v. Donelly*, (1939), 61 C.L.R. 577; 13 A.L.J. 76. C

APPEAL by special leave by the husband from an order of the High Court of Australia, dated Feb. 23, 1953, dismissing his appeal from a judgment of the Supreme Court of Victoria, dated Sept. 22, 1952, by which a decree nisi of dissolution of marriage was pronounced in favour of the wife on the ground that the husband had without just cause or excuse wilfully deserted her and had continued in desertion for three years and upwards. The facts appear in the judgment. D

J. Stirling, *B. Buller-Murphy* (of the Australian Bar), and *B. J. Wakley* for the husband.

J. E. S. Simon, *Q.C.*, and *John Latey* for the wife. E

LORD PORTER: This is an appeal by special leave granted May 28, 1953, from a judgment dated Feb. 23, 1953, of the High Court of Australia. By that judgment, the High Court of Australia (DIXON, C.J., FULLAGAR and KIRRO, JJ.) dismissed the appeal of the present appellant from a judgment of the Supreme Court of Victoria (LOWE, J.), whereby it was adjudged that the present respondent should be granted a decree nisi of dissolution of marriage with costs on the ground of the present appellant's desertion. F

The parties were married in South Australia on Nov. 8, 1924. On Oct. 29, 1951, the wife presented a petition to the Supreme Court of Victoria praying for a divorce on the ground that her husband had without just cause or excuse wilfully deserted her and had continued in desertion for three years and upwards.

The matrimonial law of the State of Victoria differs notably from that of England. The main differences are: (i) that cruelty without more has in Australia never been a ground for divorce a vinculo as it has been in England since 1937, but only for a judicial separation; (ii) that desertion which, without more, became a ground of divorce in England in 1937, has been such a ground a vinculo in Victoria as long ago as 1890 by provisions which, so far as relevant to this case, were re-enacted without alteration by statutes of 1915 and 1928. The following are the provisions of the Marriage Act, 1928 (No. 3726), of the State of Victoria, which govern the relevant transactions: G H

" 75 Any married person who at the time of the institution of the suit has been domiciled in Victoria for two years and upwards, may present a petition to the court praying on one or more of the grounds in this section mentioned that his or her marriage with the respondent may be dissolved—

(a) On the ground that the respondent has without just cause or excuse

wilfully deserted the petitioner and without any such cause or excuse left him or her continuously so deserted during three years and upwards; (b) On the ground that the respondent has during three years and upwards been an habitual drunkard and either habitually left his wife without the means of support, or habitually been guilty of cruelty towards her . . . ; . . . (d) On the ground that within one year previously the respondent . . . has repeatedly . . . assaulted and cruelly beaten the petitioner: . . . If in the opinion of the court the petitioner's own habits or conduct induced or contributed to the wrong complained of . . . such petition may be dismissed."

By s. 77 of the same Act, a wife may present a petition for dissolution of marriage, inter alia, on the grounds of adultery coupled with cruelty and, under s. 63 and s. 64, a decree of judicial separation may be granted, inter alia, on the ground of cruelty. Unless, however, the cruelty can be brought within the terms of s. 75 (b) or (d) (set out above) or s. 77, it is not a ground for dissolution of marriage under Victorian law. If cruelty had been a sufficient ground for divorce in the State of Victoria, then assuming, as seems to their Lordships very probable, that the wife's health suffered from the treatment she received, the case would have presented no complications. As it is, the wife, who had been brutally ill-used and insulted over a long period, since she was the first to leave the matrimonial home, had to found her petition on desertion: and, in order to succeed, had to establish what is described as "constructive desertion".

At this point, and before proceeding with any summary of the facts, their Lordships think it desirable to make certain general observations about the law (a) of desertion; (b) of so called "constructive desertion". Both in England and in Australia, to establish desertion two things must be proved: first, certain outward and visible conduct—the "factum" of desertion: secondly, the "animus deserendi"—the intention underlying this conduct to bring the matrimonial union to an end. In ordinary desertion the factum is simple: it is the act of the absconding party in leaving the matrimonial home. The contest in such a case will be almost entirely as to the "animus". Was the intention of the party leaving the home to break it up for good, or something short of, or different from, that?

Since 1860 in England and for a long time in Australia, it has been recognised that the party truly guilty of disrupting the home is not necessarily or in all cases the party who first leaves it. The party who stays behind (their Lordships will assume this to be the husband) may be, by reason of conduct on his part, making it unbearable for a wife with reasonable self respect, or powers of endurance, to stay with him, so that he is the party really responsible for the breakdown of the marriage. He has deserted her by expelling her: by driving her out. In such a case the factum is the course of conduct pursued by the husband—something which may be far more complicated than the mere act of leaving the matrimonial home. It is not every course of conduct by the husband causing the wife to leave which is a sufficient factum. A husband's irritating habits may so get on the wife's nerves that she leaves as a direct consequence of them, but she would not be justified in doing so. Such irritating idiosyncrasies are part of the lottery in which every spouse engages on marrying, and taking the partner of the marriage "for better, for worse". The course of conduct—the "factum"—must be grave and convincing.

In the present case, there is not the slightest question that the "factum" is sufficient. The facts are not in dispute. There are, in effect, concurrent findings that the husband grossly ill-used and insulted his wife over a period of five years and gave her ample justification for leaving him. The whole and sole question is whether the wife has proved the necessary animus or intent on the part of the husband. How should that animus be ascertained? In particular, (i) is it enough for her to show a course of conduct on the part of the husband which in the eyes

of a reasonable man would, by making her life insufferable, be calculated to drive the wife out, the husband's actual intention being immaterial on the footing that every man is presumed to intend the natural and probable consequences of his acts? Or (ii) should the objective criterion of the reasonable man's reactions be rejected on the footing that the real question is, did this particular husband (who may not have been reasonable) know that his conduct, if persisted in, would, in all human probability, result in the wife's departure?—it being remembered it is possible (human nature being what it is) for such knowledge on the husband's part to co-exist with a desire that she should stay, since people often desire a thing but deliberately act in a way which makes that desire unrealisable. Or again (iii) should inferences which would naturally be drawn be wholly disregarded and an intention which would naturally be drawn from the husband's conduct negatived provided there is proved to exist, *de facto*, on his part a genuine desire (however illogical or impossible it may be to square such a desire with his conduct) that the matrimonial union should continue? On this view the husband's desire to maintain the home is conclusive whatever his conduct. All three of these views have found expression in the decided cases. Their Lordships have thought it convenient to state in very general outline the legal issues involved before citing any authorities or concluding their summary of the facts. To this last task they now revert.

The material facts are conveniently summarised in the judgment of the Supreme Court of Victoria by **LOWE, J.**

"But I take up the story in some detail from the respondent's return from the Middle East in 1942. He had been on active service, and that was the time of his return. In a conversation with his son—and the substance of it was repeated to others—he said that thenceforward he was going to be master; and when the son asked him whether that meant that he was going to knock his mother about he said that was the only thing she understood. From this time on, I find a series of constant disturbances and acts of violence on his part. There were slaps and punches which he administered to the petitioner on the face and the body. He struck her on occasions with a ruler and with a cane and with a slipper and did this in the undignified way, on occasion, of placing her across his knee and administering punishment in that way. There were bruises put upon her body by these means and the bruises on occasions were seen by other people. He twisted her arms behind her back and so caused her pain, and on occasion he so held the twisted arms in a position that continued for nearly an hour, and when the police arrived, on the summons of one of the children, he was still holding his wife's arms in that position. On two occasions at least he dragged her by the hair into the bathroom and held her under the cold shower. He abused her and he constantly called her a bitch, and there were nightly disturbances created by him, destroying his wife's rest. Now, that is a series of incidents and a course of conduct which persisted over several years. She told him on a number of occasions that if he continued that conduct she would have to leave as that conduct was affecting her health. And on one occasion she did leave, and left for some little time. I shall deal with that more particularly, but on another occasion she left and walked the streets for the night so that she might not stop in the house."

She separated from him on two occasions, viz., in 1943 and in July, 1948, before they finally parted. On the first occasion she remained away for about two months and was induced to return by promises of amendment, which were, however, promptly and continuously thereafter violated. On some date in July, 1948, he treated her with such violence that, not for the first time, the police had to be invoked. She then asked him to leave, and he did: returning, however, on Aug. 11. On Aug. 13 occurred the culminating incident which caused her finally to leave him. The husband professed to have taken advice

from a psychiatric friend as to how he could improve his relations with his wife, and to have been advised to try "Caveman stuff".

It is a little surprising that this suggestion was treated by the husband as a new departure: "Caveman stuff" is not an unfair description for the treatment he had been applying to his wife for years past and which had twice caused her to leave him. However, on Aug. 13, he planned and carried out what he referred to as the "rape of Lucrece"; in the words of the trial judge's finding he

A "forced sexual intercourse upon her in circumstances of calculated and revolting indignity":

and told her that he was going to

B "use her for that purpose whenever he wanted to and as often as he wanted to."

These last words are important. She then finally left and filed her petition, ignoring a number of letters which he wrote begging her to return, but not expressing any intention to treat her differently if she did. Her patience was not unnaturally exhausted and, even if he had expressed penitential sentiments, it would not have been unreasonable for the wife to doubt their sincerity.

C The Australian law as to constructive desertion is principally contained in three or four decisions of the High Court. Before considering these their Lordships would make some general observations.

In the present case, the existence of conduct by the husband being of sufficient gravity to constitute the necessary factum, the question is what he intended, or must be taken to have intended, while so conducting himself? Did he intend D to bring the matrimonial relations to an end? Let it be supposed that a husband intentionally persists in conduct which the hypothetical reasonable man would think calculated to cause the wife to leave him, is he necessarily guilty of constructive desertion, notwithstanding that he genuinely desires the marriage to survive? If so, evidence of his consistently expressed desire that the wife should stay with him is irrelevant and inadmissible. The formula, if satisfied, creates E an irrebuttable presumption. In other words, if a man deliberately makes his wife's life unbearable according to an objective standard, i.e., the reasonable man's reactions, is he conclusively presumed to intend to drive her out;—the presumption that a man intends the natural and probable consequences of his acts being treated as irrebuttable? This view has been in the ascendant in the leading decisions of the High Court of Australia, though, of late, traces of a F recession from it have been discernible. In England, this view finds expression in *Sickert v. Sickert* (1), *Edwards v. Edwards* (2), and generally in the cases where a husband has installed in the matrimonial home, or refused to expel from it, or to dismiss from his service, a mistress—examples of which may be found in *Dickinson v. Dickinson* (3) and *Koch v. Koch* (4).

The other view, which is embodied in the English decision in *Boyd v. Boyd* (5) G and in certain observations in *Bartholomew v. Bartholomew* (6), is that, no matter how reprehensible has been the husband's behaviour, if there is positive and credible evidence negating any actual intention on his part to end the marriage, the law will not impute such an intention to him.

In Australia, on the other hand, in *Moss v. Moss* (7), on appeal from New South Wales, what has been referred to as the objective test of conduct amounting H to constructive desertion was laid down in terms so designed as to make the deserter's actual intentions immaterial if the objective test were justified. If the course of conduct is sufficiently blameworthy and prolonged, the case decides that the law will impute to the guilty party an intention to bring the matrimonial union to an end, whatever his actual or professed desire. Overtures for a reconciliation, for instance, or a genuine de facto wish that the wife should stay, will, in such a case, be overridden by this imputation. The gist of the case of *Baily v. Baily* (8), decided forty years later, is to affirm what has been

called the objective test except where there has been express desertion, and is accurately summarised in the judgment of the trial judge, **LOWE, J.**, in the following passage:

"This is a wife's petition to dissolve the marriage on the ground of her husband's desertion. In fact it was she who left the matrimonial home and therefore the case is one of what has come to be known as constructive desertion. The term has been a good deal criticised, but for my part I must accept it that constructive desertion, if proved, is sufficient ground for the dissolution of the marriage. The matter has been very recently discussed in the High Court in the case of *Baily v. Baily* (8) . . . That case makes it plain that the test which has to be applied in these cases is one either of actual intention by the husband to bring the matrimonial relationship to an end or an intention on his part to persist in a course of conduct which any reasonable person would regard as calculated to bring about such a result. It is the second limb of that test which is relied upon in this case, namely, that the facts are such as to show an intention on the husband's part to persist in a course of conduct which any reasonable person would regard as calculated to bring about a rupture in the matrimonial relationship."

Dearman v. Dearman (9), also an appeal from New South Wales, is in line with these decisions, foreshadowing the second limb of the rule laid down in *Baily v. Baily* (8). *Bain v. Bain* (10) in substance affirms the same view; though it is a somewhat more complex decision, since it touches expressly on the problem created when there is a clash of intentions, or, if that be strictly impossible, a clash of intention with wish or desire, or aim.

Their Lordships will have to return to these among other Australian authorities and to say something about cases decided in England. But before doing so, they think it proper to deal with the judgment. It is unnecessary to analyse the evidence as the findings of fact are not in dispute. It has been noted that the petition was filed on Oct. 29, 1951, and particulars were supplied on Nov. 26, 1951. None of the particulars relate to a period earlier than Aug. 11, 1948. Yet the whole case was conducted, as regards evidence and argument, on the footing that the whole of the husband's behaviour from 1943 to 1948 was relevant. This seems to their Lordships an anomalous and regrettable state of affairs. However, no objection was raised to the excursion of the evidence far outside the limits covered by the pleadings, and the lesser evil is to treat the pleadings as amended so as to cover the additional matter.

The judgment of the Supreme Court of Victoria (**LOWE, J.**) professes to be wholly based on the second limb of the formula in *Baily v. Baily* (8). Thus he says:

"I have no doubt that the course of conduct which I have described indicates an intention to persist in a course of conduct which any reasonable person would regard as calculated to bring about a rupture of the matrimonial relations, and consequently I think that his conduct does amount to constructive desertion."

It is inherent in the logic of this formula that, if the reasonable man would regard the course of conduct in which the husband intended to persist as calculated to bring the marriage to an end, it is not open to the alleged deserter to give evidence that that was the last thing he actually desired. Yet the logic is not quite rigidly observed, for the learned judge pays regard to the wife's warnings that she would leave the appellant if he persisted, a fact mainly relevant to his actual intention, and he deals at some length as to the question whether the husband's appeals to the wife to return to him after the final separation were sincere or not.

On appeal, the High Court dealt somewhat briefly with the case partly because (as **SIR OWEN DIXON, C.J.**, explained in the later case of *Deery v. Deery* (11)) the facts were so overwhelming. **SIR OWEN DIXON** delivered the main judgment,

FULLAGAR and KITTO, JJ., merely expressing agreement. The Chief Justice quoted the actual words on which, in *Baily v. Baily* (8), the High Court had held the criterion to consist (86 C.L.R. at p. 426):

"The cases seem to show that what must be proved is either an actual intention to bring about the rupture of the matrimonial relation, or an intention to persist in a course of conduct which any reasonable person would regard as calculated to bring about such a rupture."

The Chief Justice, like LOWE, J., found that the facts of the case brought it within the second limb of this formula; he met the argument that *de facto* the husband never desired his wife to leave him with the following quotation from *Bain v. Bain* (10) (33 C.L.R. at p. 325):

"A man may intend to retain his wife's presence, but also at the same time to pursue a certain line of conduct. If at all hazards he deliberately pursues that line of conduct, his intention to retain his wife's presence is conditional on or subservient to the other intention. If his conduct is such that his wife, as a natural or necessary consequence, is morally coerced into withdrawing, it cannot be said with any truth that the husband intends her to remain. He knows in that case that the result of his deliberate act will be and is his wife's withdrawal, and, therefore, in every real sense he intends that withdrawal."

He went on to point out (86 C.L.R. at p. 437) that

"on countless occasions he must have been in the state of mind of knowing that what he was doing would necessitate her withdrawal."

No doubt the learned Chief Justice had in mind that she had again and again warned him that she would leave if he persisted, and had, in fact, twice actually left him.

It will be observed that this judgment involves a slight recession from the severely objective rule which infers an intention to desert conclusively when certain conduct is established since, clearly, the court thought a purely subjective factor—the husband's *de facto* knowledge that she would leave, was relevant. There was already, their Lordships think, some signs of vacillation between a purely objective and the admission of certain subjective elements in *Bain v. Bain* (10) (33 C.L.R. at p. 325) itself.

In the English decisions there is discernible a similar dualism. The courts which decided *Boyd v. Boyd* (5) and *Bartholomew v. Bartholomew* (6) certainly use language which suggests that, if the respondent desires the partner to remain with him, then the petitioner cannot ever prove constructive desertion. In these cases the court applied a subjective test, viz., the husband's intention. If intention bears the same meaning as desire, this reasoning, when pressed to its logical conclusion, leads to the result that a husband who desires his wife to stay in the matrimonial home simply in order that he may ill-treat her or to make her a target for insult, cannot be guilty of constructive desertion. In *Hosegood v. Hosegood* (12), DENNING, L.J. (who thinks *Boyd v. Boyd* (5) was well decided and was a party to the *Bartholomew* (6) decision) conveniently summarises the two rival strains of English authority in the following passage. He says (66 (pt. 1) T.L.R. at p. 738):

"There are at present two schools of thought about constructive desertion. One school says that, in constructive desertion, as in actual desertion, a husband is not to be found guilty, however bad his conduct, unless he had in fact an intention to bring the married life to an end. This school admits that there are many cases where he may be presumed to have that intention. For instance when a man deliberately makes his wife's life unbearable, he may be presumed to intend to drive her out, because he may be presumed to intend the natural consequences of his acts. But this school says that if in truth the facts negative any intention to bring the married life to an

and the courts should not attribute it to him. For instance, the conduct of an habitual criminal or an habitual drunkard may be so bad that his wife is forced to leave him; but he may be devoted to her, and the last thing he may intend is that she should leave. In such a case this school of thought would hold that there is no desertion: *Boyd v. Boyd* (5). The other school of thought does lip service to the necessity for such an intention, but says that, even if the husband had no intention in fact to bring the married life to an end, yet he is conclusively presumed to intend the natural consequences of his acts; and, if his conduct is so bad or so unreasonable that his wife is forced to leave him, he must be presumed to intend her to leave, and he is guilty of constructive desertion, however much he may, in fact, desire her to remain: *Sickert v. Sickert* (1) ([1899] P. at pp. 283, 284) and *Edwards v. Edwards* (2). *Buchler v. Buchler* (13) does not resolve the difference between these two schools of thought. In one passage LORD GREENE, M.R., seems to favour the first school, for he cites *Boyd v. Boyd* (5) with approval. In another passage, however, he seems to favour the second school, for he cites *Sickert v. Sickert* (1), with equal approval."

He continues:

"To my mind the views of the first school are logically unanswerable. When people say that a man must be taken to intend the natural consequences of his acts, they fall into error: there is no 'must' about it; it is only 'may'. The presumption of intention is not a proposition of law but a proposition of ordinary good sense. It means this: that, as a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule, reasonable to infer that he did foresee them and intend them. But, while that is an inference which may be drawn, it is not one which must be drawn. If on all the facts of the case it is not the correct inference, then it should not be drawn."

The conflict of opinion in the English cases appears again in *Simpson v. Simpson* (14), where the view expressed in *Edwards v. Edwards* (2) is repeated, and in *Pike v. Pike* (15), where the Court of Appeal re-affirmed the propositions expressed in *Hosegood v. Hosegood* (12).

These four cases so completely review the divergence which exists in this country that it would, in their Lordships' opinion, serve no purpose to quote from, or refer to, the many decisions, whether given under the present law or at a time when adultery by a husband was not of itself a ground of divorce, but required the presence of some other factor, viz., cruelty or desertion. Nor, at this stage, is it necessary to consider the effect of those cases in which it is claimed that one who continues to live with a mistress has been held guilty of desertion, even though he did not admit her to the matrimonial home but desired to retain the consortium of his wife.

So far as the Australian cases are concerned, there is not, as their Lordships apprehend, so marked a dichotomy but the distinction between the instances in which desertion has been held to have been established and those in which the facts have been held to afford insufficient proof is a fine one. Apart from the cases already quoted, the place at which the line is drawn is most clearly exhibited in the difference of result between that reached by the High Court in the present case and their decision in the later case of *Deery v. Deery* (11). In the latter case, the High Court by a majority allowed an appeal by a wife against a finding that she had constructively deserted her husband, on the ground that the incidents relied on were due to the wife's permanent characteristics rather than to any design to drive the husband away; and, therefore, the evidence was insufficient to enable the court to infer that the respondent had an actual intention to bring about a rupture of the matrimonial relationship or to persist in conduct calculated in the mind of any reasonable person to bring about such a rupture. DIXON, C.J., said:

"As I read the evidence the one thing which she never intended to do was to drive her husband away."

Later he continues:

"The question whether she intentionally persisted in a course of conduct which she knew was inconsistent with the continuance of the relation or which any reasonable person would regard as calculated to bring about a rupture of the matrimonial relation may perhaps be a more doubtful question. But I have reached the conclusion that a finding against her ought not to be sustained."

Of the present case, DIXON, C.J., who gave the leading judgment says:

"In *Lang v. Lang* where we thought it unnecessary to deliver a considered judgment because the facts appeared to be so overwhelming, we relied upon what we had said in *Baily v. Baily* (8) but emphasised the difficulty of distinguishing between an intention to destroy the matrimonial relationship and such an intention as the passage already quoted from the reasons of IRVINE, C.J., in *Bain v. Bain* (10) postulates. It amounts to an intention to persist in a course of conduct with knowledge that it is completely inconsistent with the maintenance of the matrimonial relation."

In these two cases the results at which the High Court arrived were different, but in each two grounds for inferring desertion were accepted, viz., actual intention and intention inferred from conduct which any reasonable person would regard as calculated to bring the consortium to an end.

In spite of some of the expressions used in the cases both in England and in Australia it was not, as their Lordships understand, contended that certain types of action of necessity create an irrebuttable presumption that the party guilty of them must be held to intend to break up the marriage tie on the principle that a man must irrebuttably be held to intend the natural consequences of his acts. Indeed, in *Simpson v. Simpson* (14), the learned President (LORD MERRIMAN, P.) expressly says ([1951] 1 All E.R. at p. 962):

"... I venture to suggest that in this jurisdiction, at any rate, we may continue to use the time-honoured maxim [i.e., a man must be taken to intend the natural consequences of his acts], provided always that we remember that it does not express an irrebuttable presumption of law and that it is only to be applied in connection with conduct which can fairly be described as ill-treatment."

Nor do those who hold the other view maintain that an intention deserendi may not legitimately be inferred from acts alone. In *Hosegood v. Hosegood* (12), DENNING, L.J., accepted the position that there are many cases where the husband may be presumed to have had the intention to end the marriage.

The difference between the two views is rather what meaning is to be attached to the word "intention" and what evidence is sufficient to rebut a prima facie case.

Prima facie, a man who treats his wife with gross brutality may be presumed to intend the consequences of his acts. Such an inference may, indeed, be rebutted, but if the only evidence is of continuous cruelty and no rebutting evidence is given, the natural and almost inevitable inference is that the husband intended to drive out the wife. The court is at least entitled and, indeed, driven, to such an inference unless convincing evidence to the contrary is adduced. In their Lordships' opinion, this is the proper approach to the problem and it must, therefore, be determined whether the natural inference has been rebutted in the present case.

The fact that the question at issue involves a consideration of the effect of the actions of one person on another adds to the complexities of the case. But, apart from this, the distinction between intention and desire has to be borne in mind. A man may wish one thing and intend another—"Video meliora proboque,

Deteriora sequor”—and, indeed, as the High Court have pointed out, a man's intention does not necessarily always remain constant but fluctuates from time to time. Nevertheless, some general principle must be sought and adopted.

But before the question of the rebutting evidence is reached it has first to be determined what is the exact connotation of the word “intention” as used in the relevant cases. In *Bain v. Bain* (10), the High Court visualises the problem which may arise where the husband appears to be actuated by “intentions” which conflict with, or contradict, each other. The answer given is, in substance, that in such a conjuncture the dominant intention must be ascertained and looked to. The passage from *Bain v. Bain* (10) which is cited by the High Court in the present case has already been set out.

Their Lordships are of opinion that this passage goes to the root of the matter. But they venture to question whether, as a matter of strict terminology, a man can be said to entertain conflicting “intentions”. A man may well have incompatible desires. He may have an intention which conflicts with a desire, i.e., he may will one thing, and wish another, as when he renounces some cherished article of diet in the interest of health. But “intention” necessarily connotes an element of volition: desire does not. Desires and wishes can exist without any element contributed by the will. What, then, is the legal result where an intention to bring about a particular result (be it proved directly or by inference from conduct) co-exists with a desire that that result should not ensue? That is the substantial point raised by this appeal. The issue may be put more concretely. What legal inference is to be drawn where the whole of a husband's conduct is such that a reasonable man would know—that the particular husband must know—that in all human probability it will result in the departure of the wife from the matrimonial home. Apart from rebutting evidence this, in their Lordships' opinion, is sufficient proof of an intention to disrupt the home: but suppose, further, a husband's hope is that in some way his actions will not produce these natural consequences, that the wife will stay and that the home will not be disrupted. Where a man's own actions are concerned and not their effect on another, the answer is easy. If he desires to resist temptation but yields to it his intention is evidenced by his acts. His better self is, it may be, overborne, yet, in the end, his intention is to yield. Where, however, the effect of his actions on other people is concerned, and there is no certainty but only a high degree of probability as to what the result will be, is a court to say that, if he did entertain an unjustified hope that his wife would stay, the intention normally to be inferred from his acts is rebutted, and is the correct conclusion that he did not intend to drive her out? In their Lordships' opinion, no such conclusion is justified. If the husband knows the probable result of his acts and persists in them, in spite of warning that the wife will be compelled to leave the home, and indeed, as in the present case, has expressed an intention of continuing his conduct and never indicated any intention of amendment, that is enough, however passionately he may desire or request that she should remain. His intention is to act as he did, whatever the consequences, though he may hope and desire that they will not produce their probable effect.

To say that it is not enough unless he knows that separation must inevitably result from his actions is to ask too much. Men's actions and judgments are not founded on certainty—in most cases certainty is unascertainable—but on probabilities. No doubt a high degree of probability is required but no more.

With these considerations in mind, can it be said that the appellant has rebutted the natural inference, which would be drawn from his acts if no countervailing testimony was given? In their Lordships' opinion, no sufficient ground has been given for rejecting the finding of the High Court.

It is true that *Lowe, J.*, founded his judgment on the wording used by the High Court in *Baily v. Baily* (8), in which one of the tests is expressed to be an intention to persist in a course of conduct which any reasonable person would regard as calculated to bring the matrimonial relationship to an end and, in

A their Lordships' view, this is too objective a requirement. But the High Court took a more subjective standard after examining the evidence as a whole. They found, and, as their Lordships think, were entitled to find, that the appellant must have known that what he was doing would necessitate her withdrawal if she acted as any reasonable creature would. Such a finding, if warranted, is, in their Lordships' opinion, decisive of the case and, in spite of *LOWE, J.*'s, reliance on what may be regarded as a purely objective test, there is, in their view, ample ground for coming to the conclusion that the appellant must have recognised the gravity of the effect of his behaviour though he hoped and desired that it might not have its natural result.

B The Australian courts are ready to draw the inference of intention on evidence of the same nature as that adduced in the present case and have twice approved of its decision before it reached their Lordships' Board, once as already stated in *Deery v. Deery* (11), and again in the High Court in *Sharah v. Sharah* (16), which, so far as their Lordships are aware, was not reported at the time of the hearing before them, but of which they were furnished a transcript.

C So far as England is concerned, their Lordships' opinion is fortified by the cases which decide that constructive desertion is to be inferred where a husband retains a mistress in spite of the wife's protests, even though the mistress was not brought into contact with the wife and the adulterous association took place away from the matrimonial home. So far as their Lordships are aware, such actions have always been regarded as justifying the wife's withdrawal, and a holding that she had been constructively deserted if she leaves the house. *Farmer v. Farmer* (17), *Pizzala v. Pizzala* (18), *Garcia v. Garcia* (19), *Koch v. Koch* (4) and *Sickert v. Sickert* (1) are examples of this outlook and (unless one takes the view of the minority in the Australian case of *Donnelly v. Donnelly* (20)) support the view that, whatever the husband's desire may be, this behaviour of itself establishes an intention to break up the married life.

D Before they conclude their review, one proposition propounded on behalf of the respondent should be mentioned, viz., that the law permitting divorce for desertion first enacted in Victoria in 1890 has been re-enacted in 1915 and in 1928, and between the first and later dates the courts of that State had interpreted the word "desertion" as bearing the objective meaning contended for by the respondent. Having regard to the opinion on the main question, it is unnecessary for their Lordships to express an opinion on this matter. As at present advised, they would only say they are not satisfied that the law as laid down before 1928 is sufficiently clear to warrant an assumption that an animus deserendi must always be inferred where the deserter's action warrants it, whatever his real intention may be shown to be.

E For the reasons they have indicated their Lordships will humbly advise Her Majesty to dismiss the appeal. The appellant must pay the respondent's costs as between solicitor and client of the appeal to their Lordships' Board.

Appeal dismissed.

F Solicitors: *Blyth, Dutton, Wright & Bennett* (for the husband); *Davenport, Lyons & Barker* (for the wife).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

WATSON v. SECRETARY OF STATE FOR AIR.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Birkett, L.J.J.), November 12, 1954.]

Compulsory Purchase Compensation—Assessment—Agricultural holding—Yearly tenancy—Acquisition of Land (Assessment of Compensation) Act, 1919 (c. 57), s. 2, r. (2), r. (6).

The claimant was a yearly tenant of agricultural land, his tenancy being terminable by one year's notice expiring on May 12 in any year. On May 18, 1951, the Secretary of State for Air, with a view to acquiring the land, served on the claimant a notice to treat by virtue of powers derived by him under the Defence Act, 1842, and the Secretary of State entered into occupation in August and September, 1951. It was accepted that, for the season current at the date of the notice, the claimant was entitled, under the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2, r. (2), to receive as compensation, in effect, the profit which he would have realised; and the total compensation computed for that season included compensation for disturbance, in the sense of compensation for the expense of moving. On the question how compensation was to be assessed for the further period to May 12, 1953, the earliest date after the date of the notice to treat on which the tenancy could be determined under the tenancy agreement,

HELD: the claimant was entitled under s. 2, r. (2) of the Act of 1919 to receive the amount which his interest in the land (i.e., an agricultural tenancy liable to be determined on, but not before, May 12, 1953) would realise if sold, subject to all its incidents under the tenancy agreement, in the open market by a willing seller; in addition, therefore, to receiving as compensation the amount, in effect, of the profit which the claimant would have made for the season current at the date of the notice to treat, he was entitled to such sum as a purchaser in the open market would give for the second season (i.e., the further period which would end on May 12, 1953); but the claimant was not entitled under s. 2, r. (6), to receive also in relation to the second season compensation for disturbance based on his loss of profit during the second season, because such compensation, as distinct from the compensation for the expense of moving already allowed, would in effect be covered by the compensation payable under s. 2, r. (2).

Appeal allowed.

FOR THE ACQUISITION OF LAND (ASSESSMENT OF COMPENSATION) ACT, 1919, s. 2, see 3 HALSBURY'S STATUTES (2nd Edn.) 977.

CASE STATED by the Lands Tribunal on the requisition of the claimant pursuant to s. 3 (4) of the Lands Tribunal Act, 1949.

This matter was referred to the Lands Tribunal for the determination of the amount of compensation payable by the respondent, the Secretary of State for Air, on the compulsory acquisition of the claimant's interest in 38.189 acres of land, being part of Stob Hill Farm, Stamfordham, Northumberland, of which the claimant was the tenant. A notice to treat dated May 18, 1951, was served by the respondent on the claimant. Physical entry on the arable part of the land was made by the respondent on Aug. 1, 1951, and on the pasture in September, 1951. The claimant's interest in the land was that of tenant from year to year. The tenancy agreement, made on Mar. 6, 1934, included the whole of Stob Hill Farm, having an acreage of 146.491 acres, and contained amongst others the following provisions:

"1. (c) Power of the landlord to resume possession at any time of any part or parts of the said farm for any purposes whatsoever not being a purpose of an agricultural nature, the landlord allowing to the tenant reasonable compensation in respect of the part or parts of which possession shall be resumed . . .

"2. The tenancy shall be a yearly tenancy commencing May 13, 1934, and determinable by either party giving to the other one year's previous notice in writing such notice to expire on May 12 in any year of the tenancy."

No notice to quit had been served on the claimant. On the date of the notice to treat some twenty-six acres of land were sown to cereal crops and twelve acres were pasture. Owing to the entry by the respondent, it was not reasonably possible for the claimant to harvest the cereal crops, which were abandoned.

It was contended by the claimant (i) that he had an interest in land within the meaning of the Defence Act, 1842, s. 16; (ii) that the word "compensation" in s. 19 of the said Act included compensation for the value of land taken, for injurious affection, for disturbance and for any other matters in respect of which the claimant suffered loss as a result of the exercise of the respondent's powers in relation to the land; (iii) that the claimant was entitled to compensation for the loss of two years' profit less rent, £76 for disturbance, £14 15s. unexhausted manurial value and a sum in respect of valuer's fee and expenses. It was contended by the respondent (i) that the Lands Clauses Consolidation Act, 1845, did not apply, (ii) that the compensation must be assessed in accordance with the Defence Act, 1842, s. 19, and the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2; (iii) that the compensation should be assessed having regard to the position as it existed at the date of the notice to treat and that no regard should be paid to the effect of subsequent events on values; and (iv) that compensation should be limited to the loss in relation to the 1951 crop, together with the amount of the value of unexhausted manures and compensation for disturbance as claimed. The Lands Tribunal found* that reasonable compensation, having regard to the security of tenure enjoyed by the claimant at the material date, would be that based on the loss of profit likely to accrue from the land in the season following the notice to treat and not based on two years' loss of profits until May 12, 1953, although the probabilities of the claimant being ejected at short notice were normally somewhat remote. Accordingly, the compensation awarded was as follows: (a) disturbance as agreed £76, (b) tenant right as agreed £14 15s., (c) loss of profit for one season on the arable land £850 and on the grazing £90, (d) valuer's fees £38 5s., making a total amount of £1,069.

J. G. Kekwick for the claimant.

B. S. Wingate-Saul for the Secretary of State for Air.

SIR RAYMOND EVERSLED, M.R.: This is an appeal in the form of a Case Stated by the Lands Tribunal (Mr. DONE) in regard to an area of approximately thirty-eight acres of land being part of the claimant's farm near Stamfordham in the county of Northumberland. The claimant held under the terms of a tenancy agreement which is scheduled to the Case, and which was in fact entered into as long ago as 1934, whereby, as is common enough with agricultural land, the tenant's interest was that of a yearly tenant, and the year ran from May 12. The total area of the farm is approximately 150 acres, slightly less. The Secretary of State for Air served a notice to treat on May 18, 1951, and in fact entered into possession of the thirty-eight acres in the months of August and September following. The question is, what compensation is payable by the Secretary of State?

To dispose of one matter at once, the tenancy agreement contained an unusual clause, cl. 1 (c), which I will paraphrase. The landlord was to have power to resume possession of any part of the farm at any time for any purpose whatever other than purposes of an agricultural nature, the landlord allowing to the tenant reasonable compensation in respect of the parts so occupied. The view taken by Mr. DONE was that, whatever the interest of the tenant might properly be described as being, it was subject to this severe limitation, that it was liable at any time, without any specified notice, as to part or as to the whole of it, to be

* The decision is reported in 104 L.Jo. 188.

re-occupied by the landlord; and that led him to the conclusion that, whatever otherwise might have been the result, the claimant could not make any claim in respect of any period or interest beyond the first farming season, which occurred immediately after the notice to treat; in other words, he limited the claimant's claim, in effect, to what he would have got had he remained in occupation until the end of the current 1951 season and had gathered his crops, and so forth. It is conceded by the Secretary of State that in that matter Mr. DONE erred. The claimant here has claimed that the paragraph which I have read from the tenancy agreement was unenforceable at law, having regard to the statutes regulating agricultural tenancies, and therefore should be disregarded, and that contention has been accepted on behalf of the respondent, the Secretary of State. It is, therefore, plain that the basis on which compensation was arrived at was not correct, and the case will have to go back for re-consideration. In those circumstances, it is, obviously, not desirable that we should say more than is strictly necessary in order to lay the foundation for any further assessment by the tribunal.

The argument has in effect become narrowed down in the course of the discussion, and it stands now thus: The Secretary of State was requisitioning this land in pursuance of powers which were derived, indirectly, from the Defence Act, 1842. It follows that the provisions of the Lands Clauses Consolidation Act, 1845, do not strictly apply. I say "strictly", because it may well be that for practical purposes, certainly in many cases, the principle of assessing compensation does not, or does not substantially, differ under that Act from the principle to be applied under the Act of 1842. This much, however, seems clear, that in the present case it is necessary, in assessing compensation, to refer to the terms of the Acquisition of Land (Assessment of Compensation) Act, 1919, and s. 2 thereof in particular. The argument before us really has turned on the exact effect of two rules of s. 2, on which I propose accordingly to say a few words. The section provides:

"In assessing compensation an official arbitrator* shall act in accordance with the following rules . . . (2) The value of land shall . . . be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise . . . (6) The provisions of r. (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land."

By s. 12 of the same Act the word "land" is by definition to comprehend any interest in land. We therefore arrive at the following position. The claimant was in occupation of these thirty-eight acres, and he had, I think, beyond any question an interest in the land, the interest being that which he derived from his tenancy agreement. At the date of the notice to treat, and of the subsequent entry, his interest was one which could not be determined, according to the terms of his agreement, at any date earlier than May 12, 1953, and it appears, therefore, to me that the thing to be valued for the purpose of compensation was that interest, an agricultural tenancy liable to be determined on, but not before, May 12, 1953. In arriving at a solution of the question, what is the value of that interest, the statute requires it to be assumed that the claimant, instead of being evicted from this land, was a willing seller, and, therefore, the question which must be answered is, what would those thirty-eight acres have fetched in the open market, if the claimant, instead of being forcibly evicted from them, had put up his interest for sale, the interest being such as I have described, but subject, of course, to the other terms in the tenancy agreement including any restrictions on assignment.

* The jurisdiction of the official arbitrator under this section was transferred to the Lands Tribunal by the Lands Tribunal Act, 1949, s. 1 (2): 28 HALSBURY'S STATUTES (2nd Edn.) 318.

A It is conceded that, so far as the first season is concerned, he must be entitled to recover in effect the profits which he would have made. I have already indicated that his crop was sown and was waiting to be gathered in the summer and autumn of that year, but he still has a claim for the interest in the land which would have subsisted until May 12, 1953, over and above what has been allowed for the first season or year. It must, therefore, be ascertained, what would some purchaser in the market have given for that further year's interest? Obviously, the profit which this claimant had made in farming these acres is a highly material consideration, because it may well be that a purchaser who bought the land, or the claimant's interest in it, would have fixed the price he was prepared to pay on the basis that he, too, would be likely to make, by farming, such a figure of profit. It is, then, a matter entirely for the tribunal to decide what sum should be allowed to compensate for that part of the interest which the claimant must be taken willingly to have sold.

B It was suggested by counsel for the claimant that, apart from anything which can be attributed to that landed interest, r. (6) entitles the claimant in addition to say: "I must be compensated also for disturbance or loss measured by the profit which I can show that I did lose during that second year." If, however, the figure is properly arrived at under r. (2), it seems to me that any further sum of that nature is necessarily excluded, for otherwise he would be having the same thing twice over. Compensation for disturbance, in the sense of meaning the cost of expense he was put to in actually moving, has already been allowed, and the sum of £76 has been agreed for that; but if r. (2) is construed, as I think it ought to be, and, if a figure is arrived at to compensate the claimant for that second year of the interest which he has lost subject, as I have said, to all its incidents under the tenancy agreement, then I think r. (6) would have no further room for application.

D That being the situation, I think I have covered all that need be said on the present occasion. The case must go back in order that the tribunal should decide what that figure is, and the tribunal must decide, and will decide, to what extent it is desirable or proper to allow any further opportunities for evidence to be given. On that I say nothing, because that is a matter which the tribunal will have to decide, but in view of the basis on which Mr. DONE limited his award, it seems to me that this appeal must be allowed so as to enable us to direct a reference back for a re-assessment of the amount to be awarded on the footing that cl. 1 (c) of the agreement should be treated as excluded from consideration.

E **JENKINS, L.J.:** I agree, and have nothing to add.

BIRKETT, L.J.: I also agree.

Appeal allowed; case remitted.

Solicitors: *Herbert Smith & Co.* (for the claimant); *Treasury Solicitor.*

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

DUNNE v. SABAN (formerly DUNNE).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Davies, J.), October 20, November 15, 16, 1954.]

Divorce—Foreign decree—Jurisdiction of foreign court based on separate domicile of wife and ninety days' residence by her—Decree not recognised by English court.

The parties were married in 1950 in England. The husband's domicile of origin was English. In June, 1951, the parties emigrated to Florida, arriving in the United States on June 26, 1951, where the husband acquired a domicile of choice. In October or November, 1952, the husband returned alone to England with the intention of permanently residing here thereby re-acquiring his English domicile. On July 20, 1953, the wife instituted in Florida proceedings for divorce on the ground of "extreme cruelty", and filed a bill of complaint in which it was alleged, *inter alia*, that she "is a resident of the city of Hollywood, county of Broward, State of Florida, and has been an actual bona fide resident of . . . Florida, for more than ninety days last prior to the filing of this bill of complaint for divorce". The husband took no part in those proceedings and on Nov. 3, 1953, the circuit court of Florida made a "final decree" dissolving the marriage.

By his petition dated May 31, 1954, the husband prayed for a declaration that the marriage was dissolved by the decree of the circuit court of Florida. The evidence showed that the jurisdiction of the Florida court was based on a separate domicile of the wife in Florida plus ninety days' residence there.

HELD: since the divorce jurisdiction of the English court depended on the domicile of the parties, the court would not recognise a divorce decree of a foreign court made in the exercise of jurisdiction which encroached on that test unless the English court itself possessed a statutory jurisdiction which so encroached to an equal extent; accordingly, the decree of the court in Florida would not be recognised, because English law did not accept that a wife could have a domicile separate from her husband or that ninety days' residence by her was sufficient to found a jurisdiction dependent on her residence, and, therefore, the petition would be dismissed.

Travers v. Holley & Holley ([1953] 2 All E.R. 794), distinguished.

AS TO THE RECOGNITION BY ENGLISH COURTS OF FOREIGN DECREE OF DIVORCE, see 7 HALSBURY'S LAWS (3rd Edn.) 113, paras. 200, text and note (u), 201; and FOR CASES, see 11 DIGEST (Repl.) 481, 1079 et seq.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 18 (1) (b), see 29 HALSBURY'S STATUTES (2nd Edn.) 405.

FOR THE MATRIMONIAL CAUSES (WAR MARRIAGES) ACT, 1944, s. 1, see 11 HALSBURY'S STATUTES (2nd Edn.) 845.

Cases referred to:

- (1) *Har-Shefi v. Har-Shefi*, [1952] 2 All E.R. 821; *reversd.* C.A., [1953] 1 All E.R. 783; [1953] P. 161; 3rd Digest Supp.
- (2) *Le Mesurier v. Le Mesurier*, [1895] A.C. 517; 64 L.J.P.C. 97; 72 L.T. 873; 11 Digest (Repl.) 468, 1011.
- (3) *Lord Advocate v. Jaffrey*, [1921] 1 A.C. 146; 1920 S.C. (H.L.) 171; 89 L.J.P.C. 209; 124 L.T. 129; 11 Digest (Repl.) 356, 253.
- (4) *A.G. for Alberta v. Cook*, [1926] A.C. 444; 95 L.J.P.C. 102; 134 L.T. 717; 11 Digest (Repl.) 472, 1030.
- (5) *Salvesen (or von Loring) v. Austrian Property Administrator*, [1927] A.C. 641; 96 L.J.P.C. 105; 137 L.T. 571; 11 Digest (Repl.) 478, 1069.
- (6) *Travers v. Holley & Holley*, [1953] 2 All E.R. 794; [1953] P. 246; 3rd Digest Supp.

- (7) *Armistage v. A.-G., Gillig v. Gillig*, [1906] P. 135; 75 L.J.P. 42; 94 L.T. 614; 11 Digest (Repl.) 483, 1094.
- (8) *Ogden v. Ogden*, [1908] P. 46; 77 L.J.P. 34; 97 L.T. 827; 11 Digest (Repl.) 357, 260.
- (9) *H. v. H.*, [1928] P. 206; 97 L.J.P. 116; 139 L.T. 412; *subsequent proceedings*, sub nom. *Horn v. Horn*, (1929), 142 L.T. 93; 11 Digest (Repl.) 469, 1022.

A PETITION by the husband for a declaration.

The parties were married on Feb. 4, 1950, in England, both parties being then twenty-one years of age. The husband had been born in and had always lived in England (save for service overseas in the Forces), and his domicile of origin was English. There were no children of the marriage.

B In June, 1951, the parties decided to emigrate to Hollywood, Florida, whither the wife's parents had gone a year before, and they arrived in the United States of America on or about June 26, 1951. On June 24, 1952, the wife applied to the appropriate authority in the United States for naturalisation. In October or November, 1952, the husband returned alone to England, intending to reside permanently in this country.

C On July 20, 1953, the wife caused to be issued in the circuit court of the fifteenth judicial circuit in and for Broward County, State of Florida, a "notice to appear" directed to the husband which read:

" . . . you [the husband] are . . . required to serve upon . . . [the wife's] attorney . . . your written defenses to the bill of complaint herein on or before Aug. 25, 1953, in this cause ; otherwise a decree pro confesso will be entered against you. The relief sought by this suit is a divorce upon the grounds set forth in the said bill of complaint."

In the bill of complaint, it was alleged, inter alia:

E " 1. [The wife] is a resident of the city of Hollywood, county of Broward, State of Florida, and has been an actual bona fide resident . . . for more than ninety days last prior to the filing of this bill of complaint for divorce. 2. That [the husband] is a non-resident of the State of Florida . . . 6. [The wife] and [the husband] continued to live together and cohabit together as husband and wife until on or about September, 1952, when . . . [the husband] left [the wife] and returned to England. 7. [There were set out allegations of cruelty culminating with an alleged incident in September, 1952] [The husband] left for England shortly thereafter and made no arrangements for [the wife] to return to England to join him and stated that he did not intend to see [the wife] again . . . [The wife], by reason thereof, charges [the husband] with extreme cruelty . . . Wherefore [the wife] prays (a) That . . . [the wife] may be divorced and forever free from the bonds of matrimony now existing between the parties. (b) That [the wife's] name before she was married Marie Vaughan Saban be restored as though no marriage had ever existed between the parties."

G The husband took no part in those proceedings and by a final decree of the court of Florida dated Nov. 3, 1953, it was

H " ordered, adjudged and decreed as follows: 1. That the report of the special master and his findings of fact and of law, and his recommendations be and the same are hereby ratified and confirmed. 2. That the court has jurisdiction of the subject-matter and the parties to this cause. 3. That [the wife] is a bona fide resident of the State of Florida, and was a bona fide resident of the State of Florida for more than ninety days continuously immediately next prior to the filing of her bill of complaint in this cause. 4. That [the husband] is guilty and has been guilty of extreme cruelty exhibited directly to and against [the wife] and the evidence has established such extreme cruelty, and the evidence as to the jurisdictional fact of

residence of [the wife] has been corroborated. 5. That the bonds of matrimony now and heretofore existing between [the wife] and [the husband] be and the same are hereby dissolved, and the parties hereto are hereby divorced each from the other a vinculo matrimonii . . . 7. That [the wife] be allowed to resume the name of Marie Vaughan Saban."

By his petition dated May 31, 1954, the husband prayed for a declaration

"that his . . . marriage was dissolved by the said decree of the said circuit court of the said State of Florida."

The suit came undefended before DAVIES, J., on Oct. 20, 1954. After the husband had given evidence, evidence as to the law of the State of Florida was given by Mr. James Lawrence McDonnell, an expert in American law. At the conclusion of the evidence HIS LORDSHIP adjourned the case for argument by the Queen's Proctor.

P. R. Hollins for the husband.

Paul Wrightson for the Queen's Proctor.

DAVIES, J.: The competence of this court to entertain a petition of this sort was established by the recent decision of the Court of Appeal in *Har-Shefi v. Har-Shefi* (1). I should have liked, had I the opportunity, to have had further time to consider it but as no doubt the husband wishes to have this matter decided one way or the other with reasonable celerity, and as I am due to go away on circuit tomorrow, I thought it right that I should deliver my judgment now.

[His LORDSHIP stated the facts and continued:] I am quite satisfied that when the husband went to America in 1951 he abandoned his English domicile of origin and acquired a domicile of choice in the United States, indeed in Florida, and the wife's domicile followed that of the husband. Owing, however, to the difficulties between them, and owing to the fact that he apparently did not like America, the husband decided to leave America and come back to this country. In October or November, 1952, he returned to this country intending to reside permanently here. It is, therefore, plain that by so doing he abandoned his domicile of choice in Florida and automatically reverted to his domicile of origin in this country. According to his evidence the wife refused to come back with him to England. He told me:

"She made it plain that she was going to stay in the United States . . .

She refused to come with me at the time."

He said that after he got back to this country he wrote on two occasions to her asking her to come back, but that she did not reply to either of those letters. From June, 1951, until, I suppose the present day, but certainly until Nov. 13, 1953, the wife had in fact been living in Florida. The husband acquired a domicile of choice in Florida in June, 1951, and, whatever may be the position in American law (and I understand from Mr. McDonnell that American law recognises the possibility of a wife and a husband having different domicils) by English law there is no doubt that when the husband decided to leave America for good and come back here, he and she reverted to a domicile here.

[His LORDSHIP referred to the documents relating to the wife's suit in Florida and continued:] That decree (i.e., the decree of the Florida court divorcing the husband and wife) having been pronounced, the husband not unnaturally wants to know where he stands and has brought the present petition, dated May 31, 1954, for a declaration that that divorce was valid and that the marriage was validly dissolved by that decree.

There was little dispute between counsel for the husband and counsel for the Queen's Proctor as to the law as it existed up to 1937. A certain number of leading authorities were cited to me: *Le Mesurier v. Le Mesurier* (2); *Lord Advocate v. Jaffrey* (3); *A.-G. for Alberta v. Cook* (4); and *Salvesen (or von Lorang) v. Austrian Property Administrator* (5). It is not necessary to refer to

these various authorities. Suffice it to say that two propositions are established beyond peradventure by those and other well known cases. The first is that the English courts take the view that the only court which can validly dissolve a marriage (and I emphasise that, because we are talking now about dissolution or divorce and not about any other matrimonial proceedings) is the court of the domicile of the parties. The second proposition is that by our law the domicile of the wife follows that of the husband, and that the wife cannot have a domicile different from that of the husband.

Counsel for the husband, as I have said, did not dispute that, but he says that that fundamental principle has been relaxed consequent on various statutory exceptions which have been introduced into our law, starting with the Matrimonial Causes Act, 1937, s. 13 (the substance of which is now contained in the Matrimonial Causes Act, 1950, s. 18 (1)). Then he points out that, in addition to that departure from strict application of the domicile principle, there was also the special provision contained in the Matrimonial Causes (War Marriages) Act, 1944, s. 1, and finally in the Matrimonial Causes Act, 1950, s. 18 (1). That sub-section provides:

"Without prejudice to any jurisdiction exercisable by the court apart from this section, the court shall by virtue of this section have jurisdiction to entertain proceedings by a wife in any of the following cases, notwithstanding that the husband is not domiciled in England, that is to say . . . (b) in the case of proceedings for divorce or nullity of marriage, if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and the husband is not domiciled in any other part of the United Kingdom . . ."

It is perhaps worth remembering that in the Matrimonial Causes (War Marriages) Act, 1944, s. 1 (2), it is provided:

". . . that this section shall not apply to any marriage if, since the celebration thereof, the parties thereto have at any time resided together in the country in which the husband was domiciled at the time of the residence."

That is to say that the special right given to a wife by the Act of 1944 to proceed in this country when the husband was domiciled elsewhere, was lost at once if at any time she resided with him in the country of his domicile, which does not at any rate to my way of thinking suggest that at that time the legislature was abandoning the principle of domicile. Counsel for the husband's contention is that these invasions of the principle of domicile as the sole test of jurisdiction to dissolve marriage show that the legislature is prepared to authorise the courts here to dissolve marriages at any rate where the wife is resident here, though the husband is not domiciled here, and that, therefore, this court must recognise the right of a court of a foreign country to exercise jurisdiction where the wife is resident there despite the fact that the husband is domiciled elsewhere.

The contrary argument is this. If the legislature had been minded to abandon the principle of domicile and to grant to this court the right to dissolve and to recognise the right of foreign courts to dissolve marriage in cases where the parties were, or the wife was, merely resident but not domiciled in the jurisdiction, it would have been a simple thing to have said so. One would not expect the legislature to pass an Act relating to the competence of foreign courts; but it could have done so generally with regard to this court, and it has not done so. In every case where this extraordinary jurisdiction has been given to the court it has been confined within strict limits and, except in cases which fall within those limits, the principle of domicile is still in full force and effect.

The only case to which I need refer is *Travers v. Holley & Holley* (6). The point at issue was that there was in force at the relevant time the New South Wales Matrimonial Causes Act, 1899, No. 14, s. 16, which, though by no means in pre-

cisely the same terms, was in similar terms to s. 13 of the Matrimonial Causes Act, 1937, to which I have already referred. The Court of Appeal discussed in *Travers v. Holley & Holley* (6) the question whether our courts would recognise the right of the New South Wales court under the statute to which I have referred, to entertain a suit for divorce when the jurisdiction depended on residence of three years and upwards. I say the question was discussed, because the discussion was plainly obiter. Mr. Commissioner GRAZEBROOK, Q.C., had found that the divorce pronounced by the New South Wales court was invalid, and consequently that the wife, who had re-married after that divorce, was guilty of adultery. In the Court of Appeal the majority of the court, SOMERVELL and HODSON, L.JJ., found that the husband was at the relevant time domiciled in New South Wales and, therefore, statute or no statute, the New South Wales court obviously had jurisdiction to dissolve the marriage which had, therefore, been validly dissolved and consequently the wife, who married thereafter, had not committed adultery. In addition to holding on the evidence that the husband was domiciled in New South Wales and therefore the New South Wales court had jurisdiction, the Court of Appeal went on to discuss whether or not the English court would recognise and acknowledge the right of the New South Wales court to pronounce a decree under the jurisdiction given to it by what for convenience I will call the three years' residence statute. I think the most convenient passage to refer to in that connection is a passage in the judgment of HODSON, L.J., who said ([1953] 2 All E.R. at p. 799):

"The argument is that domicile of both spouses at the time of the proceedings is the sole test of jurisdiction in divorce: see *Le Mesurier v. Le Mesurier* (2), which unequivocally established this test. Since the decision in this case the English courts have not recognised a decree of a foreign court unless the parties were at the time of the proceedings domiciled in the jurisdiction of the foreign court, or, if domiciled elsewhere, such decree would be recognised by the law of the domicile: *Armitage v. A.-G.*, *Gillig v. Gillig* (7). For this purpose New South Wales is a foreign court. It is contended that, the husband not being domiciled in New South Wales in August, 1943, the courts of this country will not recognise the decree of the court of that State. I think that this argument is not valid at the present day. For many years after the decision in *Le Mesurier's* case (2) the position was that the courts of this country only exercised jurisdiction in cases where both parties were domiciled here. Following certain dicta of SIR GORELL BARNES, P., in *Ogden v. Ogden* (8) ([1908] P. at p. 82), there was thought to be an exception to this rule in the case of wives deserted by husbands who at the time of the desertion were domiciled in England. It was thought that they might obtain a decree in this country although this country was not the true domicile of the husband. In undefended cases these courts did not inquire what had happened to husbands after desertion in such circumstances either because it was thought they were estopped from denying an English domicile or because the burden was on them to show an abandonment and they had done nothing to discharge the burden. When the question was raised in a defended case, however, the decision was against the view that there was any exception to the rule: *H. v. H.* (9). Indeed, the supposed exception had been adversely criticised in *A.-G. for Alberta v. Cook* (4).

"The position has, however, been radically altered by statute. By the Matrimonial Causes Act, 1937, s. 13, it was provided that 'Where a wife has been deserted by her husband . . . and the husband was immediately before the desertion . . . domiciled in England and Wales, the court shall have jurisdiction for the purpose of any proceedings' concerned with divorce. Since 1937 this exception has been largely extended, first, by the

Matrimonial Causes (War Marriages) Act, 1944 (a temporary war measure), and later by the Matrimonial Causes Act, 1950, s. 18. It is unnecessary to consider the effect of these later statutory provisions since, at the material time when the New South Wales proceedings were instituted, the Act of 1937 was in force and s. 13 of this Act corresponds in substance with the provisions under which the New South Wales court claimed jurisdiction between the parties to this appeal. It seems to me, therefore, that Parliament has cut the ground from under the argument put forward on behalf of the husband. If English courts will only recognise foreign decrees of divorce where the parties are domiciled in the territory of the foreign court at the time of the institution of proceedings because that is the jurisdiction which they themselves claim, what is the situation when the courts of this country arrogate to themselves jurisdiction in the case of persons not domiciled here at the material date? It must surely be that what entitles an English court to assume jurisdiction must be equally effective in the case of a foreign court.

LORD WATSON in the *Le Mesurier* case (2) used the following language ([1895] A.C. at p. 528): ‘ . . . a decree of divorce a vinculo, pronounced by a court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trenches upon the interests of any other country to whose tribunals the spouses were amenable, claim extra-territorial authority ’. Conversely, it seems that where it is found that the municipal law is not peculiar to the forum of one country, but corresponds with a law of a second country, such municipal law cannot be said to trench on the interests of that other country. I would say that where, as here, there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognise a jurisdiction which mutatis mutandis they claim for themselves. The principle laid down and followed since the *Le Mesurier* case (2) must, I think, be interpreted in the light of the legislation which has extended the power of the courts of this country in the case of persons not domiciled here.”

Counsel for the husband argues, therefore, that as this court has the right by statute to dissolve marriages on the petition, for example, of a wife resident here when the husband is domiciled elsewhere, so, consequent on the decision of the Court of Appeal in *Travers v. Holley & Holley* (6), we must recognise the right of foreign courts to do likewise. I think, however, that the real question is: Does the foreign court do likewise? It seems to me that the observations of the

Court of Appeal (SOMERVELL and JENKINS, L.JJ., agreed in substance with HODSON, L.J.) were directed to a case where the extraordinary jurisdiction (I use that as meaning out of the ordinary jurisdiction) of the foreign court corresponded almost exactly with the extraordinary jurisdiction exercisable by this court. One may say frivolously it is an application of the “sauce for the goose and sauce for the gander” principle. I am far from being satisfied in the present case that the jurisdiction exercisable by the Florida court is anything like the jurisdiction of this court. I have already referred to the proceedings in the Florida court where jurisdiction on the face of the document appears to be founded on actual bona fide residence for more than ninety days. Mr. McDonnell, in his most helpful evidence, told me that all other American courts under Article 4 of the American Constitution would give full faith and credit to the decree of the Florida court, but he said that residence is construed to mean domicile. He said:

“Residence as it appears in the statutes—and in the Florida statute ‘residence’ is used—is construed to mean ‘domicil’, my Lord, but it is distinct from the statutory period of ninety days.”

I asked what he meant by that, and he said:

"That is a requirement that the plaintiff be physically present in the State as well as being domiciled there."

I said:

"You mean, to found jurisdiction there has got to be domicile plus ninety days' residence?"

and his answer was: "Yes, my Lord". Counsel for the husband summed it up and asked:

"I think it is what his Lordship has just said. Is it two things: domicile plus ninety days' residence?"

and he said: "Yes". Then he goes on to say that all American States recognise the right of a wife to establish a domicile separate from that of her husband. He also made it plain that requirements of different States varied. Florida, the State under consideration, requires ninety days; some other State in America was mentioned which had a requirement of sixty days. There was one country mentioned by Mr. McDonnell in his evidence, viz., Mexico, where apparently one day's residence was sufficient. I do not think even counsel for the husband would suggest that this court would be bound to recognise the jurisdiction of a court which presumed to dissolve a marriage on the faith of one day's residence. I think that extreme case points the difficulty which faces the husband in the present case.

Travers v. Holley & Holley (6) deals with a case where the foreign court's jurisdiction depends on three years' residence, as does ours in similar circumstances. What is the court to do when it is faced with a case of this kind? How is it to draw the line? Three years is alright because we exercise a similar jurisdiction. Is two years alright or is it too short? Is twelve months, ninety days, sixty days, one day, alright? How is one to draw the line and where is one to fix the standard? It seems to me that that is a matter of impossibility unless there is some statutory yard-stick by which one could measure what is reasonable residence from our point of view. I think the present case falls to be decided on a more precise ground than considerations of that kind. I think the argument of counsel for the Queen's Proctor was plainly right. It seems to me that the statutory exceptions to the law regarding domicile as being the test of the jurisdiction to dissolve a marriage are exceptions and that the rule, apart from those exceptions, remains in full force. In my judgment the observations in *Travers v. Holley & Holley* (6) merely decide that this court will recognise the right of other courts to encroach on the principle of domicile only to the extent to which this court also does. Where, as in the present case, you find a court purporting, no doubt completely properly according to the laws of Florida, to exercise jurisdiction on ninety days' residence, even though that is coupled with something that we do not recognise, namely, a separate domicile of the wife, the only possible answer which this court can give is to say that the decree of that foreign court was in our law invalid. In those circumstances, all that I can do is to dismiss this petition, with the result that the husband will either have to wait for the expiration of the statutory triennium and then take proceedings on the ground of desertion or else, if the wife has "re-married", to commence proceedings in this country on the ground of adultery. That, however, is no concern of mine. The petition, therefore, will be dismissed.

Petition dismissed.

Solicitors: *Rowe & Maw*, agents for *Clutterbuck, Trevenen & Mawson*, Carlisle (for the husband); *Queen's Proctor*.

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

RANDS v. McNEIL.

COURT OF APPEAL (Denning, Jenkins and Morris, L.J.J.), October 14, November 19, 1954.]

Animal—Domestic animal—Bull of known fierce disposition—Attack on owner's employee—Duty of owner.

A *Master and Servant—Duty of master—Farming—Fierce bull owned by master—Duty to take care not to subject employees to unnecessary risk—No order by master to servant not to enter stall—Servant entered stall and was injured by bull—Liability of master.*

B The plaintiff was a senior farm hand employed by the defendant, a farmer. The defendant owned a bull which was known by the defendant and by all the farm hands to be of a fierce disposition. Following an attack on F., another employee of the defendant, the bull was kept permanently in a loose-box, and the defendant gave instructions to two of the farm hands, F. and B., that they were never to enter the box. The plaintiff and the beastman M. were never told in terms that they must not enter the box, although the defendant told M. to take care and gave him instructions in respect of
C cleaning out the box. These were that he must first secure the ring on the bull's nose with a hooked staff through either the half door or the window of the box and then tether the bull by means of a rope to some secure object outside the box. On May 11, 1951, the box was to be cleaned out and M., after an unsuccessful attempt to hook the ring through the window, asked the plaintiff to give him some assistance. The plaintiff entered the box and while he was trying to hook the ring, the bull charged and injured him
D severely. In an action for damages for personal injuries,

HELD: although an owner of an animal which he knows to be dangerous keeps it at his peril and may incur liability, independently of negligence, if the animal escapes and injures a member of the public, yet (i) a farmer does not owe such a strict duty to his farm employees, but owes to them
E the ordinary duty of a master to take reasonable care not to subject his servants to unnecessary risk, and (ii) even if the defendant had owed to the plaintiff the strict duty, independent of negligence, there was no breach of it as the bull did not escape. On the facts (DENNING, L.J., dissenting) the defendant had not subjected the plaintiff to unnecessary risks and, therefore, was not guilty of negligence, the cause of the accident being the
F negligence of the plaintiff in entering the loose-box.

Knott v. London County Council ([1934] 1 K.B. 126), considered.
Appeal dismissed.

G EDITORIAL NOTE. As there is nothing unlawful in keeping a dangerous animal, unless it escapes, its owner is under no liability to trespassers whom it injures. Neither, as the present case shows, is a master liable, independently of negligence, to his servants if injured by an animal kept by him and known to be dangerous; but this may admit of exception if the risk of dealing with the animal is not incidental to the employee's service: see *Mansfield v. Baddeley* (1876) (34 L.T. 696). The present case may be compared with such decisions as
H *Marlor v. Ball* (1900) (16 T.L.R. 239, C.A.), where the plaintiff brought his injury on himself by entering the stable of a zebra and stroking the animal, and failed to recover damages for that reason; or may be contrasted, from the aspect of a master's duty to provide a safe system of work, with *Yarmouth v. France* (1887) (19 Q.B.D. 647), where a master's vicious horse, which injured his servant, the driver of one of his carts, was considered, for the purposes of a statutory liability, to be part of the plant used in the business, and it was held that the vice in the horse was a defect in the condition of the plant.

AS TO LIABILITY OF OWNERS FOR INJURIES CAUSED BY DOMESTIC ANIMALS, see 1 HALSBURY'S LAWS (3rd Edn.) 663, para. 1267; and FOR CASES, see 2 DIGEST 238, 245 et seq.

Cases referred to:

- (1) *Knott v. London County Council*, [1934] 1 K.B. 126; 103 L.J.K.B. 100; 150 L.T. 91; 97 J.P. 335; Digest Supp.
- (2) *Fletcher v. Rylands*, (1866), L.R. 1 Exch. 265; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; *on appeal*, sub nom. *Rylands v. Fletcher*, (1868) L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70; 2 Digest 228, 195.
- (3) *Read v. Lyons & Co., Ltd.*, [1946] 2 All E.R. 471; [1947] A.C. 156; [1947] L.J.R. 39; 175 L.T. 413; 2nd Digest Supp.
- (4) *Limpus v. London General Omnibus Co., Ltd.*, (1862), 1 H. & C. 526; 32 L.J.Ex. 34; 7 L.T. 641; 27 J.P. 147; 158 E.R. 993; 1 Digest 595, 2286.
- (5) *Stapley v. Gypsum Mines, Ltd.*, [1953] 2 All E.R. 478; [1953] A.C. 663; 3rd Digest Supp.
- (6) *May v. Burdett*, (1846), 9 Q.B. 101; 16 L.J.Q.B. 64; 7 L.T.O.S. 253; 115 E.R. 1213; 2 Digest 237, 240.
- (7) *Filburn v. People's Palace & Aquarium Co., Ltd.*, (1890), 25 Q.B.D. 258; 59 L.J.Q.B. 471; 55 J.P. 181; 2 Digest 238, 243.
- (8) *Marlor v. Ball*, (1900), 16 T.L.R. 239; 2 Digest 238, 244.
- (9) *Mason v. Keeling*, (1699), 12 Mod. Rep. 332 (88 E.R. 1359); 1 Ld. Raym. 606 (91 E.R. 1305); 2 Digest 243, 274.
- (10) *Baker v. Snell*, [1908] 2 K.B. 825; 77 L.J.K.B. 1090; 99 L.T. 753; 2 Digest 240, 254.

APPEAL by the plaintiff from an order of DONOVAN, J., at Leeds Assizes dated Apr. 2, 1954, whereby he dismissed the plaintiff's claim for damages for personal injuries. The facts appear in the judgment.

E. Ould for the plaintiff.

F. C. Denny for the defendant.

Cur. adv. vult.

Nov. 19. The following judgments were read.

DENNING, L.J. : A Yorkshire farmer had a dangerous bull. He knew it was dangerous because the bull on one occasion had chased one of his men, Featham, in the yard. The farmer thereafter kept the bull inside a loose-box all the time. It was kept there untethered. On a later occasion the bull got the farmer himself against the wall of the box and the farmer then took his horns off. The bull was never let out of the box. Even the cows were taken into the box for service. The farmer told some of his men [Benson and Featham] not to go into the box, but he never told his stockman, Moss, not to go in. He warned Moss that he must be very careful of the bull, but did not tell him not to go into the box. Nor did he tell his senior man, Rands, the plaintiff, in terms not to go into the box; although no doubt the plaintiff knew that it was a dangerous thing to do and that he ought not to do it.

The accident happened because Moss and the plaintiff on one occasion did go into the box. It came about in this way. The box had to be cleaned out. The stockman, Moss, wanted to catch the bull and tie it up whilst he cleaned out the box. The bull had, of course, a ring in his nose. Moss got a staff with a hook on the end of it and he tried to get the hook through the ring on the bull's nose. He tried this at first from outside the box. He put the staff through the window, but did not succeed in catching the bull; whereupon the bull became wary and backed away from the hook. To use Moss's own words:

"I went round to the window and the bull he maybe was near enough to get with the staff, but if you did not get him the first time you had had it.

He went to back away, or maybe he would go further to the door and you had to go round and try and get him. If he got into the far corner you could not reach him, [and he added significantly] You are alright if you can get him the first time like."

Not having caught the bull from outside, Moss decided to get some help to go inside, for otherwise he might have been outside there all day. He said:

"I went and asked Rands if he would give me a hand as I did not fancy going in to try and get him by myself."

The plaintiff said he would give him a hand and did so. First Moss went into the box whilst the plaintiff stood at the door and kept it open in case Moss had to make a dash for safety. Moss failed to catch the bull, so the plaintiff said:

"Shall I have a try?" They changed places. The plaintiff took the staff and Moss held the door. The plaintiff tried to hook the bull, but as he was doing so the bull charged and knocked him down against the wall and severely injured him. Moss drove the bull off with a dung fork and the plaintiff got out of the box, but he had a frightful wound to his left arm. He has had to undergo nine operations and his arm is still practically useless to him.

This is the first case, so far as I know, where the court has had to consider the liability of a farmer towards the men whom he employs to look after a bull or to help in looking after it. We were urged to say that his liability to his men was the same as to the public at large: and that, inasmuch as the farmer, the defendant, knew the bull was dangerous, it was his strict duty to keep it under control so that it should do no damage. The farmer keeps the bull, it was said, at his peril, even so far as his own men are concerned. I do not think that is the law. The duty of the farmer to his men is not a strict duty. It is the same as the duty of any other employer. He must take reasonable care not to subject his men to unnecessary risk. The only difference is that when he has a dangerous bull he must take very great precautions. It is trite knowledge that the greater the danger the greater the precautions that should be taken.

Apart from these general considerations, there is a narrower ground on which it can be seen that the defendant here is not under a strict liability. In order to impose strict liability, even to the public, it is essential to prove not only knowledge of the dangerous propensity of the animal, but also to prove that it escaped and did harm. LORD HALE put it very accurately in his *PLEAS OF THE CROWN* (vol. 1), p. 430. He said:

"The owner must at his peril keep him up safe from doing hurt, for though he use his diligence to keep him up, if he escapes and do harm the owner is liable to answer damages."

LORD WRIGHT in *Knott v. London County Council* (1) said ([1934] 1 K.B. at p. 138):

". . . it is not unlawful or wrongful to keep such an animal; the wrong is in allowing it to escape from the keeper's control with the result that it does damage."

This is in full accord with the principle of *Fletcher v. Rylands* (2) where "escape" is an essential condition of liability: see *Read v. Lyons & Co., Ltd.* (3) ([1946] 2 All E.R. at p. 474), per VISCOUNT SIMON. Applying this principle it is plain that the plaintiff cannot succeed on the ground of strict liability, for the simple reason that the bull never escaped at all. So far from the bull escaping, the plaintiff actually went into the loose-box where it was kept and thus brought the danger on himself.

There remains, however, the question whether the defendant was guilty of negligence. The judge does not mention this point, the reason being no doubt because the case was fought before him mainly on the question of strict liability;

but negligence was distinctly pleaded and we ought, I think, to consider it. There was much evidence of a faulty system. The system which the defendant did in fact provide is best shown by his own description of it. He was asked:

" Q.—What was the procedure you laid down for mucking out the box ?

A. That they should use the staff provided for the job and get the bull either through the half door on the foal yard side or preferably through the window on the far side, but at no time had they to go into the box."

I cannot regard that system as satisfactory and for these reasons: (i) It was essential to the safety of the system that the men should be specifically instructed that they should not go into the box in any circumstances: but no such instruction ever reached the stockman, Moss, or the senior farm hand, the plaintiff, who were the two most likely to be affected by it. (ii) It was an inefficient system which meant poking a hook at the bull's nose, a thing to which the bull would naturally object. The defendant ought, as the veterinary surgeon said, at least to have had a chain eighteen inches long hanging down from his ring, for then the men could angle for the end of the chain, which the bull does not mind so much. (iii) It was an inefficient system which depended on the chance of hooking the bull first time. If he was not caught first time, the men had to put off the job indefinitely until they could hook him. Good sturdy men like these would naturally say: " We had better go in and catch the bull rather than put off the job ". I realise, of course, that Moss and the plaintiff were both at fault. They ought not to have gone into the box at all, because they must have known it was a dangerous thing to do and that they ought not to do it; but their being at fault does not excuse the farmer from his share of the responsibility, if he also was at fault. It is only a ground for reducing the damages. The judge seems to have thought that the case depended entirely on whether the plaintiff acted outside the scope of his employment or not. Indeed, as I read his judgment, he decided against the plaintiff simply on the ground that, when he went into the shed " he acted outside the scope of his employment ". I do not think this is the right line of approach. An inquiry as to " scope of employment " is relevant and proper when considering whether a master is liable to a third person for his servant's negligence, but it does not arise when considering a claim by the servant himself for his master's negligence. In any case, if I were asked whether the plaintiff here was acting " in the course of his employment ", or was out on a " frolic of his own ", as the phrase is, I would answer that by saying that beyond question he was acting in the course of his employment. He was acting for the master's purposes in a matter which concerned his master, and in no way on his own account. Even if he had been told not to go into the box he would not thereby have been taken outside the scope of his employment: cf. *Limpus v. London General Omnibus Co., Ltd.* (4).

In these circumstances, I ask myself what the judge meant by saying that the plaintiff " acted outside the scope of his employment ". He probably meant that it was no part of the plaintiff's duty to go into the box. No doubt that is true; but it does not defeat his claim altogether. It is no part of any man's duty to be careless or disobedient, but his carelessness and disobedience does not necessarily defeat his claim altogether. In *Stapley v. Gypsum Mines, Ltd.* (5) it was no part of the plaintiff Stapley's duty to enter the stope. He, like the plaintiff in this case, did what he must have known was dangerous and that he ought not to do it. Yet the House of Lords held that he was entitled to damages, although the damages were reduced, of course, owing to his own negligence. So also in this case, I think that whatever the plaintiff did wrong goes to contributory negligence, but does not discharge the defendant altogether if he also was negligent. I may add that the evidence clearly showed that Moss was negligent and the judge said he was; and if the pleadings had sought to make

the defendant liable for Moss's negligence, I do not think there could have been any answer to it: see *Stapley v. Gypsum Mines, Ltd.* (5).

What, then, is to be done in this case? Inasmuch as the judge misdirected himself about the "scope of employment", it is plain that there should be at least a new trial. I think, however, that we should not put the parties to that expense. The facts were not in dispute. The only question is: what is the proper inference from those facts? I think we should take the responsibility of judging it ourselves, and I should hold that there was a faulty system of work and that the defendant is responsible for it. Further, if there were to be a new trial, the plaintiff would certainly be allowed to amend the pleadings and rely on Moss's negligence to which there could be no answer. In one way or the other, therefore, the defendant is certainly liable. The plaintiff also was at fault and I would place the responsibility equally on each. The plaintiff should recover, therefore, half his damages, i.e., £1,250.

JENKINS, L.J.: This is an appeal by the plaintiff from a judgment of DONOVAN, J., dated Apr. 2, 1954, dismissing the plaintiff's action against the defendant for damages for personal injuries sustained by the plaintiff in an attack on him by a bull kept by the defendant on a farm where the plaintiff was employed by the defendant as a farm hand. The accident happened on May 11, 1951. The plaintiff, who was then thirty-eight years of age, had been a farm worker ever since he left school and had been with the defendant for five years. The farm was some 260 acres in extent and the defendant employed on it some five or six men. The defendant kept on the farm a herd of cows and also the offending bull which he used for stud purposes. The plaintiff was by length of service the senior employee on the farm, but was not in charge of the cattle which were normally looked after by a fellow employee named Moss, who was the regular "beastman", and had been in the service of the defendant a matter of only four or five months. The defendant acquired the bull in or about April, 1950. It showed signs of bad temper in or about October, 1950, when it chased an employee named Featham who was feeding it in the open foal yard. After this episode, the bull was kept permanently in a loose-box in the walls of which there were (on opposite sides) a window with no glass in it and a half door. At some time after the incarceration of the bull, the defendant had the bull de-horned because "it nearly caught him one day". Earlier, when the bull had been let out for the purpose of serving cows, it had been masked, this being a precaution commonly taken with bulls of uncertain temper. It is thus not in doubt that the bull was known to the defendant to be dangerous. In addition to causing the bull to be permanently shut up after it had attacked Featham, the defendant specifically warned two of his men (Benson and Featham) that it was dangerous. According to their evidence, he told Benson that the bull was dangerous and that he must not go into the loose-box with it; while he told Featham: "Do not go and handle him yourself. Do not go near the bull yourself", Featham "taking it for granted" that this meant that he was not to go into the loose-box with the bull. According to Moss's evidence, the defendant also told Moss to be very careful of the bull, and while not definitely telling Moss not to go into the loose-box with the bull said that when Moss had to "muck out" the box he should try to catch it through the window or through the half door. The defendant said in his evidence that he could not remember specifically warning the plaintiff and the plaintiff said in his evidence that the defendant did not do so. The plaintiff, however, knew that the bull had attacked Featham, and I think that there can be no doubt that everyone on the farm, including the plaintiff, knew perfectly well that it was dangerous. Moss's evidence to the effect that the defendant told him to try to catch the bull through the window must, I think, clearly be taken as referring to the instructions which, according to the defendant's evidence, the defendant, after the attack on Featham, gave to some

of his men to the effect that when it was necessary to "muck out" the loose-box they must, before going in, secure the bull from outside by putting a staff with a hook at the end, provided for the purpose, through the window or half door, and passing the hook through a ring in the bull's nose. After catching the bull in this way they were to pass a rope through the ring and make the rope fast to some suitable object (there seem to have been several) outside the loose-box, the bull being thus tethered firmly with his head protruding outwards through the window or half door, so that anyone could go into the loose-box and "muck it out" in safety.

As to the warnings and instructions given by the defendant after the attack on Featham the learned judge thus summarised the effect of the evidence:

"After the bull had previously attacked the farm employee, one Featham, the defendant, as the owner of the farm and of the bull, told two of his employees that they must not go into the box while the bull was not tethered. When the bull needed to be tethered they were to engage the hooked staff with the ring in the bull's nose while they stood outside the open window or outside the half door. Once that was done the bull would be under sufficient control to enable the man to enter the shed, if necessary, and attach the rope. Alternatively, the rope would be attached to the ring from the open window or half door, if the bull could be brought with the staff within reach. The defendant cannot specifically remember which two men he told never to go into the shed with the bull untethered. The plaintiff says that he was not one of them and the defendant cannot say that he was. Moss, the beastman, does not remember being so told, but simply to be very careful about the bull. But I am satisfied that the defendant did tell two of his men. He had only four or five altogether at the time, the farm being a comparatively small one, and the strong probability is that these instructions became known to all his employees."

I am not sure that this is entirely accurate. It is clear that two of the employees (Featham and Benson) were specifically warned of the dangerousness of the bull in the terms I have already mentioned, but it does not appear that either of them was told about the use from outside the loose-box of the hooked staff, and one of them, Benson, said he was not told anything about that as it was a job he did not do. On the other hand, it is clear from Moss's own evidence that he was instructed as to the use of the hooked staff in this way. There is, however, no reason to qualify the learned judge's conclusion that

"the strong probability is that these instructions became known to all his [the defendant's] employees"

except by adding that they certainly became known to Moss, who was given them by the defendant himself. It was not always an easy matter to catch the bull by reaching through the window or half door with the hooked staff. The bull's head might be out of reach, or if it was in reach the hook might not engage the ring at the first attempt, in which case the bull (who did not like having the staff poked at his face) might start shaking his head, backing away and generally taking evasive action. To quote Moss's evidence "if you did not get him the first time you had had it". On the other hand, the "mucking out" of the loose-box was not an urgent operation. It was done at intervals of a month or six weeks when time could conveniently be spared for it; and if the bull could not be caught on a particular occasion there is no apparent reason why the "mucking out" should not have been put off until he was in a more tractable mood. On the day of the accident Moss determined to "muck out" the loose-box. He tried to catch the bull from outside by means of the hooked staff but failed to do so. He then asked the plaintiff to come and help him. It is clear from the evidence that while the plaintiff was not under Moss's orders, it was

well within the scope of the plaintiff's employment to lend a hand with the bull when requested to do so by Moss. The plaintiff went with Moss to the stable. Moss went in and tried to hook the bull with the staff, but without success, the bull shaking his head and backing away. Meantime, the plaintiff stood by the door and kept it open "in case", to quote the plaintiff's own words, "he" (i.e., Moss) "had to make a dash for it". Moss having failed to catch the bull, the plaintiff asked Moss whether he should "have a go". They changed places. Moss stood by the door while the plaintiff took the staff and went and tried to catch the bull. The plaintiff made several attempts, but the bull would not allow itself to be caught, and finally charged the plaintiff and knocked him down against the wall causing serious injuries to his left arm.

The learned judge, after summarising in the passage quoted above the effect of the evidence as to the giving of warnings and instructions by the defendant, said:

"But I consider the case on the footing that no express warning to refrain from going into the shed with the bull untethered reached the plaintiff."

He then referred to the knowledge which the plaintiff clearly had about the bull's attack on Featham, the bull's consequent incarceration, his being de-horned, and the previous practice of masking him when let out to service cows, and expressed the conclusion, with which I entirely agree, that

"the plaintiff must have known, if he had thought about it at all, that it was dangerous to go into the shed with the bull untethered inside."

Then, after describing the way in which the accident took place, the learned judge expressed in these terms his reasons for dismissing the action:

"If it were part of the plaintiff's duty to go into the box and do as he did, then there would be no answer to his claim. On the other hand, if he acted outside the scope of his employment, the defendant is not answerable. Moss, the beastman, was in charge of the operation of tethering the bull. He asked the plaintiff to lend him a hand and the plaintiff agreed. When Moss made this request and the plaintiff agreed, both were acting within the scope of their employment by the defendant; but when Moss opened the door of the shed and went in, I am satisfied he was doing what he knew he should not do, whether or not he had been expressly told by the defendant to stay outside. If the defendant had seen him he would, I have not the least doubt, have rebuked him and told him to hook the bull from outside the shed which, though it sounds a chancy operation, can clearly on the evidence be done, because a bull is attracted towards an open window or a half door where a human being is standing. The same remarks apply to the plaintiff. I think he must have known he should not have gone into the shed with the bull untethered or would have realised that he should not had he given the matter any thought. Equally, I think the defendant would have stopped him doing what he did had the defendant seen it. The result is in my view that when the plaintiff went into the shed he acted outside the scope of his employment. Certainly he was never told this was part of his duty and, knowing as he did, that the bull had been put in the shed for the very reason that it was dangerous, common sense would tell him that he must keep out until the bull was tethered in the way I have described. Some time was spent in discussing whether in these circumstances the doctrine of *volenti non fit injuria* defeats the plaintiff's claim. I do not think the case raises that question, for admittedly there was no agreement, express or implied, between the plaintiff and the defendant whereby the plaintiff agreed to run the risk. This is a case where the plaintiff ran the risk, which was an obvious one, without being asked to do so and in disobedience if not of

instructions about which he knew, at least of the promptings of ordinary common sense. In other words, his own lack of reasonable care for himself was the sole cause of this distressing mishap. The fact that Moss did the same thing and that he was in charge of the operation in my opinion makes the case no better for the plaintiff. I am sorry to reach this conclusion because the plaintiff acted as he did no doubt in a desire to help and without thinking much about the danger involved."

It is contended on behalf of the plaintiff that, on the facts as found by the learned judge, he was bound as a matter of law to give judgment in the plaintiff's favour. This contention is one which succeeds but seldom in ordinary cases of negligence; but the present case was not primarily put as an ordinary case of negligence. The particulars of negligence alleged in the statement of claim were these:

"(a) The defendant well knew that the said bull was of a fierce and mischievous nature and accustomed to attack mankind, and was therefore dangerous to human beings, but he in breach of his duty wrongfully kept the said bull and failed to keep it under proper control and to prevent it injuring anyone. (b) The said bull, being of the said nature, should have been kept tethered to a ring in the wall, or otherwise secured so as to prevent it attacking anyone entering the box. (c) Further, or alternatively, the bull should have had a length of chain attached to the ring in his nose to facilitate catching him with a stick as is a usual precaution. (d) Anyone endeavouring to catch the bull was compelled to enter the said box, which was too small to allow a safe place for manoeuvre, and exposed such person to unnecessary risk of being attacked and trapped in the said small space by the bull as the plaintiff in fact was. (e) By reason of the matters specified in paras. (b), (c) and (d) above, the defendant negligently failed to provide and maintain for the plaintiff a safe place of work, suitable and safe equipment, a safe system of work, and proper supervision of the work."

As foreshadowed in the first of these paragraphs of particulars, counsel for the plaintiff seems to have argued his case before the learned judge and certainly argued it before us mainly, and indeed almost wholly, on the ground that this case was within the well known principle that when a man keeps an animal *ferae naturae*, and, therefore, of a kind presumed in law to be dangerous, or a domestic animal known to him to be in fact dangerous, he does so at his peril and is liable for any injury caused by the animal to any other person without proof of negligence, unless he can bring himself within one or other of certain recognised exemptions: see *May v. Burdett* (6). Counsel admitted as recognised grounds of exemption (i) contributory negligence: see *Filburn v. People's Palace & Aquarium Co., Ltd.* (7) (25 Q.B.D. at p. 260), *Marlor v. Ball* (8); although he pointed out that since the Law Reform (Contributory Negligence) Act, 1945, this must be regarded as a ground for reducing damages and not as a complete defence against liability; (ii) the principle of *volenti non fit injuria*, where the party injured by the dangerous animal has freely and voluntarily agreed (either expressly or by necessary implication) to run the risk of such injury; (iii) trespass by the injured party, where this was what brought him into contact with the dangerous animal; and (iv) act of God. Counsel argued that of these four grounds of exemption none was here available to the defendant but the first, with the result that the plaintiff was entitled to judgment for the amount of damages appropriate to his injuries and their consequences, less whatever proportion (if any) the court might think fit to deduct on account of his contributory negligence.

Speaking for myself, I do not think this doctrine of absolute liability can reasonably be applied as between a farmer and the persons employed by him on his farm in relation to the handling by those persons of an animal such as a bull kept by the farmer for breeding purposes. Counsel for the plaintiff was

prepared, in cases of this kind, to accept some relaxation of the strict rule as between the farmer and any person employed by him to look after the bull on the ground that a person employed for that purpose must be taken to have agreed to run such risks as are necessarily involved in employment of that kind. But he said that the plaintiff here was not employed to look after the bull and was, therefore, in the same position for the purposes of the rule as any stranger lawfully on the farm would have been. I do not think this last submission accords with the evidence, which to my mind shows, as the learned judge in effect found, that while it was no part of the plaintiff's regular duties to look after the bull, lending a hand with the bull when asked to do so was within the scope of his employment, or, in other words, included amongst the services which he expected, and was expected by the defendant, to render in the course of his employment by the defendant as a farm labourer.

I cannot, however, regard this as a case for the application of the rule of absolute liability mitigated by an implied agreement to take some degree of risk. I do not think the rule applies at all. This is not the case of a dangerous animal escaping from its place of incarceration or from the control of its keeper and injuring a stranger, the allowing of such escape being according to modern authority the true basis of the absolute liability: see *Knott v. L.C.C.* (1) ([1934] 1 K.B. at p. 138) per LORD WRIGHT. This is a case in which an experienced farm hand went in the course of his employment to assist a fellow employee in one of the normal operations of the farm, viz., the securing of a bull known to be dangerous with a view to cleaning out the loose-box in which it was kept. Is it to be held that in such a case the farmer by whom the man is employed is, as owner of the bull, under an absolute liability to the man for any injury he may sustain from the bull, however careful the precautions taken by the farmer to enable his men to handle the bull with safety may have been, and whatever degree of disregard for his own safety the injured man may have shown? Considering the large number of bulls which must be kept on farms up and down the country, and the high proportion of these which must be manifestly bad-tempered, I think it would be contrary to common sense to hold that the keeping by a farmer of a bad-tempered bull constitutes in itself negligence on his part so as to make him liable to his men for any injury they may sustain in the course of their dealings with the animal, unless indeed the bull has proved itself to be so utterly ferocious and unmanageable that the farmer knows or ought to know that the only way to prevent it injuring the men is to get rid of it. I do not think that the present case can on the evidence fairly be held to be an extreme one of that kind.

In my judgment, this case falls to be decided by reference to the ordinary law of negligence as it applies between master and servant. On this footing the duty of the defendant was to take reasonable care to see that the operation of "mucking out" the bull's loose-box could be carried out by his men without risk of injury from the bull. The operation could be performed with perfect safety by the method of first securing the bull from outside the box as above described, if that method was one which it was practicable to carry out with the means provided. Apart from negligence based on the rule of absolute liability, the charges of negligence made against the defendant really stand or fall according to the view taken as to the efficacy of the method provided of securing the bull from outside the loose-box, and as to the plaintiff's knowledge of the danger of going into the loose-box with the bull untethered inside it. If the method provided of securing the bull from outside was a practicable one, then there was no need to keep the bull permanently tethered inside the box, for in that case no one in his senses who knew of the danger would think of going in until the bull had been secured by that method. Again, if that method was a practicable one there was no need, from the point of view of safety, to add a chain to the ring, though there might be an advantage from the point of view of saving time. Finally, if that method was a practicable one, the charges as to the loose-box being too small to allow safe room

for manoeuvre and of failure to provide suitable equipment, a safe system of work, and proper supervision break down, given knowledge on the plaintiff's part of the danger of going into the box without first securing the bull from outside.

The learned judge held, and I agree, that if it had been part of the plaintiff's duty to go into the box and do as he did, then there would be no answer to the claim. On that assumption the defendant would have been exposing the plaintiff to an unnecessary risk. The learned judge held further that if the plaintiff was acting outside the scope of his employment then the defendant was not liable. This I take to mean "if it was no part of the plaintiff's duty to act as he did then the defendant was not liable". Taken alone I think this proposition is too widely expressed. The learned judge went on to hold, in effect, that the method provided was a practicable method of securing the bull from outside, that the plaintiff knew perfectly well that it was dangerous to go into the loose-box with the bull untethered inside it and that he ought not to do so, and further that, even if he had not been actually instructed to use the method above described, his common sense would tell him to keep outside until the bull had been tethered in that way.

It is to my mind a nice question whether on the evidence the method provided of securing the bull from outside the loose-box might not have been held to be so slow and uncertain that the defendant should have known that his men would be likely, in their anxiety to get on with their work, to take the risk of going in and attempting to secure the bull inside the loose-box. This was, however, essentially a matter for the learned judge, who clearly thought the method provided was adequate. Moreover, that method seems to have been used with success a good many times, and, as I have said before, the "mucking out" of the loose-box was not an urgent operation. As to the plaintiff's knowledge of the danger, that again was essentially a matter for the learned judge, as also was the plaintiff's appreciation, by his own common sense, of the necessity of securing the bull by the method above described before going in, even if he had not been expressly instructed to use that method. In this connection I would say again that the plaintiff was an experienced farm hand. It was not sought to make the defendant vicariously liable for the negligence of Moss, whom the learned judge described as "in charge of the operation", and who plainly flouted express instructions in acting as he did, and might be said to have led or permitted the plaintiff to follow suit. I therefore refrain from expressing any opinion as to how the case might have fared if put in that way.

On the case as presented, and on the learned judge's findings, I conclude that the appeal must fail. I confess to considerable sympathy for the plaintiff, as he seems to have been a willing servant who met with this great misfortune through excess of zeal; but, on any view of the case, I think he could hardly have escaped the attribution to himself of a serious degree of contributory negligence. Be that as it may, I am of opinion that for the reasons I have endeavoured to state this appeal should be dismissed.

MORRIS, L.J. : The argument advanced on behalf of the plaintiff was that the owner of the bull was under a strict liability and that the plaintiff was entitled to recover damages although diminished by such extent as might be thought referable to his own negligence. The argument proceeded on the assumption that the mere ownership of a bull which is known to be dangerous involves liability if someone is injured by the bull. Although, however, there is a strict liability which results from owning an animal known to be dangerous, it is a liability which is a defined one. The matter was dealt with by LORD WRIGHT in his judgment in this court in *Knott v. L.C.C.* (1). He was there dealing with the case of a dog which was known to be accustomed to attack mankind. He said ([1934] 1 K.B. at p. 138):

"Once knowledge of that propensity is brought home to the keeper of the

dog, he keeps the dog at his peril, so that if it escapes from his control and attacks and injures any one, he is liable apart from any question of negligence. It is true that it is not unlawful or wrongful to keep such an animal: the wrong is in allowing it to escape from the keeper's control with the result that it does damage. Damage is thus the gist of the action. A dog under these conditions comes to be classed for this purpose with beasts naturally savage, such as a lion or tiger. That such an absolute duty affects the keeper of such an animal once his knowledge (or what is called the scienter) of the animal's vice is established, has long been recognised to be the law. Thus, in *Mason v. Keeling* (9) HOLT, C.J., said of animals (12 Mod. Rep. at p. 335): 'If they are such as are naturally mischievous in their kind, he shall answer for hurt done by them without any notice; but if they are of tame nature, there must be notice of the ill quality'. Dogs fall into the latter category, and accordingly, in such a case, come within the rule of *Fletcher v. Rylands* (2), which deals with the strict or absolute liability for the safe keeping of things which are likely to do mischief if they escape; if they escape and cause damage the keeper is prima facie answerable for all the damage which is the natural consequence of its escape. It is not material to allege or prove negligence in the defendant—as was held, for instance, with reference to a monkey, in *May v. Burdett* (6)."

SLESSER, L.J., expressed himself to the same effect. He said ([1934] 1 K.B. at p. 143):

"The duty of a keeper of a dog who knows it to be dangerous is an absolute one. In the case of *May v. Burdett* (6), it was held that a person who keeps an animal accustomed to attack and bite mankind is prima facie liable in an action on the case at the suit of any person attacked and injured by such animal without any averment in the declaration of negligence or default in the securing or taking care of it. The gist of the action is the failure to control the animal after knowledge of its mischievous propensities. 'The owner must at his peril keep him up safe from doing hurt, for though he use his diligence to keep him up, if he escape and do harm the owner is liable to answer damages'. (HALE'S PLEAS OF THE CROWN, vol. 1, p. 430). 'The keeper of a ferocious dog, if he knows it to be ferocious, is in exactly the same category as the keeper of a naturally wild animal'. Per KENNEDY, L.J., in *Baker v. Snell* (10) ([1908] 2 K.B. at p. 834)."

In the present case the bull did not escape. The bull had been at the farm for a little over a year before the plaintiff was injured. It was there for stud purposes. At first the bull was shut up in a shed. Later he was allowed to be in an open foal yard. While there he was masked. One day there was an incident when one of the farm workers was chased by the bull. In consequence of this, the bull was immediately placed for custody again in the shed and thereafter remained in the shed and was never allowed out of the shed. When the bull was required to service cows, they were put with him, and when the shed had to be cleaned out the bull was tethered inside the shed. Having regard to these facts the learned judge held that

"The measures taken were adequate to prevent the bull from harming anyone unless that person brought the harm on himself."

In these circumstances it does not seem to me that this is a case where the "strict liability" resulting from keeping a dangerous animal is made operative. The bull was in a shed from which it could not and did not escape. No harm would have come to the plaintiff had he not gone into the shed and so "brought the harm on himself". The learned judge has held that when the plaintiff entered the shed he was doing something which he knew he should not do. The plaintiff was an experienced farm worker. He was thirty-eight years old at the

time of his injury and had worked as an agricultural labourer ever since leaving school. He had been working for the defendant for five years. What happened was that Moss, the beastman, asked his help in catching and tethering the bull so that the shed should be cleaned out. The plaintiff's normal duties did not include looking after the bull and he had not previously given any assistance to Moss or been asked to help him, nor had he on any occasion witnessed the catching of the bull when the box had to be cleaned out. The evidence of the defendant showed, however, that the plaintiff acted properly in complying with the request from the beastman for assistance. This is made clear from the following questions and answers from the evidence:

" (Counsel for the defendant): Would this be a proper way of putting it ? The beastman is the man in whose charge all the animals are, but he is entitled to avail himself of the services of other agricultural labourers to help him as and when he wants it ? A.—Correct. Q.—That is the position ? A.—Yes. (DONOVAN, J.): If he said to Rands: 'Will you give me a hand to tie up this bull', that would be quite proper ? A.—Yes. (Counsel): Rands would not take orders from him but it would be perfectly proper to comply with a request of that kind ? A.—Yes."

The learned judge found, therefore, as follows:

" He asked the plaintiff to lend him a hand and the plaintiff agreed. When Moss made this request and the plaintiff agreed, both were acting within the scope of their employment."

The learned judge proceeded to hold that the method adopted by Moss and by the plaintiff was one that they both knew that they should not pursue. They did not use the hooked staff while standing outside, either by the open window or by the half-door, but what they did was to enter the shed and to seek by the use of the hooked staff to engage the ring in the bull's nose while inside the shed. Moss tried first. He went in and the plaintiff took up a station at the door and kept the door open for him " in case he had to make a dash for it ". When Moss failed the plaintiff offered to try and they changed places. The plaintiff went into the shed and there received his injuries. As to Moss the learned judge held that in going inside the shed he

" was doing what he knew he should not do, whether or not he had been expressly told by the defendant to stay outside."

As to the plaintiff the learned judge held that

" he must have known he should not have gone into the shed with the bull untethered or would have realised that he should not had he given the matter any thought."

For the reasons I have set out, I do not consider that there was any failure on the part of the defendant in regard to his strict obligation to prevent the bull from escaping. It may well be that if someone is employed as the custodian of a bull with dangerous propensities, he voluntarily accepts such risks as are involved in such employment. On the facts of this case, this aspect need not be further considered, and, in any event, one so employed would not be accepting the risks or the consequences of negligence on the part of his employers.

There was a claim pleaded against the defendant on the alternative basis of negligence. The alleged negligence was particularised. The fact that the learned judge does not deal in terms with each and every allegation of negligence may denote that during the hearing there was a measure of concentration, as indeed there was in the hearing in this court, on the submission that the defendant could not escape from a liability that was strict. But even in the absence of positively expressed conclusions in regard to some of the particulars of negligence,

the learned judge has, I think, absolved the defendant, for it seems to me to be implicit in the judgment that no act done by the defendant nor any omission by the defendant constituted a cause of the plaintiff's injuries. The case is a sad one, for the plaintiff was a keen man who "acted as he did in a desire to help". But the learned judge felt obliged to form the conclusion that the plaintiff

- A "must have known he should not have gone into the shed with the bull untethered or would have realised that he should not had he given the matter any thought."

The learned judge said:

- B "The result is in my view that when the plaintiff went into the shed he acted outside the scope of his employment. Certainly he was never told this was part of his duty and, knowing as he did, that the bull had been put in the shed for the very reason that it was dangerous, common sense would tell him that he must keep out until the bull was tethered in the way I have described."

- C I think that it is not necessary to say that in going into the shed the plaintiff acted outside the scope of his employment, but I think what the learned judge was holding is clear. He found that although the plaintiff had not previously assisted with the bull, he was within the scope of his employment in assisting, but that although the defendant had not in terms told the plaintiff not to go inside the box where the bull was, such an instruction was not necessary since, in the case of the plaintiff, the promptings of ordinary common sense would tell him that he should not enter. Had the plaintiff been required to go into the box he would have been required to run an unnecessary risk and his employer would have been liable. He was not so required. He was entitled to comply with a request to help, but, unhappily, in helping he did something which he knew he should not do. In these circumstances, the learned judge held that

- E "his own lack of reasonable care for himself was the sole cause of this distressing mishap."

This seems to dispose of any suggestion that the defendant was in any way responsible and made it unnecessary to decide whether any of the criticisms of the defendant's methods were valid. The particulars of negligence can, however, be examined. The first was as follows:

- F " (a) The defendant well knew that the said bull was of a fierce and mischievous nature and accustomed to attack mankind, and was therefore dangerous to human beings, but he in breach of his duty wrongfully kept the said bull and failed to keep it under proper control and to prevent it injuring anyone."

- G There was, however, no negligence in merely keeping the bull, and the judge has held that it was kept under proper control. The next was:

- H " (b) The said bull, being of the said nature, should have been kept tethered to a ring in the wall, or otherwise secured so as to prevent it attacking anyone entering the box."

I doubt whether it would be held that a bull that is in a shed ought to be kept permanently tethered to a ring in the wall; but, in any event, the learned judge has held that the plaintiff knew that he ought not to enter the shed. The next was:

- " (c) Further, or alternatively, the bull should have had a length of chain

attached to the ring in his nose to facilitate catching him with a stick as is a usual precaution."

Again, I doubt whether a failure to have such a length of chain would be negligent, but, whether this be so or not, it seems to me that, on the findings of the learned judge, any such failure was not a cause of the accident. The next was:

"(d) Anyone endeavouring to catch the bull was compelled to enter the said box, which was too small to allow a safe place for manoeuvre, and exposed such person to unnecessary risk of being attacked and trapped in the said small space by the bull as the plaintiff in fact was."

The learned judge has negatived the view that there was compulsion to enter the shed. The last was:

"(e) By reason of the matters specified in paras. (b), (c) and (d) above, the defendant negligently failed to provide and maintain for the plaintiff a safe place of work, suitable and safe equipment, a safe system of work, and proper supervision of the work."

The findings point, however, to the conclusion that the plaintiff did not meet with his accident by doing anything that he was required to do or by following any system of work. On the contrary, he met with his accident, because most regrettably he did something in a way which he knew was irregular and unauthorised.

It is grievous to think that the plaintiff should have sustained so distressing an injury while showing the zeal of a willing man, but in considering whether the defendant is liable either wholly or in part to compensate the plaintiff, I am driven to the view that, on the findings of fact of the learned judge, no case of legal liability was established and that there are no reasons why a further hearing should be ordered.

Appeal dismissed.

Solicitors: *Devonshire & Co.*, agents for *Pearlman & Rosen*, Hull (for the plaintiff); *Dawson, Lancaster & Co.* (for the defendant).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

HUGHES AND VALE PROPRIETARY, LTD. v. STATE OF NEW SOUTH WALES AND OTHERS. (THE COMMONWEALTH OF AUSTRALIA AND OTHERS, Interveners).

[PRIVY COUNCIL (Lord Oaksey, Lord Morton of Henryton, Lord Reid, Lord Tucker and Lord Cohen), April 28, 29, May 3, 5, 6, 10, 11, 12, 13, 17, 18, 19, 20, 24, 25, 26, 27, 28, 31, June 3, November 17, 1954.]

Privy Council—New South Wales—Transport—Freedom of inter-State trade—Licensing of public motor vehicles—Validity of licensing provisions of New South Wales State Transport (Co-ordination) Act, 1931-1952 (No. 32 of 1931—No. 24 of 1952)—Commonwealth of Australia Constitution Act, 1900 (c. 12), s. 92.

Judgment—Judicial decision as authority—Stare decisis—Conflict of judicial authorities—Appeal to Privy Council.

By the Commonwealth of Australia Constitution Act, 1900, s. 92: "On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free . . ." The New South Wales State Transport (Co-ordination) Act, 1931-1952 ("the Transport Act"), provided for the licensing of motor vehicles engaged commercially in the transport of passengers and goods on the public highways of New South Wales, and prohibited all unlicensed transportation, and authorised the imposition of certain charges on transport operations. By s. 3 (2) of the Transport Act: "This Act shall be read and construed so as not to exceed the legislative power of the State to the intent that where any enactment thereof would, but for this sub-section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power." The charges were imposed for the purpose of protecting the railways in New South Wales from competition.

The appellant, a company incorporated in New South Wales, carried on business as a carrier of general merchandise between Sydney, New South Wales, and Brisbane, Queensland, and was the owner of certain public motor vehicles in respect of which it held licences under the Transport Act on the granting of which certain mileage charges were imposed. On the question of the validity of the licensing provisions of the Transport Act, and thus whether the appellant was bound to apply for a licence and submit to the mileage charges,

HELD: as a simple prohibition of the trade of an individual or such a prohibition subject to a discretionary exemption was not merely regulatory of the trade (and, not being merely regulatory, would offend against s. 92 of the Constitution within the principle stated in *Commonwealth of Australia v. Bank of New South Wales* ([1949] 2 All E.R. at p. 771, letters E and F)) because the individual was thereby not allowed in effect to carry on his trade at all, so the prohibition in the Transport Act of the operation of transport unless authorised by licence which might be granted or withheld at the discretion of a State authority was not merely regulatory of trade, commerce and intercourse among the States; accordingly, the licensing provisions of the Transport Act contravened s. 92 of the Constitution and were invalid as regards inter-State transport, but by s. 3 (2) of the Transport Act were preserved and made effective as regards intra-State transport.

Commonwealth of Australia v. Bank of New South Wales ([1949] 2 All E.R. 755), applied.

R. v. Vizzard, Ex p. Hill (1933) (50 C.L.R. 30), overruled.

McCarter v. Brodie (1950) (80 C.L.R. 432), and dictum of LATHAM, C.J., in *Riverina Transport Pty., Ltd. v. State of Victoria* (1937) (57 C.L.R. at p. 340), disapproved.

Per curiam: (i) it might be necessary, e.g., on grounds of public safety, to limit the number of vehicles or the number of vehicles of certain types in certain localities or over certain routes, with the result that some applicants might be unable to obtain licences; such a system might well be justified as regulatory (see p. 629, letter A, post).

(ii) it would be wrong to apply the maxim stare decisis to the present appeal as it offered an opportunity to set at rest a conflict of judicial opinion and the decision principally relied on, *R. v. Vizzard, Ex p. Hill*, supra, had never been approved by this court (see p. 630, letter A, post).

AS TO TRADE AMONG STATES OF AUSTRALIA BEING FREE, see 5 HALSBURY'S LAWS (3rd Edn.) 513, 514, text and notes (b)-(g); and FOR CASES, see 8 DIGEST (Repl.) 753, 754, 299, 300.

Cases referred to:

- (1) *R. v. Vizzard, Ex p. Hill*, (1933), 50 C.L.R. 30; 40 A.L.R. 16; 7 A.L.J. 362; Digest Supp.
- (2) *James v. Commonwealth of Australia* (No. 2), [1936] 2 All E.R. 1449; [1936] A.C. 578; 105 L.J.P.C. 115; 155 L.T. 393; 55 C.L.R. 1; Digest Supp.
- (3) *James v. State of South Australia*, (1927), 40 C.L.R. 1; Digest Supp.
- (4) *James v. Cowan*, [1932] A.C. 542; 101 L.J.P.C. 149; 147 L.T. 321; 47 C.L.R. 386; Digest Supp.
- (5) *Commonwealth of Australia v. Bank of New South Wales*, [1949] 2 All E.R. 755; [1950] A.C. 235; 79 C.L.R. 497; 2nd Digest Supp.
- (6) *Willard v. Rawson*, (1933), 48 C.L.R. 316; 7 A.L.J. 57; Digest Supp.
- (7) *O. Gilpin, Ltd. v. Commissioner for Road Transport and Tramways*, (1935), 52 C.L.R. 189; 41 A.L.R. 138; 8 A.L.J. 472.
- (8) *Bessell v. Dayman*, (1935), 52 C.L.R. 215; 41 A.L.R. 145; 8 A.L.J. 469.
- (9) *Duncan and Green Star Trading Co. Pty., Ltd. v. Vizzard*, (1935), 53 C.L.R. 493; 9 A.L.J. 117.
- (10) *McArthur (W. & A.), Ltd. v. State of Queensland*, (1920), 28 C.L.R. 530, 556; 27 A.L.R. 130.
- (11) *Riverina Transport Pty., Ltd. v. State of Victoria*, (1937), 57 C.L.R. 327; 43 A.L.R. 374; 11 A.L.J. 150.
- (12) *Australian Airways Proprietary, Ltd. v. The Commonwealth*, (1945), 71 C.L.R. 29; [1946] A.L.R. 1; 19 A.L.J. 304; 2nd Digest Supp.
- (13) *McCarter v. Brodie*, (1950), 80 C.L.R. 432; [1950] A.L.R. 385; 24 A.L.J. 172; 2nd Digest Supp.
- (14) *Duncan v. State of Queensland*, (1916), 22 C.L.R. 556; 22 A.L.R. 465.
- (15) *Milk Board (N.S.W.) v. Metropolitan Cream Pty., Ltd.*, (1939), 62 C.L.R. 116.
- (16) *State of Tasmania v. State of Victoria*, (1935), 52 C.L.R. 157; 41 A.L.R. 157; 8 A.L.J. 425.
- (17) *Melbourne Corpn. v. Barry*, (1922), 31 C.L.R. 174; 42 Digest 643, 479i.
- (18) *Swan Hill Corpn. v. Bradbury*, (1937), 56 C.L.R. 746; 43 A.L.R. 194; 11 A.L.J. 34; [1937] V.L.R. 141.
- (19) *Gibbons v. Ogden*, (1824), 22 U.S. 1; 6 Law Ed. 23.

APPEAL by special leave by a company incorporated in New South Wales from an order of the Full Court of the High Court of Australia, dated Apr. 16, 1953, overruling a demurrer by the company to the defence of the respondents.

The appellant, a company incorporated in New South Wales and carrying on business as a carrier of general merchandise between Sydney in the State of New South Wales and Brisbane in the State of Queensland, was the owner of certain public motor vehicles in respect of which it held licences under the State Transport (Co-ordination) Act, 1931-1952, in the granting of which certain mileage charges were imposed according to the distance travelled by such vehicles in the State of New South Wales. In an action in the High Court of

A Australia the appellant sought, inter alia, declarations against the respondents, the State of New South Wales, the Minister of State for Transport for the State of New South Wales (the Honourable William Francis Sheahan) and the Director of Transport and Highways, that the State Transport (Co-ordination) Act, 1931, as amended, was beyond the powers of the Parliament of the State of New South Wales and invalid, and that certain charges imposed on the appellant thereunder were invalid. The appellant demurred to the respondents' statement of defence. On appeal to the Privy Council, the appellant abandoned its application for the second declaration. The interveners intervened by leave on the hearing before the High Court of Australia.

Sir Garfield Barwick, Q.C., J. D. Holmes and G. D. Neallham (all of the Australian Bar) for the appellant.

B *M. F. Harvie, Q.C.* (of the Australian Bar), *F. Gahan, Q.C., R. Elsie-Mitchell* (of the Australian Bar) and *J. G. Le Quesne* for the respondents.

P. D. Phillips, Q.C., and C. I. Menhemitt (both of the Australian Bar) for the intervener, the Commonwealth of Australia.

J. G. Le Quesne for the interveners, the State of Victoria and the State of Queensland.

C **LORD MORTON OF HENRYTON:** This is an appeal by special leave from a judgment and order of the High Court of Australia overruling by a majority (SIR OWEN DIXON, C.J., McTIERNAN, WILLIAMS and WEBB, JJ.; FULLAGAR, KITTO and TAYLOR, JJ., dissenting) a demurer by the plaintiff (appellant) to the defence of the defendants (respondents). In overruling the appellant's demurrer, the High Court held that the State Transport (Co-ordination) Act, 1931-1952 (hereafter referred to as "the Transport Act"), was within the powers of the Parliament of the State of New South Wales and did not infringe s. 92 of the Constitution of the Commonwealth of Australia.

D The appellant, who carries on business as a motor carrier of general merchandise between Sydney in the State of New South Wales and Brisbane in the State of Queensland, brought the action claiming declarations that the Transport Act and certain charges levied thereunder were invalid. At the hearing of the appeal, however, the appellant sought only to obtain the declaration hereafter mentioned.

E It is convenient to set out at once the most relevant sections of the Australian Constitution and of the Transport Act. The Commonwealth of Australia Constitution Act, 1900:

F "51. The parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: (i) Trade and commerce with other countries, and among the States; . . .

G "92. On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free . . .

H "107. Every power of the parliament of a colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the parliament of the Commonwealth or withdrawn from the parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be."

New South Wales State Transport (Co-ordination) Act, 1931-1952:

"3 (1) . . . 'Motor vehicle' means any vehicle whatsoever propelled by mechanical means and includes a tractor or trailer and also includes aircraft, but does not include a vehicle used on a railway or tramway . . . 'Operate' means carry or offer to carry passengers or goods for hire or for any consideration or in the course of any trade or business whatsoever . . .

'Public motor vehicle' means a motor vehicle (as hereinbefore defined)—
 (i) used or let or intended to be used or let for the conveyance of passengers or of goods for hire or for any consideration or in the course of any trade or business whatsoever, or (ii) plying or travelling or standing in a public street for or in hire or in the course of any trade or business whatsoever . . .
 (2) This Act shall be read and construed so as not to exceed the legislative power of the State to the intent that where any enactment thereof would, but for this sub-section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.

"12 (1) Any person who after a date appointed by the governor and notified by proclamation published in the Gazette operates a public motor vehicle shall, unless such vehicle is licensed under this Act by the board and unless he is the holder of such licence, be guilty of an offence against this Act: Provided that this sub-section shall not apply to a public motor vehicle that is being operated under and in accordance with an exemption from the requirement of being licensed granted under s. 19 or a permit granted under s. 22 of this Act . . .

"14 (1)—[as amended by s. 7 of the Motor Traffic (Amendment) Act, 1951]—Every person desiring to operate a public motor vehicle shall in addition to any licence or registration which by law he is required to hold or effect, apply to the board or to the prescribed person or authority for a licence for such vehicle under this Act. (2) The application for a licence shall be made in the prescribed form and manner and shall contain the following particulars: . . . (3) The application shall be accompanied by the prescribed fee. (4) The prescribed fee shall be payable in respect of every renewal of any such licence . . . "

The "board" referred to in this and other sections was a board of four commissioners to be appointed by the governor, in exercise of a power conferred by s. 4, and the section provided that the board should

"subject to the control of the Minister, carry into effect the objects and purposes of this Act and have and discharge the duties, powers, and functions thereby conferred and imposed . . . "

The board was called the State Transport (Co-ordination) Board and it was the licensing authority. Its subsequent history is described as follows by DIXON, C.J. (87 C.L.R. at p. 67):

"This board was superseded as long ago as Mar. 22, 1932. Since then not a few statutory changes have taken place and now, after the field of transport administration and control has undergone more than one division, the powers and authorities conferred by the Act with respect to road transport and probably aircraft have come to reside in an officer called the Director of Transport and Highways. He is constituted a corporation sole but in his natural capacity he is the chairman of a commission called the New South Wales Transport and Highways Commission, the functions of which seem to be rather to plan and recommend than to administer. As chairman moreover the director has the privilege of submitting any decision of the commission of which he disapproves to the Minister, who may then determine whether the decision is or is not to be carried into effect: see Act No. 10 of 1950, s. 3, s. 4, s. 6 (4) and s. 8. In his corporate capacity the Director of Transport and Highways is the road transport authority of the State. But in the exercise and performance of the powers duties and functions conferred upon him as a result of the various statutes he is subject to the direction and control of the Minister: Act No. 15 of 1952, s. 3 (4). No purpose would be

served by recounting the legislative steps by which the director became the road transport authority. It is enough to mention the successive provisions from which the result ensues, which are: No. 3 of 1932, s. 9 (1) and s. 12 (2); No. 31 of 1932, s. 5, s. 14 (1) and (2), and s. 20 (1) (b) and (2) (c); No. 10 of 1950, s. 3, s. 6 and s. 8 (1) (g) and (2); No. 15 of 1952, s. 2, s. 3 considered with s. 4, s. 5 (1), s. 11, s. 17 (1) (a) and (2) (a).

A “The duties and powers of the Director of Transport and Highways do not extend in any way into the field of railway or tramway administration or transport by sea. Whatever ‘co-ordinating’ he does must be effected by his control of carriage by road. From a practical point of view air transport may be put aside, assuming his authority extends to it.

B “17 (1) Every licence under this Act shall be subject to the performance and observance by the licensee of the provisions of this Act and the regulations that may relate to the licence or to the public motor vehicle in respect of which it is issued, and of the provisions contained in or attaching to the licence, and all such provisions shall be conditions of the licence. (2) The regulations may prescribe, or the board may determine in respect of any particular licence, or of any class of licences relating to any area, route, road, or district, or of any other class of licences whatsoever, or generally what terms and conditions shall be applicable to or with respect to a licence, including (but without in any way limiting the generality of the foregoing)—

C (a) the fares, freights, or charges, or the maximum or minimum fares, freights, or charges to be made in respect of any services to be provided by

D means of the public motor vehicle referred to in the licence; (b) the use of such public motor vehicle as to whether passengers only or goods only or goods of a specified class or description only shall be thereby conveyed, and as to the circumstances in which such conveyance may be made or may not be made (including the limiting of the number of the passengers or the

E quantity, weight, or bulk of the goods that may be carried on the vehicle). (3) In dealing with an application for a licence the board shall consider all such matters as they may think necessary or desirable, and in particular (where applicable) shall have regard to—(a) the suitability of the route or

F road on which a service may be provided under the licence; (b) the extent, if any, to which the needs of the proposed areas or districts, or any of them, are already adequately served; (c) the extent to which the proposed service is necessary or desirable in the public interest; (d) the needs of the district, area, or locality as a whole in relation to traffic, the elimination of unnecessary services, and the co-ordination of all forms of transport, including transport

G by rail or tram; (e) the condition of the roads to be traversed with regard to their capacity to carry proposed public vehicular traffic without unreasonable damage to such roads; (f) the suitability and fitness of applicant to hold the licence applied for; (g) the construction and equipment of the vehicle and its fitness and suitability for a licence: Provided that the certificate of registration and the certificate of airworthiness of an aircraft issued under the Air Navigation Regulations or a registration of any

H motor vehicle other than aircraft under any other Act of the State may be accepted as sufficient evidence of suitability and fitness of the vehicle. (4) The board shall have power to grant or refuse any application of any person for a licence or in respect of any vehicle or of any area, route, road, or district. (5) If the holder of any licence of a public motor vehicle under this Act, or the owner of any public motor vehicle so licensed, fails to comply with or observe any of the terms or conditions of or attaching to such licence he shall be guilty of an offence against this Act.

" 18 . . . (5) The board may, in any licence for a public motor vehicle to be issued under this Act that authorises the holder to carry goods or goods and passengers in the vehicle, impose a condition that the licensee shall pay to them (and in addition to any other sums payable under the preceding sub-section and any other provision of this Act) such sums as shall be ascertained as the board may determine. The board may determine that the sum or sums so to be paid may be differently ascertained in respect of different licences and may be ascertained on the basis of mileage travelled as hereinafter mentioned or may be ascertained in any other method or according to any other basis or system that may be prescribed by regulation made under this Act: Provided that if the sum or sums so to be paid are to be ascertained according to mileage travelled they shall not exceed an amount calculated at the rate of three pence per ton or part thereof of the aggregate of the weight of the vehicle unladen and of the weight of loading the vehicle is capable of carrying (whether such weight is carried or not) for each mile or part thereof travelled by the vehicle (which mileage may be ascertained for such purposes as prescribed by the regulations or as determined by the board), and if the sum or sums so to be paid to the board are not to be ascertained according to mileage travelled then the board shall repay to the persons entitled thereto any moneys received by the board under this sub-section in excess of the amount that would have been payable to the board calculated on the mileage basis in the foregoing manner during the period of the licence. For the purposes of this proviso the weight of the vehicle unladen and the weight of loading the vehicle is capable of carrying shall be as mentioned in the licence or as determined by the board . . . (11) Where the board at any time thinks it desirable that any of the terms, conditions, and authorities in respect of any licence for a public motor vehicle should be varied during the currency thereof, or that any new term, condition or authority should be attached to any such licence during its currency, they may, subject to this Act and the regulations, vary the same or attach thereto such term, condition or authority accordingly, and the terms, conditions and authorities as so varied or added to as the case may be shall thereafter be the terms, conditions and authorities of the licence."

In granting licences to the appellant under this section, the authorities have imposed certain mileage charges. For reasons which will appear later, it is unnecessary to describe these charges in detail, but it is not in doubt that the object of these charges was to protect the railways in New South Wales from competition, as part of a system for "co-ordinating transport".

" 19 (1) The board may grant exemption from the requirements to be licensed under this Act in respect of any public motor vehicle or class of public motor vehicles in such cases and under such conditions as they think fit. (2) The board may from time to time vary or revoke any such exemption. (3) Any person who commits a breach of any condition imposed under this section shall be guilty of an offence against this Act . . .

" 22 (1) The board may, on payment of the prescribed fees, issue permits, for such period as it thinks fit and subject to any conditions that may be prescribed or imposed by the board, permitting the carrying on a motor vehicle of persons in or over specified districts or routes. (2) Any such permit may be revoked or varied at any time by the board. (3) Any person who commits a breach of any of the conditions of a permit shall be guilty of an offence against this Act.

" 37 (1) If any person operates any public motor vehicle in contravention of this Act the board may impose upon him an obligation to pay to them

on demand such sums as the board determines, but such sums shall not exceed the sums that could have been made payable to the board under sub-ss. (4) and (5) of s. 18 had the person operating the vehicle been the holder of a licence to operate it and had the board imposed therein the conditions provided by such sub-sections. (2) This section shall not relieve such person or any other person from the penalties for the offence."

A Their Lordships find it unnecessary to travel in detail through the pleadings, for it is now clear that the first question which arises on this appeal is:

"whether the licensing provisions of the Transport Act, considered apart from the provisions of s. 3 (2) thereof, are invalid as contravening s. 92 of the Constitution."

B It was contended by counsel for the respondents that their Lordships should refrain from considering this question, and should apply the principle *stare decisis*, in view of a line of decisions of the High Court of Australia, referred to throughout the hearing as "the transport cases". Their Lordships are informed that this principle was relied on by the respondents at the hearing of the appellant's application for special leave to appeal, and that the Board then intimated

C that it would be open to the respondents to put forward the contention just stated, at the hearing of the appeal. Their Lordships have considered this contention, but have decided to reject it, for reasons which will appear later. If the first question is answered in the affirmative, a second question will arise: what is the effect of s. 3 (2)? The appellant contends that question (1) should be answered

D in the affirmative, adding that, by reason of s. 3 (2), the Transport Act may not be wholly invalid, but its licensing provisions are inapplicable to the appellant while operating its vehicles in the course and for the purposes of inter-State trade, or to the vehicles while so operated. It claims a declaration to this effect. If their Lordships are of opinion that the appellant is entitled to the declaration claimed, no question will arise as to the validity of the imposition of the mileage charges already mentioned, since the appellant will not be bound to apply for a licence under the Act, and the charges are imposed on the granting of a licence.

E The question whether the Transport Act does or does not contravene s. 92 was considered by the High Court of Australia as long ago as 1933, in *R. v. Vizzard, Ex p. Hill* (1). That case was the second of the line of cases referred to as "the transport cases", and it gave rise to a marked difference of opinion

F in the High Court. By a majority of four to two (GAVAN DUFFY, C.J., RICH, EVATT and McTIERNAN, JJ.; STARKE, J., and DIXON, J. dissenting), it was held that the Transport Act did not contravene s. 92. Their Lordships find it convenient to trace the history of the transport cases in some detail, first, in view of the contention that the principle *stare decisis* should be

G applied in the present case, secondly, because it has been suggested by counsel for the respondents that *Vizzard's* case (1) was approved by the Board in *James v. Commonwealth of Australia* (No. 2) (2), and thirdly, because it is impossible fully to appreciate the judgments delivered in the High Court in the present case without a survey of the events leading up to those judgments.

H The transport cases were preceded by *James v. State of South Australia* (3) and *James v. Cowan* (4). These two cases are of great importance for the present purpose, and their Lordships will quote at once the summary of the facts and judgments in those cases which is to be found in the judgment of the Board in *Commonwealth of Australia v. Bank of New South Wales* (hereafter referred to as "the Bank case") (5) ([1949] 2 All E.R. at p. 767):

"The facts in *James v. Cowan* (4) can only be understood if they are read in conjunction with the earlier case of *James v. State of South Australia*

(3). James carried on business in South Australia as a grower and producer of dried fruits and in the course of it sold his products outside that State. For reasons, which have been many times stated in judgments of this Board and of the High Court and need not be repeated, the Commonwealth and certain of the States, including South Australia, had recourse to legislation to deal with the whole question of marketing dried fruits. In 1924 the South Australian legislature enacted the Dried Fruits Act, 1924. The material provisions of this Act are set out at large in the judgment of *James v. Cowan* (4). It is essential only to notice that the Act contained two sections, s. 20 and s. 28, each of which authorised an interference with the free disposal by the grower of his products, s. 20 by empowering the Dried Fruits Board, which was established under the Act, in its absolute discretion to determine where and in what quantities the output of dried fruits produced in any year should be marketed, and s. 28 (which was expressed to be subject to s. 92 of the Constitution) by empowering the Minister to purchase by agreement, or acquire compulsorily, any dried fruits in South Australia grown and dried in Australia, subject to certain exceptions which need not be particularised.

"In *James v. State of South Australia* (3) it was in the first place the validity of s. 20 of the Act and of determinations made under it that came in question and it was held by the whole court (ISAACS, A.C.J., GAVAN DUFFY, POWERS, RICH and STARKE, J.J.) that that section, so far as it authorised a determination by the board limiting the quantities of dried fruits which might be marketed within the Commonwealth, was obnoxious to s. 92. From the decision of the High Court no appeal was brought to this Board. But, s. 20 failing him, the Minister of Agriculture in South Australia sought to make use of his powers under s. 28. Once more James invoked s. 92 of the Constitution and in *James v. Cowan* (4) challenged the validity of the executive action taken under s. 28, and it was in this case when it came before the Board that the decision was given, which, as their Lordships think, goes far to determine the present case. For, as part of the ratio decidendi of the case and by no means obiter or by way of a historical narrative, the Board expressly affirmed the decision of the High Court in *James v. State of South Australia* (3). The primary importance of the decision lies in this, that, in regard to s. 20 of the Act of 1924, LORD ATKIN, delivering the opinion of the Board, said ([1932] A.C. at p. 559): "In the result, therefore, one returns to the precise situation created by s. 20 with its determination of where and in what quantities the fruit is to be marketed. Section 20 and the determinations are invalid, and for precisely the same reasons it appears to their Lordships inevitable that the exercise of the powers of the Minister, crediting him with the precise object and intention found by the High Court, were also invalid."

The first of the transport cases was *Willard v. Rawson* (6). In that case, the court by a majority (DIXON, J., dissenting) held that a law of the State of Victoria requiring every motor car to be registered by the Chief Commissioner on payment of a licence fee, and making it an offence to use an unregistered motor car on a public highway, did not infringe s. 92. Their Lordships were not invited to review this case, which involved the consideration of an Act very different in its terms from the Act under consideration in the present case.

In *Vizzard's* case (1), the High Court had to consider for the first time precisely the same question as is now before their Lordships—does the Transport Act contravene s. 92 of the Constitution? STARKE, J., and DIXON, J., would have answered this question in the affirmative, and delivered powerful dissenting judgments, relying, inter alia, on the two *James* cases (3), (4), but they were outvoted, as has already been stated. Their Lordships will consider at a later stage the reasons on which the judgments of the majority were based, but one

observation can be made at once. Their Lordships feel that the majority did not attach sufficient weight to the aspects of the two *James* cases (3), (4) which were emphasised seventeen years later, in the passage just quoted from the judgment in the *Bank* case (5).

Next came the case of *O. Gilpin, Ltd. v. Commissioner for Road Transport and Tramways* (7). The High Court held that the provisions of the Transport Act, and, in particular, a charge imposed under s. 37 thereof, did not contravene s. 92 of the Constitution. The majority followed its own decision in *Vizzard's* case (1), while STARKE and DIXON, J.J., again dissented. The result was the same in the next case, *Bessell v. Dayman* (8). The Act under consideration was the Road and Railway Transport Act, 1930-1931, of South Australia, and it was held to be indistinguishable from the Transport Act. Next came *Duncan and Green Star Trading Co. Pty., Ltd. v. Vizzard* (9), yet another case decided under the Transport Act. In that case, the question in issue related primarily to a licence which had been issued to a consignor of goods by motor lorry from Melbourne to a town in New South Wales situate more than fifty miles from the border. It was held by RICH, EVATT and McTIERNAN, J.J., that the provisions of s. 92 of the Constitution were not infringed by the Act, or by the regulations thereunder, or by the administration of the Act as disclosed in the evidence and the terms of the licence. STARKE, J., dissented but DIXON, J., felt bound to accept the majority decision, holding that the decisions of the majority of the court in *Vizzard's* case (1), *Gilpin's* case (7) and *Bessell v. Dayman* (8) completely covered the question of the validity of the licence.

At this stage came the decision of the Board in *James v. Commonwealth of Australia* (No. 2) (2). The effect of that case was to establish that s. 92 of the Constitution binds the Parliament of the Commonwealth of Australia equally with the States. The Act under consideration was the Dried Fruits Act, 1928-1935, of the Commonwealth Parliament and the Dried Fruits (Inter-State Trade) Regulations, 1934, made pursuant thereto, and their Lordships first considered the wider constitutional question as to the effect of s. 92. LORD WRIGHT, M.R., in delivering the judgment of the Board, stated the argument put forward ([1936] 2 All E.R. at p. 1465)

“that there is such an antinomy between s. 51 and s. 92 that they cannot both apply to the Commonwealth”

and proceeded as follows (*ibid.*, at p. 1466):

“Before turning to the statute with the object of construing its language in order to settle the problem, it seems to be convenient to refer briefly to some of the decisions of the High Court and to the decision of the Judicial Committee in order to see if they support the theory that there is the complete antinomy or overlapping between the two sections which has been propounded. It will be remembered that these decisions deal with s. 92 as applied to the States, but they are helpful in seeking to ascertain what exactly s. 92 means.”

In the course of its survey of cases, the Board referred to *Vizzard's* case (1), and, in particular, to the judgment of EVATT, J., and to a passage quoted from that judgment, in terms which, standing by themselves, might well be read as an approval of the decision in *Vizzard's* case (1) and of the whole of EVATT, J.'s judgment. Their Lordships cannot, however, so read the passage in question, having regard to the context. It occurs in a survey of certain cases for a particular purpose which had already been stated (*ibid.*, at p. 1466), and (*ibid.*, at p. 1472), the survey is described as being “inevitably brief and incomplete” and

“undertaken simply in order to show that the propositions laid down in *McArthur's* case (10), which are the foundation of the respondents' argument

that s. 92 does not bind the Commonwealth, were not merely novel when first enunciated, but have not been applied by the High Court in practice in subsequent decisions, though re-affirmed from time to time in dissenting judgments."

One passage from the judgment of EVATT, J., in *Vizzard's case* (1) was, however, undoubtedly approved by the Board in *James v. Commonwealth* (2). That passage was in the following terms (50 C.L.R. at p. 94):

"Section 92 does not guarantee that, in each and every part of a transaction which includes the inter-State carriage of commodities, the owner of the commodities, together with his servant and agent and each and every independent contractor co-operating in the delivery and marketing of the commodities, and each of his servants and agents, possesses, until delivery and marketing are completed, a right to ignore State transport or marketing regulations, and to choose how, when and where each of them will transport and market the commodities."

In their Lordships' view, it does not follow from the approval given to these observations that the Board considered how far "State transport or marketing regulations" could go without contravening s. 92 of the Constitution. In the *Bank case* (5), the Board referred to these observations of EVATT, J., and observed ([1949] 2 All E.R. at p. 771):

"But it does not appear to their Lordships that the whole of that learned judge's reasoning received the considered approval of the Board [i.e., of the Board in *James v. Commonwealth* (2)] . . . In this connection it may be noted that in *James v. Cowan* (4) their Lordships observed ([1932] A.C. at p. 561) that they found themselves . . . in accord with the convincing judgment delivered by ISAACS, J., in the High Court.' The decisions in *James v. Cowan* (4) and in *Vizzard's case* (1) may be reconciled. It would not be easy to reconcile all that was said by EVATT, J., in the one case with all that was said by ISAACS, J., in the other."

From this passage, it seems clear that the Board in the *Bank case* (5) did not construe the judgment in *James v. Commonwealth* (2) as approving the decision in *Vizzard's case* (1); that they felt some doubt whether that decision could be reconciled with the decision in *James v. Cowan* (4); and that they certainly did not accept as correct all that was said by EVATT, J., in *Vizzard's case* (1).

The Board's judgment in *James v. Commonwealth* (2) concluded ([1936] 2 All E.R. at p. 1477):

"For these reasons their Lordships are of opinion that s. 92 binds the Commonwealth. On that footing it seems to follow necessarily that the Dried Fruits Act, 1928-1935, must be held to be invalid. On the interpretation of 'free' in s. 92, the Acts and the regulations either prohibit entirely, if there is no licence, or if a licence is granted, partially prohibit inter-State trade. Indeed the contrary was but faintly contended if the Commonwealth were held to be bound by the section. The conclusion of the matter is that in their Lordships' judgment s. 92 applies to the Commonwealth and that being so, the Dried Fruits Act and regulations should be declared invalid as contravening s. 92."

After the decision in *James v. Commonwealth* (2), there came yet another of the series of transport cases, *Riverina Transport Pty., Ltd. v. State of Victoria* (11). The Victorian Act in question in that case, the Transport Regulation Act, 1933, as amended by the Transport Regulation Act, 1935 (Vic.), provided that a commercial goods vehicle should not operate on any public highway unless licensed in accordance with the Act. The Transport Regulation Board was

A empowered to grant such licences, and it was provided that, in granting or refusing licences, the board should have regard to the interests of the public generally and should take into consideration the advantages of the service proposed to be provided and its convenience to the public, the adequacy of the existing transportation service and the effect on it of the service proposed to be provided, and the character, qualifications and financial stability of the applicant. It was further provided that no decision of the board granting or refusing a licence should have any force or effect until reviewed by the Governor in Council, and that the Governor in Council might approve or disapprove the decision of the board or make any determination in the matter which the board might have made. It is unnecessary for the present purpose to set out the facts of that case or the claims made by the plaintiff, who operated services for the carriage of goods between Melbourne and places in New South Wales. Suffice it to say that the validity of the Act in question was treated by all the members of the court as established by the transport cases, and LATHAM, C.J. (57 C.L.R. at p. 340) expressed the view that the Board in *James v. Commonwealth* (2) approved the decision in *Vizzard's* case (1) and expressly approved the judgment of EVATT, J., therein. For the reasons already given their Lordships cannot accept this view.

C Between the *Riverina* case (11) and the *Bank* case (5) came a case of great importance for the present purpose, decided in 1945, *Australian National Airways Proprietary, Ltd. v. The Commonwealth* (12). In that case, which was expressly approved in the *Bank* case (5), a Commonwealth Act conferring on a commission a monopoly in respect of aerial services between States was held to infringe s. 92, and a Commonwealth regulation requiring a licence for an inter-State air service, and empowering an official in his uncontrolled discretion to grant or refuse a licence, was also held to infringe s. 92.

D Their Lordships now turn to the *Bank* case (5), which precedes in date the last of the transport cases, *McCarter v. Brodie* (13). In the *Bank* case (5), the Board had to consider whether s. 46 of a Commonwealth Act, the Banking Act, 1947, was invalid as offending against s. 92 of the Constitution. Section 46 is set out in full in the report; in effect, it prohibits the carrying on in Australia of the business of banking by private banks, while leaving untouched the Commonwealth and State banks. The reasoning of the judgment in the *Bank* case (5), coupled with the views of the Board on the effect of the three *James* cases (2), (3), (4), and with the Board's approval of the decision in the *Airways* case (12), is of the utmost assistance to their Lordships in determining the present appeal.

F In the *Bank* case (5), after referring to *James v. State of South Australia* (3) and *James v. Cowan* (4) in the terms already quoted, the Board continued as follows ([1949] 2 All E.R. at p. 768):

G "Before further examining what is involved in this decision [i.e., the decision in *James v. Cowan* (4)], their Lordships think it convenient to note what was actually decided in the other of the two cases which have come before them. In *James v. Commonwealth of Australia* (2) it was a similar Act, but in this case an Act of the Commonwealth, that was under attack, and the substantial issue was whether the Commonwealth, as well as the States, was bound by s. 92. If it was bound, then the further question arose whether the Act in question was obnoxious to s. 92 of the Constitution. The decision of the Board was that the Commonwealth was bound by s. 92 and it is significant that the judgment delivered by LORD WRIGHT, M.R., thus proceeds ([1936] 2 All E.R. at p. 1477): 'For these reasons their Lordships are of opinion that s. 92 binds the Commonwealth. On that footing it seems to follow necessarily that the Dried Fruits Act, 1928-1935, must be held to be invalid. On the interpretation of "free" in s. 92, the Acts and

the regulations either prohibit entirely, if there is no licence, or if a licence is granted, partially prohibit inter-State trade. Indeed the contrary was but faintly contended if the Commonwealth were held to be bound by the section.' There does not in fact appear to have been any ground for contending that, if the Act which was challenged in *James v. Cowan* (4) was invalid, that challenged in *James v. Commonwealth of Australia* (2) could be valid.

"It might well appear that these two decisions were a serious obstacle to the present appellants' case. Section 20 of the South Australian Act was invalid. It was general in its terms. It did not discriminate between inter-State and intra-State trade in dried fruits. But because it authorised a determination at the will of the Dried Fruits Board, the effect of which would be to interfere with the freedom of the grower to dispose of his products to a buyer in another State, it was invalid. And for the same reason the Commonwealth Act fell. The necessary implications of these decisions are important. First may be mentioned an argument, strenuously maintained on this appeal, that s. 92 of the Constitution does not guarantee the freedom of individuals. Yet James was an individual and James vindicated his freedom in hard-won fights. Clearly there is here a misconception. It is true, as has been said more than once in the High Court, that s. 92 does not create any new juristic rights, but it does give the citizen of State or Commonwealth, as the case may be, the right to ignore, and, if necessary, to call on the judicial power to help him to resist, legislative or executive action which offends against the section. And this is just what James successfully did.

"Linked with the contention last discussed was another which their Lordships do not find it easy to formulate. It was urged that, if the same volume of trade flowed from State to State before as after the interference with the individual trader, and, it might be, the forcible acquisition of his goods, then the freedom of trade among the States remained unimpaired. In the first place, this view seems to be in direct conflict with the decisions in the *James* cases (2) and (4), for there the section was infringed though it was not the passage of dried fruit in general, but the passage of the dried fruit of James, from State to State that was impeded. Secondly, the test of total volume is unreal and unpractical, for it is unpredictable whether by interference with the individual flow the total volume will be affected and it is incalculable what might have been the total volume but for the individual interference. Thirdly, whether or not it might be possible, if trade and commerce stood alone, to give some meaning to this concept of freedom, in s. 92 'trade' and 'commerce' are joined with 'intercourse' and it has not been suggested what freedom of intercourse among the States is protected except the freedom of an individual citizen of one State to cross its frontier into another State or to have such dealings with citizens of another State as his lawful occasions may require."

The Board went on to consider, and reject, certain arguments, based on the *James* cases (2), (4), which had been put forward by the then appellants in support of the validity of the Banking Act, 1947. Then there followed the observations on *Vizzard's* case (1) which have already been quoted in part. The rest of the judgment in the *Bank* case (5) is so important for the present purpose that it ought to be quoted in full ([1949] 2 All E.R. at p. 771):

"Their Lordships have thought it proper to deal at considerable length with the earlier decisions of this Board because so much reliance was placed on them by the appellants. It is, they think, clear that, far from assisting the appellants, these two decisions are, as the respondents have throughout contended, strongly against them. In observing on the *James* cases (2) and (4), and their bearing on the present case, their Lordships noted that the

Act now under consideration operated to restrict the freedom of inter-State 'trade, commerce, and intercourse', not remotely or incidentally, but directly. On this and on a cognate matter, the distinction between restrictions which are regulatory and do not offend against s. 92 of the Constitution and those which are something more than regulatory and do so offend, their Lordships think it proper to make certain further observations. It is generally recognised that the expression 'free' in s. 92, though emphasised by the accompanying 'absolutely', yet must receive some qualification. It was, indeed, common ground in the present case that the conception of freedom of 'trade, commerce, and intercourse' in a community regulated by law presupposes some degree of restriction on the individual. As long ago as 1916 in *Duncan v. State of Queensland* (14), SIR SAMUEL GRIFFITH, C.J., said (22 C.L.R. at p. 573): 'But the word "free" does not mean extra legem, any more than freedom means anarchy. We boast of being an absolutely free people, but that does not mean that we are not subject to law.' Through all the subsequent cases in which s. 92 has been discussed, the problem has been to define the qualification of that which in the Constitution is left unqualified. In this labyrinth there is no golden thread. But it seems that two general propositions may be accepted: (i) that regulation of trade, commerce and intercourse among the States is compatible with its absolute freedom, and (ii) that s. 92 is violated only when a legislative or executive act operates to restrict such trade, commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote. In the application of these general propositions, in determining whether an enactment is regulatory or something more, or whether a restriction is direct or only remote or incidental, there cannot fail to be differences of opinion. The problem to be solved will often be not so much legal as political, social, or economic, yet it must be solved by a court of law. For where the dispute is, as here, not only between Commonwealth and citizen but between Commonwealth and intervening States, on the one hand, and citizens and States, on the other, it is only the court that can decide the issue. It is vain to invoke the voice of Parliament.

"Difficult as the application of these general propositions must be in the infinite variety of situations that in peace or in war confront a nation, it appears to their Lordships that this further guidance may be given. In *Australian National Airways Proprietary, Ltd. v. The Commonwealth* (12), LATHAM, C.J., used these words (71 C.L.R. at p. 61): 'I venture to repeat what I said in the former case [*viz.*, *Milk Board (N.S.W.) v. Metropolitan Cream Pty., Ltd.* (15) (62 C.L.R. at p. 127)]: "One proposition which I regard as established is that simple legislative prohibition (Federal or State), as distinct from regulation, of inter-State trade and commerce is invalid. Further, a law which is 'directed against' inter-State trade and commerce is invalid. Such a law does not regulate such trade, it merely prevents it. But a law prescribing rules as to the manner in which trade (including transport) is to be conducted is not a mere prohibition and may be valid in its application to inter-State trade, notwithstanding s. 92." With this statement, which both repeats the general proposition and precisely states that simple prohibition is not regulation, their Lordships agree. And it is, as they think, a test which must have led the Chief Justice to a different conclusion in this case had he decided that the business of banking was within the ambit of s. 92. They do not doubt that it led him to a correct decision in the *Airways* case (12). There he said (71 C.L.R. at p. 61): 'In the present case the Act is directed against all competition with the inter-State services of the Commission. The exclusion of other services is

based simply upon the fact that the competing services are themselves inter-State services. . . . The exclusion of competition with the Commission is not a system of regulation and is, in my opinion, a violation of s. 92.' Mutatis mutandis, these words may be applied to the Act now impugned, for it is an irrelevant factor that the prohibition prohibits inter-State and intra-State activities at the same time.

" Yet about this, as about every other proposition in this field, a reservation must be made, for their Lordships do not intend to lay it down that in no circumstances could the exclusion of competition so as to create a monopoly either in a State or Commonwealth agency, or in some other body, be justified. Every case must be judged on its own facts and in its own setting of time and circumstance, and it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation and that inter-State 'trade, commerce, and intercourse' thus prohibited and thus monopolised remained absolutely free. Nor can one further aspect of prohibition be ignored. It was urged by the appellants that prohibitory measures must be permissible, for otherwise lunatics, infants and bankrupts could without restraint embark on inter-State trade, and diseased cattle or noxious drugs could freely be taken across State frontiers. Their Lordships must, therefore, add what, but for this argument so strenuously urged, they would have thought it unnece- v
to add, that regulation of trade may clearly take the form of denying certain activities to persons by age or circumstances unfit to perform them or of excluding from passage across the frontier of a State creatures or things calculated to injure its citizens. Here, again, a question of fact and degree is involved which is nowhere better exemplified than in the *Potato Case* (*State of Tasmania v. State of Victoria* (16)) where the following passage occurs (52 C.L.R. at p. 168) in the judgment of GAVAN DUFFY, C.J., and EVATT and McTIERNAN, JJ.: 'In the present case it is neither necessary nor desirable to mark out the precise degree to which a State may lawfully protect its citizens against the introduction of disease, but, certainly, the relation between the introduction of potatoes from Tasmania into the State of Victoria and the spread of any disease into the latter is, on the face of the Act and the proclamation, far too remote and attenuated to warrant the absolute prohibition imposed'.

" The same difficulty arises in applying the other discriminatory test, that between a restriction which is direct and one that is too remote. Yet the distinction is a real one and their Lordships have no doubt on which side of the boundary the present case falls. It is the direct and immediate result of the Act to restrict the freedom of trade, commerce and intercourse among the States. Their Lordships will not attempt to define this boundary. An analogous difficulty in one section of constitutional law, viz., in the determination of the question where legislative power resides, has led to the use of such phrases as 'pith and substance' in relation to a particular enactment. These phrases have found their way into the discussion of the present problem also and, as so used, are the subject of just criticism by the learned Chief Justice. They, no doubt, raise in convenient form an appropriate question in cases where the real issue is one of subject-matter, as when the point is whether a particular piece of legislation is a law in respect of some subject within the permitted field. They may also serve a useful purpose in the process of deciding whether an enactment which works some interference with trade, commerce and intercourse among the States is, nevertheless, untouched by s. 92 as being essentially regulatory in character. But where, as here, no question of regulatory legislation can fairly be said to arise, they do not help in solving the problems which s. 92

presents. Used as they have been to advance the argument of the appellants, they but illustrate the way in which the human mind tries, and vainly tries, to give to a particular subject-matter a higher degree of definition than it will admit. In the field of constitutional law—and particularly in relation to a federal constitution—this is conspicuously true, and it applies equally to the use of the words ‘direct’ and ‘remote’ as to ‘pith and substance’. But it appears to their Lordships that, if these two tests are applied, viz., (i) whether the effect of the Act is in a particular respect direct or remote, and (ii) whether in its true character it is regulatory, the area of dispute may be considerably narrower. It is beyond hope that it should be eliminated.”

In the *Bank* case (5) it was not necessary for the Board to express a concluded opinion whether *Vizzard's* case (1) was or was not rightly decided, since the Banking Act, 1947, differed widely in its terms from the Transport Act. Their Lordships are, however, of opinion that the reasoning of the Board in the *Bank* case (5), coupled with the comments then made on the *James* cases (2), (3), (4), cannot be reconciled with the reasoning of the majority of the High Court in *Vizzard's* case (1), and that the decision in the latter case cannot stand, unless the provisions of the Transport Act can be justified as being “regulatory” legislation. Each of these matters was fully discussed in the judgments of the minority in *McCarter v. Brodie* (13), and their Lordships will turn at once to that case.

McCarter v. Brodie (13) was decided by the High Court shortly after the publication of the judgment of the Board in the *Bank* case (5). The legislation under consideration was the Victorian Act which had already been held to be valid in the *Riverina* case (11). It was contended by counsel for *McCarter* that the reasoning of the majority in *Vizzard's* case (1) was inconsistent with the views expressed by the Board in the *Bank* case (5) and with the decision in the *Airways* case (12), approved in the *Bank* case (5). The majority of the court, LATHAM, C.J., McTIERNAN, WILLIAMS and WEBB, JJ. (DIXON and FULLAGAR, JJ., dissenting) rejected this contention and affirmed the view expressed in the *Riverina* case (11) that the Victorian Act did not contravene s. 92 of the Constitution. DIXON, J., in his dissenting judgment, referred to his explanation in the *Airways* case (12) of the reasoning on which the majority decisions in the transport cases were based, and continued as follows, with reference to the judgment of the Board in the *Bank* case (5) (80 C.L.R. at p. 465):

“I do not think that there is any room for doubting that their Lordships have rejected as erroneous three propositions that have often been put forward. The first is ‘that s. 92 of the Constitution does not guarantee the freedom of individuals’. The second is ‘that, if the same volume of trade flowed from State to State before as after the interference with the individual trader . . . then the freedom of trade among the States remained unimpaired’. The third relates to the relevance of absence of discrimination. As I understand it their Lordships have rejected the theory that because a law applies alike to inter-State commerce and to the domestic commerce of a State, it may escape objection notwithstanding that it prohibits restricts or burdens inter-State commerce.

“I shall not stop to examine or explain the contraries of these propositions or to state how they should be understood to apply. They have been much canvassed and there ought to be no difficulty in understanding them. All that is important for present purposes is that in face of the pronouncement of the Privy Council the propositions themselves are no longer tenable.

“There are two further matters settled by the decision of their Lordships that are relevant to the basis upon which the *Transport* cases (7), (9), (11) appear to me to rest. One is that the object or purpose of an Act challenged as contrary to s. 92 is to be ascertained from what is enacted and consists in

the necessary legal effect of the law itself and not in its ulterior effect socially or economically. The other is that the question what is the pith and substance of the impugned law, though possibly of help in considering whether it is nothing but a regulation of a class of transactions forming part of trade and commerce, is beside the point when the law amounts to a prohibition or the question of regulation cannot fairly arise. Now I think that every one of these five errors will be found to have a place in what in the passage I have quoted I ventured to call the pragmatistical solution which the *Transport* cases (7), (9), (11) gave to a problem they approached as a complex.

"Trade and commerce were treated as a sum of activities. The inter-State commercial activities of the individual and his right to engage in them were ignored. Inter-State commerce as a whole was considered and the adverse effect upon the total flow was treated as the test or at all events a test. Great importance was attached to the absence from the Act of discrimination against inter-State trade. The purpose imputed to the Act of making a planned structure of the internal transport of the State was taken into account as another element weighing in favour of the valid operation of the Act upon inter-State carriage. But that purpose was a matter of supposed policy which as it was thought it was the design of the Act to carry out: not the legal effect of the enacted provisions. The use of the idea expressed by the words 'pith and substance' may not appear so clearly; but I think that underlying much of what is said in the judgments in the *Transport* cases (7), (9), (11) is a view of the Act which treated the restriction on the carriage of goods by road as a means of effecting a main purpose of distributing the traffic between road and rail in a 'rationalised' manner.

"To these elements one other was added; one not the subject of consideration by the Privy Council. That element is the distinction taken between on the one hand motor vehicles as integers of traffic and on the other hand the trade of carrying by motor vehicle as part of commerce. It is a distinction that I have never understood. The statutes dealt with the commercial use of motor vehicles and not with motor vehicles as such or at rest so to speak. There are tendencies in the *Transport* cases (7), (9), (11) to thrust the carriage of goods and persons towards the circumference of the conception of commerce, but in the *Airlines* case (12), it was shown that it must lie at or near the centre. The combination of ideas upon which, according to my view, the *Transport* cases (7), (9), (11) are based, consists therefore of no element which can survive. Five of them have been destroyed by the judgment of the Privy Council. The sixth would not suffice as a separate reason and is unsustainable. I am therefore of opinion that we should no longer regard ourselves as bound by the authority of the *Transport* cases (7), (9) (11).

"It remains to consider whether those decisions can be supported on independent grounds. Now upon this subject it is enough to say that I have had the advantage of reading the judgment of FULLAGAR, J., and entirely agree with it."

Accepting as they do the views so clearly expressed by DIXON, J., their Lordships are of opinion that the six conceptions dealt with in this passage can no longer be regarded as sound. In their opinion, it follows that, if the validity of the Transport Act is to be established in the present case, it can only be on the ground that the restrictions contained therein are "regulatory" in the sense in which that word is used in the *Bank* case (5). This point is dealt with by FULLAGAR, J., in his dissenting judgment in *McCarter v. Brodie* (13). Having reached the conclusion that the reasoning in *Vizzard's* case (1) was irreconcilable

with the law as propounded in the *Bank* case (5), he continued (80 C.L.R. at p. 495):

A "I have still, however, to consider an argument put before us in support of *R. v. Vizzard* (1), the major premise of which argument is not only consistent with, but supported by, the *Banking* case (5). The major premise is, in the words of their Lordships, that '*regulation* of trade commerce and intercourse among the States is compatible with its absolute freedom.' And the minor premise is that the Transport Regulation Acts of the State of Victoria are merely regulatory of trade and commerce, including trade and commerce among the States.

B "The distinction between what is merely permitted regulation and what is a true interference with freedom of trade and commerce must often, as their Lordships observed, present a problem of great difficulty, though it does not, in my opinion, present any real difficulty in the present case. We may begin by taking a few examples, confining our attention to the subject-matter of transportation, which is now under consideration. The requirements of the Motor Car Acts of Victoria afford very good examples of what is clearly permissible. Every motor car must be registered: we may note in passing that there is no discretionary power to refuse registration. A fee, which is not on the face of it unreasonable, must be paid on registration. Every motor car must carry lamps of a specified kind in front and at the rear, and in the hours of darkness these lamps must be alight if the car is being driven on a road. Every motor car must carry a warning device, such as a horn. A motor car must not be driven at a speed or in a manner which is dangerous to the public having regard to all the circumstances of the case. Other legislation of the State—Parliamentary or subordinate—prescribes other rules. In certain localities a motor car must not be driven at more than a certain specified speed. The weight of the load which may be carried by a motor car on a public highway is limited. The driver of a motor car must keep to the left in driving along a highway. He must not overtake another vehicle on a curve in the road which is marked by a double line in the centre. He must observe certain 'rules of the road' at intersections: for example, the vehicle on the right has the right of way.

E "Such examples might be multiplied indefinitely. Nobody would doubt that the application of such rules to an inter-State trader will not infringe s. 92. And clearly in such matters of regulation a very wide range of discretion must be allowed to the legislative body. When we ask why such rules do not infringe s. 92, I think that common sense suggests a fairly clear and satisfactory answer. The reason is that they cannot fairly be said to impose a burden on a trader or deter him from trading: it would be foolish, for example, to suggest that my freedom to trade between Melbourne and Albury is impaired or hindered by laws which require me to keep to the left of the road and not drive in a manner dangerous to the public.

G "Of course, even rules of the *kind* which I have taken as examples could be made to operate as a burden or deterrent in a high degree. Let me take an example. The town of Wangaratta is in Victoria, some fifty miles by road from the border between Victoria and New South Wales. It is on the Hume Highway, which is the busy main highway between Melbourne and Sydney. A law which provided that a motor car should not travel on that highway at greater speeds than thirty miles per hour within the limits of towns and sixty miles per hour outside towns would not impede or interfere with the trade of persons carrying goods for reward between Melbourne and Sydney: their trade would remain 'free'. But let me suppose a law that no person should drive a motor car between Wangaratta and the border at a speed exceeding one mile per hour. We should instantly say that

such a law interfered with the freedom of inter-State trade. It would operate as a burden and a deterrent to the trader by making the journey economically impossible. The examples which I have taken seem clear. On which side of the line a particular case falls will, of course, be a question of fact. It may be a difficult question in some cases, but it does not seem to me likely that any very difficult question will arise within the sphere of practical politics. The real, and truly baffling, difficulties of s. 92 seem to me to lie outside the field of transportation. Within that field the very nature of the subject-matter seems to lend itself to the application of a quite simple test, which will rarely, if ever, be productive of any real difficulty. When difficulty does arise, it will be the kind of difficulty with which lawyers are constantly called upon to deal in a great variety of cases.

"The question is sometimes raised whether a State—or the Commonwealth for that matter, since the Commonwealth is equally bound by s. 92—can, consistently with s. 92, make a charge for the use of trading facilities, such as bridges and aerodromes, provided by it. The answer is that of course it can. The great bridge over Sydney Harbour was erected at huge expense to facilitate trade commerce and intercourse between all places north of the harbour and all places south of the harbour. The collection of a toll for the use of the bridge is no barrier or burden or deterrent to traders who, in its absence, would have to take a longer or less convenient or more expensive route. The toll is no hindrance to anybody's freedom, so long as it remains reasonable, but it could, of course, be converted into a hindrance to the freedom of trade. If the bridge authority really wanted to hamper anybody's trade, it could easily raise the amount of the toll to an amount which would be prohibitive or deterrent. It would not be possible a priori to draw a dividing line between that which would really be a charge for a facility provided and that which would really be a deterrent to trade, but the distinction, if it ever had to be drawn, would be real and clear, and nobody need worry about it in advance. Nothing but futile exaggeration of the difficulties of s. 92 can result from an insistence on imagining border-line cases which are excessively unlikely to arise in practice. If we are ever actually called upon to say whether a money exaction is really a charge for a facility provided or really a burden on somebody's freedom to conduct a trade or business or engage in intercourse, human affairs are such that we are unlikely to experience any very serious difficulty in making a decision.

"It is clear enough that such provisions as I have been considering are properly regarded as regulatory in character, and therefore within the category which their Lordships have held to involve no violation of s. 92. It should be emphasised that they are to be examined from the point of view of every individual engaged in trade commerce or intercourse, because s. 92 protects the trade commerce and intercourse of the famous Mr. James and every other individual. As to what is *not* regulatory in the relevant sense, one thing at least is clear. Prohibition is not regulatory. LORD PORTER ([1949] 2 All E.R. at p. 772), after quoting from the judgment of the learned Chief Justice of this court in *Australian National Airways Pty., Ltd. v. The Commonwealth* (12) (71 C.L.R. at p. 61), said 'simple prohibition is not regulation'.

"It is quite impossible, in my opinion, to distinguish the present case from the case of a simple prohibition. If I cannot lawfully prohibit altogether, I cannot lawfully prohibit subject to an absolute discretion on my part to exempt from the prohibition. The reservation of the discretion to exempt by the grant of a licence does not alter the true character of what I am doing. This was, indeed, as I have pointed out, one of the two things that were really decided in *James v. Commonwealth* (2), though it was naturally treated as more or less self-evident, and the contrary view does

not seem to have been very seriously argued. Such cases as *Melbourne Corpn. v. Barry* (17), and *Swan Hill Corpn. v. Bradbury* (18), do not, of course, afford exact parallels to such cases as the present, because they turn primarily on the meaning of the word 'regulate' in a statute, but they are, in my opinion, precisely in point, since one thing that they make plain is that, if a legislative body cannot lawfully prohibit altogether, it cannot lawfully prohibit subject to an administrative discretion to exempt from the prohibition. It is quite true to say that regulation may involve partial prohibition, but it is quite untrue to say that total prohibition subject to discretionary exemption or 'licensing' is merely partial prohibition within the meaning of that proposition.

"The truth is that it is possible to regard such legislation as regulatory with respect to trade and commerce if, but not unless, we regard s. 92 as referring not to the trading and commercial activities of individuals but to a totality or general volume or flow of trading and commercial activities. A simple prohibition, or a prohibition subject to discretionary exemption, of the trade of an individual may be regarded as regulatory of the general flow or volume of trade. It cannot possibly be regarded as regulatory of the trade of the individual who is simply not allowed to carry on his trade at all. The view that s. 92 does not protect an individual trader but has regard only to a general volume of inter-State trade could hardly have been more emphatically rejected by the Privy Council, and it must now, I would think, plainly be regarded as unsound. And, without it, the view that the Victorian Transport Regulation Act is merely regulatory, so far as it affects inter-State trade and commerce, cannot stand.

"It was argued before us that the regulation of public transport vehicles in respect of such matters as safe maintenance and so on could not be efficiently undertaken without a system of inspection and licensing. The same difficulty was felt by municipalities in connection with their building bye-laws by reason of such decisions as *Swan Hill Corpn. v. Bradbury* (18), but very little ingenuity was required to overcome the difficulty. The modern Victorian building bye-law requires the issue of a permit or licence to commence building, but it also provides that, if plans and specifications comply with the specific requirements of the bye-law, the intending builder is entitled, as of right, to the issue of the licence or permit. The legal right, so given, is, of course, enforceable by mandamus to issue the licence or permit. Such a law differs vitally from a prohibition subject to obtaining a licence which may be granted or withheld at discretion. The only reason why such a system would not be regarded as satisfactory in such legislation as that now under consideration is that such legislation is not really concerned—or at any rate is by no means solely concerned—with the safety of public transport. It is concerned very largely with restricting the development, in competition with existing railways, of modern and convenient methods of transport, and one of its supposed advantages is that the discretion to withhold licences can be used to protect the trade of one State at the expense of another. It is, for example, obviously within the sphere of practical politics that it should be thought in Melbourne that Cootamundra ought to drink Victorian beer and not South Australian beer. The protection of the industries of one State against those of another State was, of course, one of the primary things which s. 92 was designed to prevent, but, if the legislation now in question is valid, effect can easily be given to such an opinion without anybody knowing anything about it. I mention these matters only by the way and as serving to emphasise the essential vice of the legislation."

Before expressing their views on the passage just quoted, which is equally applicable to the Transport Act now under consideration, their Lordships will

state the events following on the decision in *McCarter v. Brodie* (13). *McCarter* sought leave to appeal to His Majesty in Council but leave was refused on Dec. 8, 1950. On Aug. 15, 1952, the present appellant delivered its amended statement of claim, and on Apr. 16, 1953, judgment was given in the High Court. DIXON, C.J., expressed his personal opinion in the following trenchant passage (87 C.L.R. at p. 67):

"My personal opinion has long been that, in the case of provisions of this description prohibiting transport unless licensed and authorising the imposition of such a levy, the question must be answered that neither the prohibition nor the levy is consistent with s. 92.

"Notwithstanding the failure of this conclusion to gain acceptance, the more immediate considerations which arise upon the very face of the statutory provisions, to say nothing of the levy and the conditions of the licence, still appear to me to make demands upon reason that are too insistent to admit of any other answer to the question whether trade commerce and intercourse is left absolutely free."

"I take it as finally settled that the burdens and restrictions against which s. 92 protects inter-State commerce are not only those which are imposed differentially upon inter-State commerce or affect it in a special manner. Inter-State commerce is protected also from restrictions and burdens which fall alike on commerce confined to a State and commerce crossing its borders. The carriage of merchandise from one State to another is not a thing incidental to inter-State commerce but in the language used by JOHNSON, J., of navigation, in *Gibbons v. Ogden* (19) (22 U.S. at p. 229) is 'the very thing itself; inseparable from it as vital motion is from vital existence.'

"The carriage of goods by road, which forms a most important part of this very thing, is made the subject of heavy imposts and of a definite prohibition except in so far as a branch of the executive government of the State thinks fit to permit particular persons to carry goods by specified vehicles. No conditions are laid down by the fulfilment of which a man may become entitled to a licence. It lies entirely within the discretion of the Director of Transport and Highways acting under the direction of the Minister. The refusal of an application for a licence on grounds that are arbitrary or fanciful or that no man could regard as lying within the scope or policy of the legislation would not suffice, but the discretion otherwise is absolute and in no circumstances has anyone an enforceable title to a licence. To me these rather simple considerations appear decisive. In face of them I have not been able to see how it can be said that this branch of inter-State trade is absolutely free."

"It is not my purpose to enter upon an examination of the question either in principle or upon authority, excepting of course the authority of the decision in *McCarter v. Brodie* (13). But I should perhaps say that to my mind the distinction appears both clear and wide between, on the one hand, such levies and such provisions prohibiting transportation without licence as the foregoing and on the other hand the regulation and registration of motor traffic using the roads and the imposition of registration fees. In the same way the distinction is wide between such provisions and the use of a system of licensing to ensure that motor vehicles used for the conveyance of passengers or goods for reward conform with specified conditions affecting the safety and efficiency of the service offered and do not injure the highways by excessive weight or immoderate use or interfere with the use of the highways by other traffic. The validity of such laws must depend upon the question whether they impose a real burden or restriction upon inter-State traffic."

"For myself I do not know why a uniform law for the organisation and the regular conduct of motor traffic or a uniform law prescribing conditions

A for the business of carrying by road should be regarded as necessarily impairing the freedom of inter-State trade commerce and intercourse. The provision which in *Willard v. Rawson* (6), all the judges but myself upheld as valid did not appear to me to be of this character. It was a special provision affecting only motor cars registered in other States if used in Victoria for the carriage of goods. Motor cars if registered in another State were exempt from registration in Victoria and from the payment of the registration fee annually payable in that State. But the provision impugned specially withdrew this exemption if the vehicle was used to carry goods. Thus entry into Victoria of a New South Wales lorry carrying goods at once exposed it to the levy of what to a Victorian car would be an annual fee. This appeared to me to be a direct burden upon inter-State trade. I am quite prepared to accept the view that my conclusion as to the character or characterisation of the provision was erroneous, but it has nothing to do either with the present case on the one hand or with a general regulation of transport on the other hand.

B "The decisions of this court that the State Transport (Co-ordination) Act, 1931 (N.S.W.), and the legislation of other States in *pari materia* did not infringe s. 92 were based on grounds which, as it seemed to me, were no longer tenable in face of the reasons of the Privy Council in *Commonwealth of Australia v. Bank of New South Wales* (5). In *McCarter v. Brodie* (13), however, a majority of the court decided that notwithstanding the decision of the Privy Council the transport cases should be followed. In the present case the plaintiff [appellant] asks us to reconsider the question thus decided in *McCarter v. Brodie* (13).

D "The strength of the considerations against refusing to follow that decision is very great. It is a recent decision of the court dealing with the very question of the authority of the transport cases. It was fully considered and, whether many of the reasons and the conclusion of those cases are, as I think, or are not, at variance with the principles expounded in the *Banking* case (5), nothing has occurred since this court decided *McCarter v. Brodie* (13) adding to or altering the considerations then before the court. These circumstances, in my opinion, make it right to decline to enter upon a reconsideration of *McCarter v. Brodie* (12) unless independent reasons exist for overruling it which appear to be imperative.

E "I do not waver at all in my belief that the transport cases cannot be reconciled with principle or in the opinion that the grounds on which they were in fact decided have for the most part been expressly rejected in the judgment of the Privy Council in the *Banking* case (5), but I do not regard that as enough."

F The learned Chief Justice then went on to give judgment against the appellant saying (87 C.L.R. at p. 70):

G "I believe, however, that I would regard it as an imperative judicial necessity to overrule *McCarter v. Brodie* (13) if it appeared inevitable that the consequences of the decision would extend beyond the subject of commercial transport by road and would make it necessary to hold that over the whole area of inter-State trade commerce and intercourse a power existed in every legislature to impose a prohibition subject to a licence to be granted or refused at the discretion of the executive. At first sight it may seem that these consequences ought logically to ensue, if the decision is allowed to stand. Nevertheless, after a full re-examination of the transport cases in the light of the reasons of the majority of the court in *McCarter v. Brodie* (13), I have come to the conclusion that the application of these cases may be confined to the particular conditions or considerations which arise from the fact that the railways and the roads form facilities for the carriage

of goods (and presumably of passengers) for the provision and maintenance of which the State is responsible."

It is clear from the foregoing that the Chief Justice did not regard the responsibility of the State for the provision and maintenance of facilities for the carriage of goods and passengers by rail and road as justifying the decision in the transport cases in principle. He merely regarded it as a distinguishing feature in this particular field, the recognition of which would confine the actual decision in *McCarter v. Brodie* (13) within limits which enabled him to accept it without its wider implications in other fields.

Their Lordships do not feel able to take so limited a view of *McCarter v. Brodie* (13), more especially since that decision was largely based on what they consider to be erroneous interpretations of passages in the judgment in the *Bank* case (5), and of references to *Vizzard's* case (1) by the Board in *James v. Commonwealth* (2).

MCTIERNAN, WILLIAMS and WEBB, J.J., adhered to the view which they had expressed in *McCarter v. Brodie* (13), but WEBB, J., said (87 C.L.R. at p. 89):

"Nothing has occurred to cause me to change the opinion I formed in *McCarter v. Brodie* (13), in the light of their Lordships' observations in *James v. Commonwealth* (2) and the *Banking* case (5), although without the guidance afforded by those observations as I understand them I would have come to a different conclusion, as appears plainly enough in what I said in *McCarter v. Brodie* (13) (80 C.L.R. at p. 482), and which is now recalled by FULLAGAR and KITTO, J.J."

FULLAGAR, J., adhered to the contrary view which he had expressed in *McCarter v. Brodie* (13) and he was supported by very cogent judgments from KITTO and TAYLOR, J.J.

This historical survey has been long, but it fulfils three useful purposes. First, it shows the remarkable conflict of judicial opinion manifested in the transport cases themselves, and arising at a later stage on the question how far the reasoning of the majority in the transport cases was affected by the reasoning of the Board in the *Bank* case (5). Secondly, it enables their Lordships to express their own view by borrowing language, on which they cannot improve, from judgments of learned judges of the High Court. Thirdly, it shows what are the facts in the light of which the argument *stare decisis* must be considered.

The argument before their Lordships' Board turned chiefly on the question whether or not the Transport Act could be regarded as being "regulatory" and, therefore, valid within the principles laid down in the *Bank* case (5). Counsel for the respondents (supported by counsel for the interveners) laid great stress on a passage in the judgment in that case, already quoted, which contains the sentence ([1949] 1 All E.R. at p. 772):

"Every case must be judged on its own facts and in its own setting of time and circumstance, and it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation and that inter-State trade, commerce, and intercourse thus prohibited and thus monopolised remained absolutely free."

Their Lordships will shortly make some brief observations on this passage, but on the specific question before them whether or not the licensing provisions in the Transport Act contravene s. 92 of the Constitution, they are entirely in agreement with the view of the minority of the High Court and with the observations, quoted above, made by the Chief Justice in expressing his "personal opinion." They would gratefully adopt as their own these observations and, subject to a reservation about to be stated, the passages already quoted from the judgments of DIXON, J., and FULLAGAR, J., in *McCarter v. Brodie* (13).

There are, however, some passages in the judgments of the Chief Justice and FULLAGAR, J., in *McCarter v. Brodie* (13) which might be interpreted as necessarily condemning as invalid any licensing system under which an inter-State trader who could comply with all the regulations validly prescribed by law might be refused a licence. Their Lordships can imagine circumstances in which it might be necessary, e.g., on grounds of public safety, to limit the number of vehicles or the number of vehicles of certain types in certain localities or over certain routes, with the result that some applicants might be unable to obtain licences. Such a system might well be justified as regulatory.

In this connection two passages from the judgment of TAYLOR, J., in the present case may be set out since they would seem to be couched in terms sufficiently wide enough to cover the kind of contingency envisaged above. The first reads (87 C.L.R. at p. 110):

"For if the legislature itself may not, without infringing s. 92, assert a right, at its absolute discretion, to permit or prohibit banking, it is, to me, inconceivable that it may, without infringing s. 92, confer such a right upon a subordinate body. This, of course, is very far from saying that trade and commerce may not be made the subject of regulation either through the medium of a licensing system or otherwise; nor does it deny the proposition that regulation may include partial prohibition or prohibition sub modo."

The second begins where, after quoting from the judgment of LATHAM, C.J., in *McCarter v. Brodie* (13), he says (*ibid.*, at p. 112):

"I understand from these and other relevant observations of his Honour that if the licensing authority had been invested with an unlimited and arbitrary discretion, a conclusion that the legislation infringed s. 92 would have been inevitable, for such legislation could not be regarded as regulatory. If this be so, legislation of this character must infringe s. 92 unless the discretion to refuse a licence is limited to or confined within the ambit constituted by those matters which should properly be regarded as regulatory of the trade or commerce concerned. For I can see no relevant distinction between an arbitrary discretion and one, which though not capable of being exercised on any grounds at all, authorises the licensing authority to travel outside the field of regulation. This is the very activity which is denied to the legislature itself and, that being so, any enactment purporting to authorise a subordinate authority to do so must be invalid. In my opinion s. 17 of the Act under review in this case, even if it does not confer a complete and arbitrary authority to grant or refuse licences, does confer an arbitrary authority to refuse licences on grounds other than those which may properly be regarded as regulatory of the trade or commerce concerned."

Their Lordships have thus adopted the unusual course of answering this important question, not in language of their own but in the language of judges of the High Court of Australia. They do so for two reasons, first, because they are in agreement with this language and see no reason to suppose that they can improve on it; secondly, because there is a very clear-cut division of opinion in *McCarter v. Brodie* (13), and in the instant case, as to the effect, if any, of the judgment in the *Bank* case (5) or the decision in *Vizzard's* case (1), and their Lordships do not wish to leave any room for doubt, by any observations which they might make, that they agree with the views on this point which have been expressed by the minority in each case.

As to the passage in the judgment of the Board in the *Bank* case (5) on which counsel for the respondents particularly relied, their Lordships accept without qualification everything that was said by the Board in the *Bank* case (5), but they are not aware of any circumstances in the present case giving rise to the situation contemplated in that passage. As the case was decided on demurrer, no evidence was given on either side at the hearing, although certain documents were

annexed to the respondents' defence. Consequently, no facts were proved which might have enabled the respondents to base an argument on the passage in question.

Their Lordships were asked to apply the maxim stare decisis and, on that ground, to refuse to disturb the decision in *Vizzard's case* (1) which had stood since 1933, had frequently been followed and had been followed yet again in *McCartier v. Brodie* (13) after the decision in the *Bank case* (5). Reliance was also placed on the observations of the Board on *Vizzard's case* (1) in *James v. Commonwealth* (2). Their Lordships think it would be quite wrong to take this course, as the present appeal offered an opportunity to set at rest the remarkable conflict of judicial opinion already mentioned. They have already expressed their view that the decision in *Vizzard's case* (1) has never been approved by the Board, and they think it would be wrong to attach weight for the present purpose, to the fact that leave to appeal has been refused in certain cases. They find it quite impossible to take any other course than to express their disagreement with the views of the majority in *Vizzard's case* (1).

The result is that the first question posed at the beginning of this judgment must be answered in the affirmative.

The second question, what is the effect of s. 3 (2) of the Transport Act, must now be considered. It was not suggested in argument that the provisions of the Act are invalid in so far as they apply to intra-State transport. In their Lordships' opinion, the effect of s. 3 (2) is that the Act must be read and construed as the appellant suggests, and the appellant is entitled to a declaration that the provisions of the Act requiring application to be made for a licence, and all provisions consequential thereon, are inapplicable to the appellant while operating its vehicles in the course and for the purposes of inter-State trade, or to the vehicles while so operated.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed and a declaration made in the terms just stated. The respondents must pay the appellant's costs here and in the High Court. There will be no order as to the costs of the interveners.

Appeal allowed.

Solicitors: *Farrer & Co.* (for the appellant); *Light & Fulton* (for the respondents); *Coward, Chance & Co.* (for the interveners, the Commonwealth of Australia); *Freshfields* (for the interveners, the State of Victoria and the State of Queensland).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

Re EAST YORKSHIRE GRAVEL CO., LTD.'S APPLICATION.

[CHANCERY DIVISION (Harman, J.), November 12, 16, 1954.]

Mine - Minerals - Right to work - Gravel and sand quarries - Mining lease - Application by tenant a week before expiry of lease - Tenant having no proprietary interest in minerals when application heard - Mines (Working Facilities and Support) Act, 1923 (c. 20), s. 1 (1).

The applicants as assigns of a mining lease, expiring Feb. 15, 1952, carried on the mining and working of gravel and sand under two fields part of a farm owned by the respondents who, on July 24, 1951, served on the applicants a notice to quit the fields on Feb. 15, 1952. On Feb. 7, 1952, the applicants applied to the Minister of Fuel and Power under the Mines (Working Facilities and Support) Act, 1923, s. 5, for the grant of the right to work the minerals (i.e., gravel and sand) in the fields, under s. 1 of the Act, and of certain ancillary rights, under s. 3. The Minister having referred the matter to the High Court, the following questions came before the court for determination, viz., (a) whether the minerals were "not capable of being worked without the concurrence of two or more persons" within the meaning of s. 1 (1) (a) of the Act of 1923, and (b) whether the applicants were a person "having an interest in the minerals" within the meaning of s. 1 (1) of the Act.

HELD: (i) there was never a time when the minerals were "not capable of being worked without the concurrence of two or more persons", within the meaning of s. 1 (1) (a) of the Act of 1923, because until the lease ended the applicants were entitled to work them without the permission of the respondents, and after the lease had expired the respondents could work them without anyone else's concurrence.

(ii) "interest", in the phrase "any person having an interest in them" in s. 1 (1) of the Act of 1923, meant a proprietary interest in the minerals, and under the sub-section a right to work minerals could be conferred only on a person having a proprietary interest in the minerals at the time when an application under s. 5 of the Act came before the court; and, therefore, the applicants were not a "person having an interest in" the minerals within the meaning of s. 1 (1), because their lease had already expired before their application came before the court.

Re West of England Road Metal Co., Ltd. ([1936] 2 All E.R. 1607), considered.

AS TO POWER TO GRANT RIGHT TO WORK MINERALS, see 22 HALSBURY'S LAWS (2nd Edn.) 677, para. 1454, and Supp.; and FOR CASES, see 34 DIGEST 747, 748, 1215-1218.

Cases referred to:

- (1) *Campbeltown Coal Co. v. Argyll (Duke)*, (July 15, 1925), cited in 12 HALSBURY'S STATUTES (1st Edn.) 182; reported, but not on this point, 1926 S.C. 126; Digest Supp.
- (2) *Re West of England Road Metal Co., Ltd.*, [1936] 2 All E.R. 1607; 155 L.T. 478; Digest Supp.

ADJOURNED SUMMONS.

By a lease dated Feb. 15, 1932, the lessor demised to tenants for a term of twenty years commencing Feb. 15, 1932, all the quarries, strata, seams and beds of gravel and sand which might be got by quarrying and excavations from the surface within or under some forty-one acres of land forming part of High Stonehills Farm at Barnston in Yorkshire and comprising two fields numbered 99 and 100 on the ordnance sheet for the parish, and rights to enter on the land and dig, work and obtain and dispose of the said gravel and sand, together with certain ancillary rights. Pursuant to the lease the tenants entered on the land and began to carry out operations of winning and working the gravel and

sand. In 1934 the benefit of the lease became vested in the applicants, East Yorkshire Gravel Co., Ltd., who continued to carry on the operations commenced by the original tenants. In 1947 the applicants purchased the freehold of a portion of field No. 100 amounting to one acre in extent. In 1951 the respondents, an unlimited company called Glendon Estates, became the owners in fee simple of High Stonehills Farm, and on July 24, 1951, they served on the applicants a notice to quit the land comprised in the lease (less the one acre purchased by the applicants) on Feb. 15, 1952, the date on which the lease was due to expire. On Feb. 7, 1952, the applicants applied to the Minister of Fuel and Power under the Mines (Working Facilities and Support) Act, 1923, s. 5,* for the grant of the right to work the minerals on the land in question in accordance with s. 1 of the Act and for certain ancillary rights under s. 3 of the Act, and the Minister, under s. 5 (4) (as amended by the Railway and Canal Commission (Abolition) Act, 1949, s. 1) referred the matter to the High Court.†

On Mar. 21, 1952, the applicants took out an *ex parte* originating summons, under R.S.C., Ord. 54o, for an order conferring on them the right to continue to work the minerals. It was stated in the summons that the application was made under s. 1, s. 3, s. 4, and s. 5 of the Act of 1923. By an order, dated July 25, 1952, directions were given, under R.S.C., Ord. 54o, r. 7, as to the procedure to be followed before the summons was set down for hearing. The application was opposed by the respondents, and by no one else. By an order dated July 15, 1954, the master ordered the summons to be adjourned into court, under R.S.C., Ord. 34, r. 2, for the following questions of law to be argued, namely: Whether on the true construction of s. 1 and s. 3 of the Mines (Working Facilities and Support) Act, 1923, and on the agreed facts set out in a schedule to the order (a) the minerals the subject-matter of the application were not capable of being worked without the concurrence of two or more persons within the meaning of s. 1 (1) (a) of the Act; (b) the applicants were a person having an interest in the said minerals within the meaning of s. 1 (1) of the Act; and (c) the applicants were otherwise a person on whom a right to work the said minerals might be conferred under s. 1 and s. 3 of the Act or either of those sections. It was further ordered that all other proceedings in the matter should be stayed until these questions of law had been determined.

H. Edmund Davies, Q.C., Raymond Walton and Desmond Nelligan for the applicants.

J. W. Mills for the respondents.

HARMAN, J., stated the facts, and said: Before the court would be able to determine whether the order asked for by the originating summons should be granted, a large body of evidence would have to be considered, including expert testimony about the state of the sand and gravel trade and whether it would be in the national interests that the working should be continued; and it appears to have occurred to the parties that a short cut could be taken, because it was the respondents' contention that, even assuming that the applicants proved that the other requirements of the Mines (Working Facilities and Support) Act, 1923, were satisfied, nevertheless the applicants were not persons to whom any grant could be made, because they were not qualified as grantees. The broad grounds of the objections on the part of the respondents were,

*Under s. 5 of the Act of 1923 the application was to be made to the Board of Trade, but the powers and duties of the Board of Trade in these matters were transferred to the Minister of Fuel and Power by the Ministers of the Crown (Minister of Fuel and Power) Order, 1942 (S.R. & O. 1942 No. 1132), and the Ministry of Fuel and Power Act, 1945, s. 1, and sched. I.

†By s. 3 (4) of the Act of 1923 the Board of Trade (now the Minister of Fuel and Power: see note * *supra*) was empowered to refer the application to the Railway and Canal Commission. By the Railway and Canal Commission (Abolition) Act, 1949, s. 1, the functions of the Commission were to be exercised by the High Court.

first, that the applicants had no such interest in the quarries or the ground as would support an application, and, secondly, that this was not a case where the concurrence of two or more persons was required for the working of the quarries, and, consequently, a condition precedent had not been fulfilled. The parties, therefore, agreed the questions which I am asked to answer today under R.S.C., Ord. 34, r. 2, which empowers the court, if it be of the opinion that there is a question of law for trial as a kind of preliminary point. It is much the same as a proceeding by way of demurrer. I have never seen this kind of procedure applied to proceedings by originating summons before, but I see no reason, *ex facie*, why that should not be done, because an originating summons is a "cause or matter", within R.S.C., Ord. 34, r. 2, as much as is an action by writ. I think, therefore, although preliminary points of this kind often lead to trouble, that the procedure is justified on this occasion.

[His Lordship stated the questions which were to be determined, and continued:] Section 1 (1) of the Act of 1923 reads:

"Where there is danger of minerals being left permanently unworked—
(a) by reason of the minerals being comprised in or lying under land which is or has been copyhold land, or land subject to a lease exception reservation restriction covenant or condition, or otherwise not being capable of being worked without the concurrence of two or more persons; (b) by reason of the minerals being owned in such small parcels that they cannot be properly or conveniently worked by themselves,
a right to work the minerals may be conferred in the manner and subject to the provisions hereinafter appearing on any person having an interest in them, or, in the case of minerals owned in small parcels, in minerals adjacent to them, who is desirous of working them either by himself or through his lessees."

Therefore, before a grant can be conferred under s. 1, an applicant has, first, to prove that there is a danger of minerals being left permanently unworked. For the purposes of the present proceedings I must assume that this first requirement can be satisfied. An applicant then has to show that the danger exists for one of the reasons set out in s. 1 (1). The first two grounds stated in para. (a) do not apply in the present case, and, so far as I know, para. (b) does not arise, but it is of interest in connection with a case to which I shall refer later. The applicants in the present case have, therefore, to rely on the last part of para. (a):

"... or otherwise not being capable of being worked without the concurrence of two or more persons."

The first point which I have to consider is the meaning of the words "without the concurrence of two or more persons", and the second point is the meaning of the words "having an interest in them", in the latter part of s. 1 (1).

Section 3 of the Act empowers what are called ancillary rights to be granted to a person already having some rights to work minerals, which are hampered. Section 4 (1) lays down limitations, and reads:

"Neither the right to work minerals nor an ancillary right shall be granted under this Act unless it is shown that it is not reasonably practicable to obtain the right in question by private arrangement for any of the following reasons . . . (d) that the person with power to grant the right unreasonably refuses to grant it or demands terms which, having regard to the circumstances, are unreasonable."

For the present purpose, I shall assume, without deciding the point, that s. 4 (1) (d) applies. Section 5 shows the way in which an application under the Act is to be made. Section 5 (1) reads:

"Any person having an interest in any minerals who is desirous of working,

either by himself or through a lessee, those minerals, or any adjacent minerals, and who considers that the circumstances are such that a right to work the minerals can be granted under this Part of this Act, may send to the Board of Trade an application for the grant of such a right."

For "Board of Trade" we now read "Minister of Fuel and Power". An application was made to the Minister under that sub-section. Section 5 (4) reads:

"The Board [now the Minister] shall consider the application, and shall, unless after communication with such other parties interested (if any) as they may think fit they are of opinion that a *prima facie* case is not made out, refer the matter to the Railway and Canal Commission."

By the Railway and Canal Commission (Abolition) Act, 1949, s. 1, the matter is to be referred to the High Court. Under a proviso to s. 5 (4) of the Act of 1923 it was essential for the Minister to communicate with the respondents, who had refused to grant the right, before referring the application to the court. As, apparently, the Minister referred the matter to the court, I must assume that he did not think that no *prima facie* case was made out, and that he did communicate with the respondents.

Section 6 (1) of the Act of 1923 reads:

"Where a matter is so referred to the Commission, the Commission, if satisfied that the requirements of this Part of this Act are complied with in the case of the applicant, and that it is expedient in the national interest that the right applied for should be granted to him, may, by order, grant the right on such terms and subject to such conditions, and for such period, as the Commission may think fit . . ."

Section 6 (2) provides for compensation to the owner. Section 6 (3) provides:

"In determining the duration of any right to be granted the Commission shall have regard to the time reasonably necessary to enable the minerals to be fully worked, and where the applicant's interest in any minerals in virtue of which he is entitled to make the application is an interest as lessee, shall have regard to the duration of such interest."

In 1926 the position was altered so far as concerned coal mining, and, by the Mining Industry Act, 1926, s. 13,* a person who wished to search for coal could have rights granted to him by the Commission without proving that he had any interest in the subject-matter. That is only of interest as showing that in the case of minerals such as sand and gravel, the applicant must have an interest in the minerals, while, in the case of certain other minerals, he does not have to have an interest. Precisely what kind of interest the applicant is required to have is not stated.

The first point is about concurrence. The applicants have to show, under s. 1 (1) (a) of the Act of 1923, that the minerals are "not capable of being worked without the concurrence of two or more persons". I do not think that I need to decide whether "not . . . capable of being worked" means that physically the minerals cannot be worked, or that lawfully they may not be worked. The words "not . . . capable of being worked without the concurrence of two or more persons" mean that there must be someone able and willing to work, and someone else who is able to prevent the working, and who is not willing to give his assent or to concur. Not more than two persons are needed, because the words in s. 1 (1) (a) are "two or more persons", but there must be, at least, two persons, and each must, *vis-à-vis* the other, be in a position to work the coal only with the concurrence of that other. That is illustrated

* Section 13 of the Act of 1926 was extended to include certain minerals other than coal by the Mines (Working Facilities) Act, 1934, s. 1, and s. 13 (1) ceased to have effect as regards coal from July 1, 1942, under the Coal Act, 1938, s. 22 (1).

by *Campbeltown Coal Co. v. Duke of Argyll* (1), a decision of the Railway and Canal Commissioners in Scotland, cited in a note to s. 1 (1) of the Act of 1923 in HALSBURY'S STATUTES OF ENGLAND (1st Edn.), vol. 12, p. 182*. The note begins with these words: "The section applies as between a landlord and a tenant of minerals". I think that it is now conceded in the present case, although it was not conceded when the hearing began, that that statement is right, subject to the limitation that there must be something in the demise to the tenant which prevents him from working the minerals without the assent or the concurrence of the landlord, who is the other person concerned. In *Campbeltown Coal Co. v. Duke of Argyll* (1), that was exactly the position. The lessee had a lease of certain mines, but the lessor had obtained an interdict from the Scottish courts restraining him from working the minerals under a farmhouse, and the lessee applied for permission to work them under s. 1 of the Act of 1923. That was, obviously, a case in which the concurrence of two persons was required. The tenant could not work without the landlord's leave because of the interdict, and the landlord could not work because he had demised the subject-matter to the tenant and, therefore, was not in possession of the mines. In the present case it is contended on behalf of the applicants that the tenants (the applicants) were not in a position to work the minerals without the concurrence of the landlords (the respondents), because when the lease ran out the tenants could not continue to work unless the landlords would allow them to do so, and that, therefore, s. 1 (1) of the Act of 1923 applied. The respondents, in answer to that contention, submitted that, while it was true that the applicants could not work the minerals without the concurrence of the respondents after the lease had expired, the respondents could do so without the concurrence of the applicants; that, until the lease expired, the applicants could work the minerals without the concurrence of the respondents; and that, therefore, there never was a time when the applicants and the respondents had to concur in order that the minerals should be capable of being worked. That seems to me to be a good point, and the answer to this case. I do not think that there was, in the circumstances stated in the schedule to the order of July 15, 1954, a time when the minerals were incapable of being worked without the concurrence of two persons. Before the lease ended the applicants could work them, and were working them, and after the lease ended the respondents could work them and the applicants had no right to interfere.

The second question which I have to determine is whether the applicants were a "person having an interest" in the minerals, within the meaning of s. 1 (1) of the Act of 1923. Under s. 5 (1) the only persons who may apply for rights are "persons having an interest in any minerals". When the application was made to the Minister in this case the applicants, undoubtedly, had an interest in these minerals. It is true that they were only interested in them for another week, but they had an interest, and it seems to me, therefore, that they were qualified to make the application. When one turns back to s. 1, however, to look for the persons on whom the right to work may be conferred, one finds that they are persons "having an interest in them". In them? In what? In the minerals. Consequently the court, when considering possible grantees of this right, is confined to persons having an interest in the minerals. It is quite obvious that, after the application under s. 5 (1) was made, at least a week would have to elapse before the matter could be adjudicated on by the court, and the court would come to the conclusion, when considering who was the person on whom to confer the rights, that the applicants had no proprietary rights in the minerals and, therefore, were not eligible for a grant of rights, if, as is contended by the respondents, "interest", in s. 1 (1) (a), must mean a proprietary interest of some sort.

* Reported 1926 S.C. 126; but the opinion of LORD BLACKBURN, the ex-officio commissioner (Ibid., at pp. 128, 129) does not include, as there reported, the particular passage cited in 12 HALSBURY'S STATUTES (1st Edn.) 182.

A proprietary interest, in my judgment, may be of at least three kinds, that is to say, one may be the owner of the minerals in fee simple, or the lessee of the minerals, or a person having a licence not presently revocable to work the minerals and carry them away. It is clear that one of the people having an interest is the lessee, because s. 6 (3) reads:

" . . . where the applicant's interest in any minerals in virtue of which he is entitled to make the application is an interest as lessee . . ."

It was submitted by the respondents that that, or some similar interest, was necessary before a person could show that he was qualified to have a right granted to him under Part I of the Act of 1923. The answer of the applicants was that it was enough to have had an interest at the date when the original application was made. That contention, as I have already said, seems to me to be incorrect. Secondly, they contended that an interest might be a commercial interest, namely, to have a true business reason for working, and they went on to say that they had a commercial interest in the quarries because they had their machinery installed on the land and they had been working the minerals and carrying on their established business.

Is that enough? I should have thought not. I should have thought that "an interest", within the meaning of s. 1 (1) (a), must mean such an interest as the law will recognise. In *Re West of England Road Metal Co., Ltd.* (2), a case before the Railway and Canal Commission in 1936, such an interest, however, was not shown. In that case the applicants were a quarrying company, who wished to acquire the right to extend their quarry over certain adjacent fields. They had no proprietary interest in the adjacent fields or in the minerals under them, and so they were not qualified in that way, but they could have qualified by being interested in adjacent minerals if it were true that the minerals which were the subject of the application were

"owned in such small parcels that they [could] not be properly or conveniently worked by themselves*."

That, however, was not proved in the case. The point was never taken, I do not know why. Counsel of the greatest eminence in matters of this sort were employed, and one would have expected every point to be taken that could be taken. That seems to me to be very far from a decision that a proprietary interest is not necessary. The decision may have been made *per incuriam*, or there may have been circumstances which the reporter failed to notice which made such a point untenable or not worth taking in that particular case, and I cannot regard *Re West of England Road Metal Co., Ltd.* (2), as a case which indicates to me that I should take a view of the nature of the interest necessary different from that which I should have gathered from the Act itself.

There are some expressions of opinion in text-books that these interests must be proprietary interests. There is such a statement in BOWEN ON THE COAL ACT, 1938, p. 287, in a note to s. 1 of the Mines (Working Facilities and Support) Act, 1923. See also BAMBER ON THE MINES (WORKING FACILITIES AND SUPPORT) ACT, 1923, p. 8. There is, however, no authority on the matter which has been brought to my attention. As a matter of construction, however, that is what seems to me to be the true view, more especially as the Mining Industry Act, 1926, s. 13, so far as coal is concerned, and the Mines (Working Facilities) Act, 1934, so far as certain other minerals are concerned, deliberately cut out the necessity of an applicant having an interest for the purposes of those minerals. The minerals with which we are concerned in the present case are not in either of those categories, and I think that counsel for the respondents is, therefore, right in saying that it is still necessary to satisfy the conditions in s. 1 (1) of the Act of 1923, and one of those conditions is that an applicant must have a proprietary interest in the minerals, or, in a small parcels case, in the adjacent

* See s. 1 (1) (b) of the Act of 1923, p. 633, letter C, ante.

minerals. In the present case, the applicants, in my judgment, have neither of these interests, because, by the time when the application comes before the court, the applicants' estate and interest have ended and they are trespassers if they enter on the land. For those reasons it seems to me that both the preliminary points should be answered in the way that the respondents suggest.

Declarations accordingly.

Solicitors: *Smith & Hudson*, agents for *Mainprize, Rignall & Whitworth*, Hull (for the applicants); *Stafford Clark & Co.*, agents for *Armitage, Speight & Ashworth*, Leeds (for the respondents).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

STOW BARDOLPH GRAVEL CO., LTD. v. POOLE (INSPECTOR OF TAXES).

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Birkett, L.JJ.), November 15, 16, 1954.]

Income Tax—Deduction in computing profits—Capital expenditure—Cost of acquiring deposits of sand and gravel—Gravel merchants' means of obtaining stock-in-trade—Income Tax Act, 1918 (c. 40), sched. D, Case I.

The taxpayers, who carried on business as sand and gravel merchants, purchased for £2,000 the benefit of an agreement conferring rights in relation to a deposit of gravel and sand ballast on land, and options in relation to two deposits on other land, one of which options they subsequently exercised in part, paying £2,250 for the further rights so acquired. They excavated the gravel and sand and sold it in the course of their trade. The agreement conferred on the taxpayers an exclusive right to win the gravel and sand, which became their property when they excavated it, but conferred on them no proprietary right in the land or in the sand or gravel until won. On the question whether the sums of £2,000 and £2,250 were proper deductions in computing the trading profits of the taxpayers for income tax purposes for the years of assessment in which the payments were made,

HELD: the rights to win and acquire the sand and gravel were a capital asset which provided the taxpayers with the means of supplying themselves with their stock-in-trade, the gravel and sand, in which they acquired no proprietary right until the sand and gravel were won; and the sums of £2,000 and £2,250, being thus paid for a capital asset, viz., the rights to win and acquire the gravel and sand, could not be deducted from the profits of the taxpayers' trade for income tax purposes under Case I of sched. D to the Income Tax Act, 1918.

Dicta of ROMER, L.J., in *Golden Horse Shoe (New), Ltd. v. Thurgood* ([1934] 1 K.B. at pp. 564, 565), applied.

Decision of HARMAN, J. ([1954] 2 All E.R. 661), reversed.

AS TO STOCK-IN-TRADE AND CAPITAL EXPENDITURE IN COMPUTING INCOME FOR INCOME TAX PURPOSES, see 17 HALSBURY'S LAWS (2nd Edn.) 124, para. 231 and 158, 159, para. 325; and FOR CASES, see 28 DIGEST 47-49, 242-252 and DIGEST SUPP.

FOR THE INCOME TAX ACT, 1918, sched. D, Case I, see 12 HALSBURY'S STATUTES (2nd Edn.) 153 (compare now INCOME TAX ACT, 1952, s. 123, 31 HALSBURY'S STATUTES (2nd Edn.) 116).

Cases referred to:

- (1) *Golden Horse Shoe (New), Ltd. v. Thurgood*, [1934] 1 K.B. 548; 103 L.J.K.B. 619; 150 L.T. 427; 18 Tax Cas. 280; Digest Supp.
- (2) *Coltress Iron Co. v. Black*, (1881), 6 App. Cas. 315; 51 L.J.Q.B. 626; 45 L.T. 145; 46 J.P. 20; 1 Tax Cas. 287; 28 Digest 6, 13.

- (3) *Alianza Co., Ltd. v. Bell*, [1904] 2 K.B. 666; 73 L.J.K.B. 755; 91 L.T. 463; *affd.* C.A., [1905] 1 K.B. 184; 74 L.J.K.B. 219; 92 L.T. 184; *affd.* H.L., [1906] A.C. 18; 75 L.J.K.B. 44; 93 L.T. 705; 5 Tax Cas. 172; 28 Digest 47, 238.
- (4) *Murray v. Inland Revenue Comrs.*, (1951), 32 Tax Cas. 238; 3rd Digest Supp.
- (5) *Kauri Timber Co., Ltd. v. Taxes Comr.*, [1913] A.C. 771; 109 L.T. 22; 28 Digest 47, 237c.
- (6) *Mohandul Haryojind of Jubbulpore, v. Income Tax Comr., Central Provinces & Berar, Nagpur*, [1949] 2 All E.R. 652; [1949] A.C. 521; 2nd Digest Supp.
- (7) *Knowle v. McAdam*, (1877), 3 Ex.D. 23; 47 L.J.Q.B. 139; 37 L.T. 795; 1 Tax Cas. 161; 28 Digest 6, 12.

APPEAL by the Crown from an order of HARMAN, J., dated May 21, 1954, and reported [1954] 2 All E.R. 661, allowing an appeal by Case Stated from the General Commissioners of Income Tax for Freebridge Marshland, Norfolk.

The taxpayers appealed against assessments to income tax under Case I of sched. D to the Income Tax Act, 1918, in the sums of £200, £300 and £300 respectively for the years 1948-49, 1949-50 and 1950-51. Shortly after their incorporation (they commenced business as dealers and merchants on Apr. 1, 1948) the taxpayers made an oral agreement with Gorbould Bros., under which in return for a payment of £2,000, they acquired the benefit of an agreement which that firm had made with Ludington Estates, Ltd. Under that agreement Gorbould Bros. had purchased a deposit of gravel and sand ballast in eight acres of land for £2,000, with an option within five years to purchase an additional deposit in five acres of land at £1,000 an acre, and a similar right in respect of a third piece of land at a similar price. The taxpayers excavated the deposit in the eight acres and sold the gravel and sand in the course of trade. In 1949 they exercised the option in the agreement for the purchase of 2½ acres of land at £1,000 per acre, paying £2,250 in respect of it. They contended that they were entitled to deduct the two sums of £2,000 and £2,250 paid for the gravel and sand deposits in computing their profits for income tax purposes, on the ground that they were: (i) expenditure incurred in the acquisition of trading stock, or, alternatively, (ii) expenditure of a revenue character wholly and exclusively incurred for the purposes of their trade. The Crown contended that the sums were not expenditure on the acquisition of trading stock but expenditure of a capital nature, and, therefore, not proper deductions in computing the taxpayers' profits. The commissioners held that the sums were not admissible deductions for income tax purposes and that the appeals, therefore, failed in principle. HARMAN, J., held on appeal ([1954] 2 All E.R. 661) that the sums were not capital expenditure but an expense of acquiring stock-in-trade, and he allowed the appeal. The Crown appealed.

H. B. Magnus for the taxpayers.

Sir Lynn Ungood-Thomas, Q.C., and *Sir Reginald Hills* for the Crown.

SIR RAYMOND EVERSHED, M.R.: The question raised in this appeal is whether the Stow Bardolph Gravel Co., Ltd., the taxpayers, were entitled to bring into their trading and profit and loss accounts for the years ended Mar. 31, 1949, 1950 and 1951, by way of expenses and in reduction of the profits or gains in respect of which they were being assessed, an item representing the purchase of gravel made during the year in question, less any stock of gravel so purchased at the end of that year. The taxpayers are admittedly being charged for tax in respect of the business of sand and gravel merchants. Therefore, *prima facie*, it seems reasonable that, in arriving at the taxable gains at the end of any given year, the taxpayers should be entitled to deduct, and to bring into account as an expense, any sums laid out by them during the year in buying

the stock-in-trade in which they dealt, viz., sand or gravel. The matter is not quite so simple as that, however, for the alleged purchase of gravel represents what the taxpayers obtained under an agreement made not with them but with a predecessor in title in October, 1947.

The General Commissioners of Income Tax were of opinion that the taxpayers' claims to make deductions were not admissible, but on the Case Stated **HARMAN, J.**, held that they were admissible. I have reached a different conclusion from that of **HARMAN, J.**, with some feelings of regret and misgiving on two grounds. First, the result bears a little hardly on the taxpayers for reasons which will emerge from the facts. Secondly, I am not quite satisfied that, if close investigation were made of the method of carrying on the businesses of the taxpayers and others in the same line of business it might not emerge—I say no more—that the commissioners would find as a fact that, notwithstanding the apparent legal consequences of the agreement referred to, there was here such a taking possession of the deposit of gravel that it could be said for tax purposes that, once the consideration money had been paid under the agreement, the deposit was the stock-in-trade of the taxpayers. In the present case, however, I have felt compelled to say that there is no finding of fact to support such a conclusion, nor is there evidence before us sufficient to warrant it. It is in that respect that I find myself at variance with **HARMAN, J.**

The taxpayers were assessed under Cases I and II of sched. D to the Income Tax Act, 1918, and r. 3 of the Rules applicable to those Cases reads:

“In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of—(a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation.”

A later sub-paragraph in the same paragraph also prohibits deduction in respect of

“(f) any capital withdrawn from, or any sum employed or intended to be employed as capital in such trade, profession, employment or vocation.”

If the question were asked as a matter of what I might call business common sense, whether the sums paid under this agreement were sums wholly and exclusively laid out or expended for the purposes of the trade as sand and gravel merchants, I think that the answer would be that they were. Only when their true nature is more closely examined in the light of the authorities, and bearing in mind the prohibition in sub-para. (f), does one come to the contrary conclusion to that which commended itself to **HARMAN, J.**

The agreement is expressed to be made between Luddington Estates, Ltd., the owners of all the land affected and two persons then carrying on a partnership business, whose interest is now vested in the taxpayers. The first clause reads:

“The company shall sell and the purchaser shall purchase the deposit of gravel and sand ballast contained in and upon the land coloured pink on the plan annexed hereto being an area of eight acres . . . forming part of the field numbered 102 on the Ordnance Survey sheet Norfolk LVII 10 . . . the property of the company, at the price of £2,000 to be paid on the signing hereof.”

The company was Luddington Estates, Ltd., and the purchaser the predecessor of the taxpayers. The second clause provides that:

“The company shall allow the purchaser . . . free access to the said land, with or without carts lorries or other vehicles, for the purpose of removing the said gravel and sand ballast through”

a specified gateway. The purchaser must erect and maintain a proper gate. Clause 4 is:

“The purchaser shall have the right to take upon the said land any

portable machinery and haulage equipment which may be required for the purpose of excavating and carrying away the said gravel and sand ballast but no structures or dwelling-houses of a permanent nature shall be erected thereon, and no refuse rubbish or spoil other than the excavated top soil shall be deposited on the land."

The purchaser is made responsible for the rates, charges and so forth, and cl. 6 provides:

"For the period of five years from the date hereof the purchaser shall have the option to purchase the additional deposit of gravel and sand ballast in and upon the adjoining five acres of land coloured blue on the plan annexed hereto at the price of £1,600 per acre where the deposit shall be of a depth of nine feet or more, provided that where the deposit shall be found to be of a lesser depth than nine feet the purchase price shall be lessened by a proportionate amount as shall be agreed between the company and the purchaser and in default of agreement to be settled by arbitration in the usual manner."

Then there is a proviso giving a further period for a further option.

The last clause (cl. 8) is:

"No legal estate in the lands hereinbefore referred to shall be created or conveyed by virtue of this agreement and no interests easements licences or rights of way sporting or otherwise whatsoever except as herein expressly agreed and declared shall be created or conferred or deemed to be created or conferred hereby."

This deposit, which is "purchased" according to cl. 1 is, in truth part of the land itself. The gravel in situ is the land. There is a real, if narrow, distinction between what is expressed to be a purchase of gravel on the one hand and a purchase of something which may be growing on the land or be lying on the land, such as potatoes, truffles, a crop of apples, or the leaves of a tree, on the other hand. Moreover, once the purchaser has paid the £2,000, he is under no particular obligation to work this gravel. Allowing for the option period the term to this agreement might extend for ten years or so. But there is no doubt that the document on its face purports to be a sale of the gravel and sand as such, and the terms of cl. 8 serve to emphasise the fact that no other interests are created than such as are essential for the main purpose of the sale of gravel and sand.

As I have already said, the practice of businesses of this kind is not really discussed in the Case Stated. The commissioners merely state in para. 3 (e):

"On acquiring the benefit of the said agreement in writing, the [taxpayers] proceeded to *excavate* the deposit of sand and gravel hereinbefore referred to, and sold the same in the course of trade."

In view of what follows, I have emphasised in reading the word "excavate". After setting out the contentions of the taxpayers and of the Crown, the commissioners state their conclusion that:

"We . . . after hearing and considering the evidence were of opinion that the above payments were not admissible deductions for income tax purposes."

As I read HARMAN, J.'s judgment, his conclusion rested on his acceptance of the literal fact of the first clause of the agreement, which has indeed underlaid the substance of the argument forcefully put before us by counsel for the taxpayers. In the report in [1954] 1 W.L.R. at p. 1060, the reason of the learned judge is introduced by the simple formula, "having stated the facts". That formula, however, does less than justice to what the judge said at the beginning of his judgment, and I think it necessary to refer to the early part of it, in which he said ([1954] 2 All E.R. at p. 662):

"The contract provided that no estate or interest in the land other than

as expressly agreed should be given to the so-called purchasers, nor was there any limit to the time in which they must remove the sand and gravel, the only time limit being the five-year periods within which they must exercise the options. They were not the owners of the land obviously, because they only had access to it by one road and the freehold must have remained, I take it, in the vendor. What they got was, apparently, a right of access not limited in time, coupled with a profit-à-prendre and for that they paid £2,000."

I respectfully agree with that summary of the rights granted by the document of 1947, and in the light of the authorities to which we have been referred I should have thought that it led to a conclusion in favour of the Crown. But the judge avoided that conclusion by the emphasis he put, not on the legal effect of the document, but on the language particularly of its first clause. Thus, he said (*ibid.*, at p. 663):

"It is said for the company [taxpayers] that this is a mere purchase of its stock-in-trade, sand and gravel, and that all it does is to go on the land, shovel up the sand and gravel into a lorry, and sell it down the road to its customer, so that it is as much its stock-in-trade as any other article in which a trader deals. It is said on behalf of the Crown that the sand and gravel is not a chattel detached from the soil and lying there to be picked up: it is something which must be worked as if it were in a mine or a quarry; that all that was bought under this contract was a capital asset, namely, the right to go on the land and win the gravel and the sand and carry it away."

In his recital of the argument of the Crown, he might have been re-stating his own conclusion on the rights given by the agreement of 1947. After referring to *Golden Horse Shoe (New), Ltd. v. Thurgood* (1), which on its facts is admittedly the closest authority to this case, and to which I shall have to allude, he states his conclusions thus (*ibid.*, at p. 664):

"It is said here that the opposite conclusion should be reached, and I think in substance the reason is because this gravel had never been raked off the soil on which it was lying. There is no question, in any true sense, of extracting gravel. No process, as I understand it, is gone through here. It is not even suggested that a riddle or sieve is used. The gravel is merely dug up or raked up where it lies, put on the lorry and sold wherever it can be."

I do not know whether those are the facts or not, but there is no finding to that effect. It may be that it is so, and, as I indicated earlier, if the facts were as stated by the judge, the General Commissioners might have found justifiably that the case was not really distinguishable as a matter of law and common sense from a sale of loose objects lying on the surface of the ground, such as windfalls from apple trees, or even crops or leaves growing on the tree. My difficulty is that I can find no justification for that conclusion in the material before us. With all respect to *HARMAN, J.*, I think it neglects the introduction to his judgment, which in my view is a correct appreciation of the rights given to the taxpayers under the 1947 agreement.

I come back to the question inherent in the judge's summary of the argument, which seems to be fundamental to the decision of the present case. Can it be said on the facts proved that this deposit, identified by reference to a field on the map, from the moment that the purchaser paid his £2,000 down, became the stock-in-trade of the gravel merchant? I have found it impossible to answer that question affirmatively.

Earlier cases on this question may be treated as sufficiently exemplified by *Coltress Iron Co. v. Black* (2) and *Alianza Co., Ltd. v. Bell* (3), and they in turn may be said to be the foundation for what is said in the *Golden Horse Shoe* case (1). The *Coltress Iron* case (2) related to the getting of iron by mining operations.

As counsel for the taxpayers observed, the business of mining has been the subject of special treatment in the Income Tax Acts, as is seen from the reference to sched. A and the exceptions thereto. In the *Alianza* case (3) the business operation was also that of turning to account a mine, a caliche mine, in South America. The point was made that, since the mine was out of the jurisdiction, the business, which was managed and controlled here, could not be treated for tax purposes on the same footing as that of the owner of a mine situated in England. It was held none the less that the same principles applied. Those cases laid down the principle that, in all cases truly analogous thereto, the cost of acquiring a mine, or the depreciation of a mine once acquired (which is another way for accounting purposes of saying the same thing), was not a legitimate deduction as being expenses wholly and exclusively incurred for the purposes of the trade and not being sums employed as capital in the business.

In the *Golden Horse Shoe* case (1), the subject-matter was not a mine or underground minerals but dumps formed of tailings, i.e., what might be called the refuse of the mine when the best gold ore had been extracted from it, like the tips which are a familiar sight near coal mines in this country. The business operation was that of extracting the gold ore still remaining in some quantities in the tailings. The *Golden Horse Shoe Company* had bought tailings—one of these dumps, it is stated, was about 250 feet high—and the tailings were undoubtedly raw material from which by appropriate manufacturing process the company extracted gold. The question was whether the costs of so acquiring these tailings, severed as they were from the earth, were legitimate deductions, and this court came to the conclusion that they were, distinguishing the tailings lying heaped on the ground from, e.g., the minerals still ungot ten which had been the subject of the *Coltress Iron Co.* (2) and earlier cases. ROMER, L.J., said ([1934] 1 K.B. at p. 563):

“Unfortunately, however, it is not always easy to determine whether a particular asset belongs to the one category or the other,”

that is, whether it is in fact a capital asset or part of the stock-in-trade or raw material.

“It depends in no way upon what may be the nature of the asset in fact or in law. Land may in certain circumstances be circulating capital. A chattel or a chose in action may be fixed capital. The determining factor must be the nature of the trade in which the asset is employed.”

He illustrated the point by the example in that case of a man whose trade was that of a manufacturer and seller of gas extracted from coal. ROMER, L.J., continued (*ibid.*, at p. 564):

“But now suppose that the gas manufacturer, instead of buying his coal from outside sources, purchases a coal mine and produces the coal that he requires by mining. The cost of extracting from the mine the coal treated will, of course, be a permissible deduction in ascertaining the profits of his business in the year. But he may not debit his profit and loss account with the sum by which the value of his mine has depreciated in consequence of the extraction of that coal. For the mine is regarded as being fixed capital . . .”

Then a reference is made to the *Coltress* (2) and *Alianza* cases (3) and ROMER, L.J., continued:

“If, on the other hand, instead of buying the mine, the gas manufacturer had bought a quantity of coal already extracted from the mine and stacked on the surface, the price of the coal would have been regarded as part of the circulating capital. The reason for this distinction is not at first sight very easy to discover. It must, as it seems to me, be found in this: that in the former case the purchase of the mine is not a purchase of coal but a pur-

chase of land with the right of extracting coal from it. The land is regarded merely as one of the means provided by the manufacturer for causing coal to be brought to his gasworks, and therefore as much part of his fixed capital as would be any railway trucks or lorries provided by him for the same purpose . . . It seems to follow from these considerations that the question to be decided in the present case resolves itself into this: Are the dumps the raw material of the appellants' business or do they merely provide the means of obtaining that raw material? In my opinion they are the raw material itself."

Applying that decision to the present case, HARMAN, J., asked: "Was the sand and gravel here subject to extraction? The raw material in this case, since there is no processing, is the stock-in-trade of the taxpayer's business", and the learned judge thought there was in principle no distinction between the *Golden Horse Shoe* case (1) and the case before him. He said ([1954] 2 All E.R. at p. 664):

"There is no question, in any true sense, of extracting gravel. . . . The gravel is merely dug up or raked up where it lies . . ."

It is on that matter that I find myself at variance with the learned judge. I find it impossible to resist the conclusion on the facts before us that, the rights under the agreement of 1947 being as stated by the judge and in this judgment, the deposit where it lay under the top soil, under part of a field like any other part of the surrounding country, was not the stock-in-trade of this business and could not become such until it had been excavated. It has been the burden of the case of counsel for the taxpayers that that is not right, and it is at that point that the ways part.

Counsel for the taxpayers further contended that, even if it could not be said that the gravel was merely sold as a chattel or chattels and became accordingly the taxpayers' stock-in-trade, still the nature of this agreement was such that the cost of acquiring the gravel, the contractual rights which the sum of £2,000, and the option price, gave, were none the less matters properly to be brought into the income accounts for income tax purposes. I cannot accept that. I think that, once it has to be conceded that there was no sale of the gravel in the way the judge said there was, it must follow that what was here acquired was, to apply ROMER, L.J.'s language, "the means of getting the gravel by excavating and making it part of the stock-in-trade."

Other examples were quoted, and counsel drew attention, among others, to cases of growing timber. On one side of the line was a Scottish case recently decided, *Murray v. Inland Revenue Comrs.* (4), where a Mr. Murray, having bought certain standing timber for £1,000 or so, was fortunately able later to sell it, still standing, for £14,000. But the Inner House of the Court of Session decided the case, as I read their opinions, on this simple ground, that there was evidence justifying the commissioners' finding that the purchase and sale of that growing timber were transactions within the scope of the business activities of Mr. Murray as a timber merchant, and therefore the difference between the two figures was taxable profit in his hands.

On the other side was *Kauri Timber Co., Ltd. v. Taxes Comr.* (5), which came to the Judicial Committee of the Privy Council from New Zealand. Like Mr. Murray, the appellant company had entered into a number of contracts or similar documents for acquiring rights in regard to standing timber. The nature of the transactions entered into may have been far more comprehensive in scope than Mr. Murray's transactions, but I think the principle was not very much different. The Board came to the conclusion that the deduction of the sums paid by the Kauri Timber Co. was not admissible. The other cases which I have cited were referred to, but LORD SHAW OF DUNFERMLINE, in delivering the judgment of the Board, said ([1913] A.C. at p. 776):

"It appears to the Board that the present case involves no refinement of distinction; for the transaction under which these timber rights were

acquired was not one under which a mere possession of goods by a contract of sale was given to the appellant company, but was one under which they obtained an interest in, and possession of, land."

If that test is applied to this case it produces, as it seems to me, the result which I have already indicated.

Finally in *Mohandul Hargovind of Jubbulpore v. Income Tax Comr., Central Provinces & Berar, Nagpur* (6), also before the Privy Council, the taxpayer had entered into a series of contracts which entitled him to pick off trees and take away leaves known as tendu leaves, which they required for making into cigarettes. The question again was whether the sums spent in acquiring them were properly deducted as expenses exclusively incurred in the business, or were they in truth, in pari materia with the *Kauri Timber* case (5), capital outlay? The Board on the facts came to the conclusion that these sums were deductible, and the judgment of the Board, delivered by LORD GREENE, undoubtedly reflects closely the argument which counsel has put forward for the taxpayers here; so that, if one substituted sand and gravel for tendu leaves, one would be hearing an echo of the argument for the taxpayers. As ROMER, L.J., said in the *Golden Horse Shoe* case (1) ([1934] 1 K.B. at p. 564), the distinctions are not always easy to discern or to expound, but I think that in the case of the tendu leaves LORD GREENE ([1949] 2 All E.R. at p. 654) undoubtedly emphasised the short-term nature of the contract and the fact that it gave nothing whatever to the taxpayer except the right to take the leaves off the trees, as a man might acquire a crop of apples on the trees and only the necessary rights to take them away. LORD GREENE said ([1949] 2 All E.R. at p. 655):

"In their Lordships' opinion the High Court has adopted an approach to the question which has diverted its view from the real point and has attached too much importance to cases decided on quite different facts. Cases relating to the purchase or leasing of mines, quarries, deposits of brick earth, land with standing timber, etc., referred to in the judgment and relied on in the argument before the Board do not appear to their Lordships to be of assistance . . ."

It is then obvious from the contrasted examples that the decision rested on the particular circumstances of the case and on the fact that the Board was able to say that the tendu leaves were part of the raw material of the taxpayer from the moment the contract was entered into, and before they had actually been picked. I cannot say the same of the sand and gravel, part of the earth itself, which was the subject of the contract here in question and which I think could only sensibly become part of the stock-in-trade of this gravel merchants' business when it had in the true sense been won, had been excavated and been taken into their possession. For these reasons, which I have stated at some length out of respect for the learned judge's judgment, I would allow the appeal.

JENKINS, L.J.: I agree. Whether the decision in this case should be in favour of the Crown or the taxpayers, in my opinion the grounds which led the learned judge to decide in favour of the taxpayers cannot be supported. He dealt with the case as if the transaction evidenced by the agreement of Oct. 29, 1947, was a sale of a chattel in the shape of gravel lying loose on the surface of the land. There is no finding of fact in the Case Stated to support the view that the gravel was lying loose. On the other hand, there are passages in the Case Stated and in the agreement which make it reasonably apparent that the subject-matter of the agreement consisted of a deposit of gravel of the usual kind lying some feet beneath the surface of the land and requiring to be won from the land by a process of excavation.

My Lord has referred to the passages in the judgment describing the gravel in effect as lying loose on the land. The learned judge said ([1954] 2 All E.R. at p. 664):

A "It is said here that the opposite conclusion should be reached, and I think in substance the reason is because this gravel had never been raked off the soil on which it was lying. There is no question, in any true sense, of extracting gravel . . . The gravel is merely dug up or raked up where it lies, put on the lorry and sold wherever it can be . . . I myself think that it is a distinction without difference to suggest that, because nobody had ever applied a rake to this gravel before, it should be treated as capital, whereas, if somebody had raked it into little heaps before the contract was made, then its purchase would constitute a different form of adventure. It is the same situation. The gravel is no more and no less attached to the land. . . . it would be to introduce only another artificiality if I were to say that the fact that this gravel was not worked before, or had not been moved, made the expenditure on it a capital outlay when that expenditure would have been a trading cost if it had happened to have been touched with a rake."

B It is to my mind clear that the case should be considered on the footing that this was a deposit of gravel beneath the surface of the land which required winning from the land by operations in the nature of quarrying or excavation. On that footing, how does the matter stand? One starts with the well known provisions of sched. D and the Rules applicable to Cases I and II. Rule 3 provides:

C "In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of—(a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation . . . (f) any capital withdrawn from, or any sum employed or intended to be employed as capital in such trade, profession, employment or vocation."

D The two sums paid by the taxpayers under the agreement of Oct. 29, 1947, i.e., the initial sum of £2,000 paid by them to the original parties to the agreement from whom they took an assignment, and the further sum of £2,250 paid by them on the partial exercise of the first of the two options, were clearly sums laid out wholly and exclusively for the purposes of their trade. It remains to consider whether these two sums were in the nature of capital outlay or of expenditure on revenue account, for in order to be expenses properly deductible they must be of the latter description. To arrive at an answer, it is necessary to consider the nature of the rights taken by the taxpayers under the agreement of Oct. 29, 1947. The agreement by cl. 1 purports to effect a sale of the deposit of gravel under the defined eight acres of land. The agreement then provides by cl. 2 for the necessary access by the taxpayers, their servants and agents, to the land for the purpose of removing the gravel, with certain limitations as to the way by which access is to be had. In cl. 4 rights are given to take on the land portable machinery, haulage equipment and so forth. There is a prohibition against structures or dwelling-houses of a permanent nature, and a prohibition against depositing on the land any refuse, rubbish or spoil other than the excavated top soil. Then the two options to which reference has already been made are given by cl. 6, the first for a period of five years from the date of the agreement, and the further option by a proviso to the same paragraph to be exercisable within a further five years from the date of the exercise of the first option, if that option is exercised. Finally, cl. 8 provides:

E "No legal estate in the lands hereinbefore referred to shall be created or conveyed by virtue of this agreement and no interests easements licences or rights of way sporting or otherwise whatsoever except as herein expressly agreed and declared shall be created or conferred or deemed to be created or conferred hereby."

F What is the effect of that agreement, and in particular of cl. 1, which contains the purported sale of the deposit of gravel contained in and on the land coloured

pink, in conjunction with cl. 8, which says that no legal estate in the land is to be created or conveyed by virtue of the agreement, and so on? In my view, its effect is to give the taxpayers as assignees of the original parties an exclusive right to win and carry away the deposit referred to. In view of cl. 8, I do not think the agreement should be regarded as conferring on the taxpayers any proprietary right in the stratum of the land containing the sand or gravel. The taxpayers had in my view an exclusive right to win the gravel, and when it had been excavated and won it became their property. But in my view the taxpayers cannot be described as having had any proprietary right in that particular stratum of the soil or in the gravel while it lay in that stratum, except in so far as they had an exclusive right to win it. The effect of the agreement, therefore, was to give the taxpayers an interest in the land in the nature of a *profit-à-prendre*, so that, if they availed themselves of the right granted, they would become the owners of any gravel excavated by them from this area of land.

Certain features of the agreement require special notice. It is unlimited in time, so that the taxpayers are allowed the right to excavate the gravel over an indefinite period. The taxpayers are under no obligation to work it at all, and if any work is done it is for the taxpayers to decide at what rate excavation shall proceed. Secondly, the price in no way depends on the amount of gravel excavated or available. Thirdly, the taxpayers are given options of securing further reserves of gravel to be exercised during a period which may extend for as long as ten years from the date of the agreement. Those reserves, in the event of the option being fully exercised, would have comprised, I think, another ten acres in addition to the eight acres to which the right originally extended.

Such being the nature of the rights, was the money laid out by the taxpayers in purchasing those rights, i.e., the rights originally granted and the part of the further rights comprised in the first option, laid out by way of capital expenditure or by way of income expenditure in the course of the taxpayers' trade? Counsel for the taxpayers contended that the business of the taxpayers was the business of dealers in sand and gravel, and not the business of quarry owners. He said the taxpayers' business was to buy and sell gravel. Therefore, any expenditure necessary to the purchase of gravel must be a proper expense of the taxpayers' trade. In my view, that states the position too narrowly. I would say that the taxpayers here do carry on the business of dealers in sand and gravel, but that one part of the business consists, not merely in purchasing gravel but in obtaining gravel, and there may be expenditure necessary or desirable with a view to obtaining gravel which is nevertheless not the purchase price of gravel as stock-in-trade of the business.

Counsel for the Crown, on the other hand, contended that the taxpayers could not be said to have purchased a quantity of gravel as part of their stock-in-trade. He said that, when the terms and effect of the agreement were examined, the true view was that the taxpayers had provided themselves with a means of supplying themselves with gravel which when procured would form part of their stock-in-trade. On that view of the agreement, he submitted that the expenditure of the taxpayers in obtaining the rights granted by the agreement was expenditure of a capital nature on the principles stated by this court, and particularly in the judgment of ROMER, L.J., in the *Golden Horse Shoe* case (1).

The question is not free from difficulty. Is this a case of a purchase of the raw material of the trade, or of the stock-in-trade, in which a particular trader deals, or is it a case of a purchase of a capital asset from which the taxpayers will be able to derive raw material or stock-in-trade as and when the requirements of the taxpayers' business make it expedient to do so? In my view, the latter conclusion is the correct one, and I think that conclusion accords with the *Alianza* case (3) and the *Coltress* case (2), and also with the observations of LORD SHAW

in the *Kauri Timber* case (5). The distinctions drawn by the cases are not altogether satisfying to some minds. It may seem strange that a purchase of a heap of tailings, as in the *Golden Horse Shoe* case (1), should be regarded as a purchase of raw material or stock-in-trade, whereas the sums expended in acquiring a quantity of caliche or nitrates embedded in a quarry, as in the *Alianza* case (3), should be a capital expense; or again that, as I think is the result in the present case, the right to obtain or win gravel lying in the soil should be a capital expense.

A But these matters of taxation must depend on the rules laid down by the relevant legislation, by reference to which income for tax purposes is to be measured, and under which capital expenditure is not deductible. In my view, when all the authorities are looked at, it is reasonably plain that an asset such as that acquired by the taxpayers in the present case must be regarded as a capital asset and not as so much stock-in-trade purchased by the taxpayers for the purposes of their trade.

B Counsel for the taxpayers invited us to distinguish the *Alianza* case (3) and the *Coltness* case (2) and other cases of that kind on the ground that either they involved a question of assessing the owner of a mine under No. III of sched. A, or else, as in the *Alianza* case (3), the appropriate schedule was sched. D, but the case concerned the profit derived from mining or quarrying operations. He
C said those cases could not govern the present case because it was not sought to tax the present taxpayers under sched. A in respect of their operations in relation to these deposits of gravel. I cannot accept that argument. It seems to me to be reasonably plain from the cases cited, in particular the *Alianza* case (3), and from the criticisms of *Knowle v. McAdam* (7) in the House of Lords in the *Coltness* case (2), that a general principle is here involved which is equally
D applicable whether the question concerns the ascertainment of the profits derived from a mine, or concerns the ascertainment of the profits of a trader or manufacturer under sched. D. The question is the same in all these cases, and it is in effect whether a given expense, granted that it is wholly and exclusively for the purposes of the trade, is a capital expense or an income expense, and in deciding that question I think the same principle must be applied whether the
E gainful activity concerned is the operation of a mine or a quarry or dealing in such a commodity as gravel. For these reasons, I agree with my Lord that this appeal should be allowed.

BIRKETT, L.J.: I am of the same opinion. The two judgments just delivered make a third judgment unnecessary, but I will indicate why I feel that the judgment of **HARMAN, J.**, cannot be supported. The variety of topics and
F many analogies discussed, potatoes, truffles, strawberries, apples, and all sorts of other commodities, all designed to elucidate the true test to be applied to the particular facts of this case, all make clearer that the all-important matter is the true view of those facts. **HARMAN, J.**, came to his decision after hearing the authorities cited to him which have been cited to this court on his particular view of the facts. The several extracts from his judgment cited by **JENKINS, L.J.**, ante, p. 644, considered in the light of the evidence are striking. I could have
G wished that the facts had been opened a little more elaborately, when the case was before the commissioners because the true position has to be extracted from the documents. For example, in the Case Stated, para. 3 (e) says:

"On acquiring the benefit of the said agreement in writing, the [taxpayers] proceeded to excavate the deposit of sand and gravel . . .",

H but in the agreement itself cl. 4 provides:

"The purchaser shall have the right to take upon the said land any portable machinery and haulage equipment which may be required for the purpose of excavating and carrying away the said gravel and sand ballast . . .",

and so on. Clause 6, which is of some importance, reads:

"For the period of five years from the date hereof the purchaser shall

have the option to purchase the additional deposit of gravel and sand ballast in and upon the adjoining five acres of land coloured blue on the plan annexed hereto at the price of £1,000 per acre where the deposit shall be of a depth of nine feet or more, provided that where the deposit shall be found to be of a lesser depth than nine feet the purchase price . . . ”

shall be adjusted.

Brought into contrast with some of the expressions in the judgment of HARMAN, J. ([1954] 2 All E.R. at p. 664), to which JENKINS, L.J., drew attention, these matters are striking: “ . . . this gravel had never been raked off the soil on which it was lying ”, which would make it a surface matter.

“ It is said that what was bought was a mere right to go on the place and win the gravel . . . because nobody had ever applied a rake to this gravel before, it should be treated as capital, whereas, if somebody had raked it into little heaps before the contract was made, then its purchase would constitute a different form of adventure.”

Then, finally:

“ They did not work it up or treat it as raw material or do anything with it, so far as I am told, except to load it on to a cart and take it away, and I think it would be to introduce only another artificiality if I were to say that the fact that this gravel was not worked before, or had not been moved, made the expenditure on it a capital outlay when that expenditure would have been a trading cost if it had happened to have been touched with a rake.”

When opening this appeal, counsel for the Crown said that he thought the learned judge had decided the case wrongly, not on any mistaken view of the law, but on a mistaken view of the facts, and it would appear that the learned judge treated the matter as one, not of a deposit of gravel on land which had to be excavated and won, as the facts would seem to have warranted, but as something indicated by the language which I have quoted. For that reason, I think that the judgment cannot be supported, because I gather that the cases cited here and the judgments of LORD HANWORTH, M.R. and ROMER, L.J., which have been read, were read to HARMAN, J. He also dealt with the *Golden Horse Shoe* case (1) in his judgment, and indicated his view of the facts that coloured the whole situation. He said ([1954] 2 All E.R. at p. 664):

“ . . . in effect, in the *Golden Horse Shoe* case (1) what was bought was the licence to go on the land and take away the ‘tailings’ and I myself think that it is a distinction without difference to suggest that, because nobody had ever applied a rake to this gravel . . . ”

and so on. In my view, the passage cited by counsel for the Crown at the outset of this appeal is really a governing consideration in this case. ROMER, L.J., said ([1934] 1 K.B. at p. 565):

“ It seems to follow from these considerations that the question to be decided in the present case resolves itself into this: Are the dumps the raw material of the appellants’ business or do they merely provide the means of obtaining that raw material ? ”

His answer to that question was that they were the raw material itself. That was a decision on the facts of that case. After hearing the argument, and applying the test which ROMER, L.J., there laid down as the test to be applied, although the first clause of the agreement says that the taxpayers purchased the deposit of sand and gravel, I think the true view is that they purchased the means of obtaining that raw material for the trade which they carried on, namely, the sale of gravel.

Finally, HARMAN, J., said also ([1954] 2 All E.R. at p. 664) that the taxpayer company “ was buying its stock-in-trade when it bought the gravel.” If

the company had gone into liquidation, it might have been difficult, if the contract had not been performed, to say one asset, its stock-in-trade, lay below the surface of the ground on that particular plot of land. I should have thought that to describe that property as stock-in-trade was quite inappropriate. For these reasons, I feel it is impossible to support the judgment of HARMAN, J., and I agree with the two judgments of the Master of the Rolls and JENKINS, L.J., which have already been delivered.

A

Appeal allowed.

Solicitors: *Metcalfs, Copeman & Pettifar* (for the taxpayers); *Solicitor of Inland Revenue.*

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

B SHEPARD AND ANOTHER v. CARTWRIGHT AND OTHERS.

[House of Lords (Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Tucker and Lord Somervell of Harrow), October 26, 27, 28, November 1, 2, 3, December 1, 1954.]

Gift—Inter vivos—Advancement—Father and children—Evidence to rebut presumption of advancement—Subsequent acts or events—Allotments of shares in names of children—Shares subsequently sold and proceeds treated by father as his own moneys—Other provision made for children.

C

Gift—Acceptance—Advancement—Shares vested in children of donor—Children ignorant of transfers—Validity of gift.

Limitation of Action—Trustee—Father vesting shares in children—Subsequent dealing with shares and proceeds of sale of shares for his own benefit.

D

The acts and declarations of the parties before or at the time of the purchase, or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration; subsequent acts and declarations are only admissible as evidence against the party who did or made them, and not in his favour.

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In 1929 the deceased and an associate promoted six private limited companies and caused substantial blocks of shares to be allotted to and registered in the names of each of his three children, of whom the two appellants, R. and W., were then aged sixteen and twenty-three years respectively. The children were ignorant of the transactions and never received the share certificates. The companies were very prosperous, and in 1934 a new company was formed to acquire the shares of the existing companies. The deceased procured a power of attorney from the appellants to deal with the shares standing in their names and any dividends on those shares. Under the agreement for sale, R. became entitled to £45,937 10s. in cash and £40,000 in shares of the new company, and W. to £26,737 10s. in cash and £40,000 in shares. R. and W. signed the agreement without understanding what they were doing. The deceased received the cash consideration for the shares of R. and W. in the six original companies, and at various times he sold and received the proceeds of sale of their shares in the new company. He subsequently placed to the credit of R. and W. respectively in separate deposit accounts at a bank the amount of the cash consideration for their shares in the original companies and the proceeds of sale of the shares in the new company. At some date in 1934, the deceased obtained the signatures of R. and W. to documents authorising him to withdraw moneys from their deposit accounts: R. and W. were ignorant of the contents of those documents. Without the knowledge of R. or W. the deceased drew on the accounts, which were exhausted by the end of 1936. Some part of the money so withdrawn was used for the benefit of R. and W., but a large part remained unaccounted for. On the deceased's instructions,

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some dividends declared in 1934 on shares in one of the original companies, and also interest on the bank deposit accounts were returned as the income of R. and W. for tax purposes. In an action brought after the deceased's death by R. and W. against the deceased's executors for an account for the proceeds of their shares in the original companies and other relief,

HELD: (i) apart from the evidence with regard to returns of income for tax purposes (which was admissible as a statement by the deceased against his interest) none of the evidence relating to events which occurred after 1929 was admissible because (a) those events could not be regarded as part of the original transaction as a result of which shares became vested in R. and W., for the events were remote in time and all of them appeared to be wholly independent of the original transaction, and (b) as regards the conduct of R. and W., that conduct did not constitute an admission against interest because it was an indispensable condition for such conduct being admissible that it should be performed with knowledge of the material facts.

(ii) the legal estate in the shares was vested in R. and W. in 1929, and their knowledge or lack of knowledge was irrelevant to that vesting; the question whether they became beneficially entitled or not depended on the presumption of their advancement and whether that presumption was or was not rebutted; and the evidence did not rebut the presumption which, therefore, prevailed in their favour.

Cochrane v. Moore (1890) (25 Q.B.D. 57), considered.

(iii) the deceased in 1934 received the cash from and shares in the new company as trustee for R. and W. and could not discharge himself of the trust by purporting to act in some capacity other than trustee in a manner and in circumstances unknown to R. and W.; accordingly, the respondents' plea of the Limitation Act, 1939, failed.

Devoy v. Devoy (1857) (3 Sm. & G. 403), explained by LORD MORTON OF HENRYTON.

Decision of the COURT OF APPEAL (sub nom. *Re Shephard (decd.)*) ([1953] 2 All E.R. 608), reversed.

AS TO PRESUMPTION OF ADVANCEMENT, see 17 HALSBURY'S LAWS (2nd Edn.) 677, paras. 1402, 1403; and FOR CASES, see 25 DIGEST 510-513, 67-88.

Cases referred to:

- (1) *Murless v. Franklin*, (1818), 1 Swan. 13; 36 E.R. 278; 25 Digest 511, 80.
- (2) *Foukes v. Pascoe*, (1875), 10 Ch. App. 343; 44 L.J.Ch. 367; 32 L.T. 545; 25 Digest 518, 128.
- (3) *Cochrane v. Moore*, (1890), 25 Q.B.D. 57; 59 L.J.Q.B. 377; 63 L.T. 153; 54 J.P. 804; 25 Digest 508, 47.
- (4) *Devoy v. Devoy*, (1857), 3 Sm. & G. 403; 26 L.J.Ch. 290; 28 L.T.O.S. 336; 65 E.R. 713; 25 Digest 515, 111.

APPEAL by the plaintiffs, the testator's son and daughter, from an order of the Court of Appeal, dated July 1, 1953, and reported sub nom. *Re Shephard (decd.)* [1953] 2 All E.R. 608, affirming an order of HARMAN, J., dated Feb. 19, 1953, and reported [1953] 1 All E.R. 569.

The appellants, Richard David Shephard and Winifred Cartwright, the younger son and daughter of the testator, Philip Edward Shephard, who died in 1949, claimed against his executors a decree for general administration together with a number of special accounts and inquiries designed to investigate their claims made or pending. The appellants claimed as creditors certain moneys and property said to arise out of gifts (viz., allotments of shares in limited companies) made to the appellants in or about 1929. The allotments of the shares were in the appellants' names and raised the presumption of advancement existing between a father and his children, and it was contended by the appellants that evidence of subsequent events was inadmissible to rebut the presumption of advancement. The appellants' claim was opposed by the eldest son. HARMAN, J.,

admitted evidence of subsequent events, and came to the conclusion that the testator did not in the allotments of shares intend to commit himself irrevocably by way of out and out gifts.

Charles Russell, Q.C., and Victor Coen for the appellants.

A. De W. Mulligan for the respondents, Joseph Osmond Cartwright and Hedley Spain Dunk.

F. B. Alcock for the respondent, Philip Edward Shephard.

A The House took time for consideration.

Dec. 1. The following opinions were read.

VISCOUNT SIMONDS: My Lords, this appeal raises questions in regard to the application of the equitable doctrine of advancement which I had regarded as well settled long ago.

B The following facts form the background of the case. On July 20, 1949, one Philip Edward Shephard died leaving a substantial estate subject to the claims to which I presently refer. The respondents, Joseph Osmond Cartwright and Hedley Spain Dunk and his son, the appellant, Richard David Shephard, are the executors of his will which was made on Dec. 4, 1946. In addition to Richard who was born on Nov. 2, 1913, the deceased, as I will call him, had two other children, an elder son, the respondent, Philip Edward Shephard, and a daughter, the appellant, Winifred Maud Cartwright, who was born on Oct. 25, 1906.

C In 1929 the deceased, who was then employed in an insurance brokerage business, engaged on speculative building ventures in association with one Meyer and for that purpose promoted six private companies and caused the following shares of £1 each, for which he had subscribed in cash, to be allotted to and registered in the names of himself, his wife and his three children whom I have named:

	<i>The deceased</i>	<i>His wife</i>	<i>Philip</i>	<i>Winifred</i>	<i>Richard</i>
New Ideal Homesteads, Ltd.	200	—	100	100	100
E Kent & Sussex Building Co., Ltd.	100	100	—	100	450
Northend Machinery & Motor Services, Ltd....	125	—	125	125	125
Reliance Electrical Co., Ltd.	100	—	—	—	50
F N.I.H. Haulage, Ltd. ...	100	—	150	100	150
Mastercraft Homesteads, Ltd.	100	—	—	—	—

G It has not been disputed that these shares were at that time of the value of £1 each or thereabouts. An equal number of shares of each company was registered in the names of the deceased's associate, Meyer, and members of his family. Neither of the appellants, of whom Richard was then aged sixteen years and Winifred twenty-three years, had any knowledge of this transaction. No evidence was given of the issue of any share certificates, but it seems reasonably certain that none were given to Richard or Winifred. Whether Philip had any is unknown. Strangely, he elected to give no evidence on this or any other matter.

H At the time of this transaction Richard and Winifred lived at home under their father's protection and, though it appears that relations between them and his wife, their stepmother, were somewhat strained, there is evidence that he recognised in full his paternal obligations, while they regarded him with more than usual filial reverence.

I think it well then to pause in this year 1929 and to ask what was the result in law of equity of the registration, in the names of his children, of shares for

which he supplied the cash, and I pause in order to examine the law, because it appears to me that the only two facts which are at this stage relied on to rebut the presumption of advancement, viz.: that the children were ignorant and that certificates were not given to them, are of negligible value. My Lords, I do not distinguish between the purchase of shares and the acquisition of shares on allotment, and I think that the law is clear that, on the one hand, where a man purchases shares and they are registered in the name of a stranger, there is a resulting trust in favour of the purchaser; on the other hand, if they are registered in the name of a child or one to whom the purchaser then stood in loco parentis, there is no such resulting trust but a presumption of advancement. Equally, it is clear that the presumption may be rebutted, but should not, as LORD ELDON said, give way to slight circumstances.

It must then be asked by what evidence can the presumption be rebutted, and it would, I think, be very unfortunate if any doubt were cast (as I think it has been by certain passages in the judgments under review) on the well settled law on this subject. It is, I think, correctly stated in substantially the same terms in every text-book that I have consulted and supported by authority extending over a long period of time. I will take, as an example, a passage from SNELL'S PRINCIPLES OF EQUITY (22nd Edn.), p. 122, which is as follows:

"The acts and declarations of the parties before or at the time of the purchase, or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration; subsequent acts and declarations are only admissible as evidence against the party who did or made them, and not in his favour."

I do not think it necessary to review the numerous cases of high authority on which this statement is founded. It is possible to find in some earlier judgments reference to "subsequent" events without the qualifications contained in the text-book statement: it may even be possible to wonder in some cases how, in the narration of facts, certain events were admitted to consideration. But the burden of authority in favour of the broad proposition as stated in the passage I have cited is overwhelming and should not be disturbed.

Though the applicable law is not in doubt, the application of it is not always easy. There must often be room for argument whether a subsequent act is part of the same transaction as the original purchase or transfer and, equally, whether subsequent acts which it is sought to adduce in evidence ought to be regarded as admissions by the party so acting, and whether, if they are so admitted, further facts should be admitted by way of qualification of those admissions.

Before, however, I ask whether evidence of any subsequent events is in this case admissible either because they formed part of the original transaction or because they were in the nature of admissions, I must shortly examine an argument which has been pressed on this appeal and appears to have carried particular weight with ROMER, L.J. It is that an inference about the intention of the deceased at the time of the vesting of the relevant shares in the appellants can be drawn from his manner of dealing with other property which before or after the transaction in question he had transferred to one or other of his children. I cannot regard such evidence as admissible or, if admissible, as of any value. If the argument only means that such other transfers ought to be regarded as "part of the same transaction" then it fails, because it is altogether too artificial so to regard them. If, on the other hand, the argument is intended to introduce a new category of admissible evidence, viz., acts which, though not part of the same transaction, yet indicate a course of dealing, I must reject it on the ground that it cannot be supported by reason or authority. This form of evidence was expressly rejected by LORD ELDON, L.C., in *Murless v. Franklin* (1) (1 Swan.

at p. 19), and I am not aware of any attempt having been again made to introduce it.

The first question then is whether any subsequent events are admissible as part of the original transaction to prove that the deceased had not in 1929 the intention of advancement which the law presumes. My Lords, for nearly five years nothing happened which could by any means be regarded as throwing light on his original intention, but an event did happen which would amply explain a change in that intention. For, within a short time of their promotion, the businesses of the six companies were prosperous beyond all expectation. In 1931 their combined profits were £57,780, in 1932, £128,525 and in 1933, £344,671. It is not surprising that, in the light of this great success, the deceased and his co-adventurer, Meyer, should form a public company to acquire all the shares of all the six companies. This they did. The Ideal Building and Land Development Co. was formed to acquire the shares, and, the deceased having in the meantime procured the execution by the appellants of two powers of attorney dated May 2, 1934, authorising him to deal with their shares and any dividends thereon in the most general terms, an agreement was entered into between the new company and the several shareholders of the six private companies for the sale of all the shares for £700,000, of which £300,000 was to be satisfied in cash and £400,000 in shares of the new company. The appellants signed this agreement and under it became entitled, Richard to £45,937 10s. in cash and £40,000 in shares and Winifred to £26,737 10s. in cash and £40,000 in shares. It is an undisputed and, from one point of view, a material fact that the appellants signed these documents at the request of the deceased without understanding what they were doing. The deceased received the cash consideration for the appellants' shares in the old companies and he at various times sold, and received the proceeds of sale of, their shares in the new company. He subsequently placed to the credit of the appellants respectively in separate deposit accounts with Barclays Bank, Ltd. (after allowing for two payments which can be identified) the exact amount of the cash consideration for the old shares and round sums in each case equivalent with trifling differences to the proceeds of sale of the new shares. At some date, which is uncertain, as the document is undated, but fell between May 16 and Sept. 5, 1934, the deceased obtained the appellants' signatures to documents authorising him to withdraw moneys from their deposit accounts. Of the contents of these documents also the appellants were ignorant. But the deceased, without their knowledge, acted on them and drew on the accounts, which were by the end of 1936 exhausted. It is not disputed that some part of the sums withdrawn was paid to or otherwise dealt with for the benefit of the appellants respectively, but a large part remains unaccounted for. Hence this suit, in which, in effect, the appellants claim an account of the proceeds of their original shares and other appropriate relief.

I have omitted to state one fact subsequent to the original transaction which, whether or not it is to be regarded as part of it and admissible in evidence under that head, is clearly admissible as an admission by the deceased against interest. Shortly before the completion of the agreement with the new company and, no doubt, as part of the arrangement, one of the old companies, New Ideal Homesteads, Ltd., declared and paid a dividend of £25 12s. per share. The deceased, acting presumably under the power of attorney to which I have referred, received the dividend attributable to the appellants' shares and, though retaining it for his own use, instructed the respondent Dunk, an accountant who acted for the deceased in the preparation of his income tax returns, that the dividend was the income of the appellants. It was so treated by Dunk whose integrity has not been challenged. Similar information and instructions were given by the deceased to Dunk in regard to the sums placed to the deposit account of the appellants with Barclays Bank, Ltd., and to the untaxed interest payable in respect of those sums, and were acted on by him.

I turn then again to ask how these facts which I have briefly narrated can be adduced in evidence by the deceased or his estate. And I think it convenient at this stage to refer to a matter in which, with great respect, I think the learned Master of the Rolls fell into an error and, moreover, into an error which largely influenced him in the conclusion to which he came. For he treated the appellants' claim merely as a claim against a dead man's estate and, therefore (as he says and reiterates), as a claim in which a heavy onus lay on the claimants. That is not, in my opinion, the way in which the claim should be regarded. It starts with the fact that in 1929 certain shares were placed by their father in the names of the appellants, and, that fact being admitted or proved, a presumption at once arises which it is for the respondents to rebut. They, as executors, are in no stronger position than their testator would be in if he were alive.

My Lords, at the outset of this opinion I said that there must often be room for argument whether subsequent events can be regarded as forming part of the original transaction so as to be admissible evidence of intention, and in this case it has certainly been vigorously argued that they can. But, though I know of no universal criterion by which a link can, for this purpose, be established between one event and another, here I see insuperable difficulty in finding any link at all. The time factor alone of nearly five years is almost decisive, but, apart from that, the events of 1934 and 1935, whether taken singly or in their sum, appear to me to be wholly independent of the original transaction. It is, in fact, fair to say that, so far from flowing naturally and inevitably from it, they probably never would have happened but for the phenomenal success of the enterprise. Nor can I give any weight to the argument much pressed on us that the deceased was an honourable man and, therefore, could not have acted as he did, if he had in 1929 intended to give the shares outright to his children. I assume that he was an honourable man as well in the directions in regard to income tax that he gave to Mr. Dunk as otherwise, but I think that he may well have deemed it consistent with honourable conduct and with paternal benevolence to take back part of what he had given when the magnitude of the gift so far surpassed his expectation.

If, then, these events cannot be admitted in evidence as part of the original transaction, can they be admitted to rebut the presumption on the ground that they are admissions by the appellants against interest? I conceive it possible, and this view is supported by authority, that there might be such a course of conduct by a child after a presumed advancement as to constitute an admission by him of his parent's original intention, though such evidence should be regarded jealously. But it appears to me to be an indispensable condition of such conduct being admissible that it should be performed with knowledge of the material facts. In the present case, the undisputed fact that the appellants, under their father's guidance, did what they were told without inquiry or knowledge precludes the admission in evidence of their conduct and, if it were admitted, would deprive it of all probative value. It is otherwise, however, with the conduct of the deceased. I have already made it clear that the respondents have failed to discharge the burden which rests on them of rebutting the presumption of advancement. The appellants, therefore, in my opinion, need no reinforcement from subsequent events. But, since inevitably in a complex case like this, either on the footing of being examined *de bene esse*, or because they have been admitted for some other purpose than the proof of intention, all the facts relevant or irrelevant have been reviewed, I do not hesitate to say that the only conclusion which I can form about the deceased's original intention is that he meant provision he then made for his children to be for their permanent advancement. He may well have changed his mind at a later date, but it was too late. He may have thought that, having made an absolute gift, he could yet revoke it. This is something that no one will ever know. The presumption which the law makes is not to be thus rebutted. If it were my duty to speculate on these matters,

my final question would be why the deceased should have put these several parcels of shares in six different companies into the names of his wife and three children unless he meant to make provision for them, and, since learned counsel have not been able to suggest any, much less any plausible, reason why he should have done so, I shall conclude that the intention which the law imputes to him was in fact his intention. The reasoning which made so strong an appeal to MELLISH, L.J., in *Foukes v. Pascoe* (2) has in this case also particular weight.

A In my opinion, then, this appeal succeeds on the main question that has been argued before us. But two further points were urged, on which I must say a few words. It was contended by counsel for the respondents that, as the appellants did not know that the shares had been registered in their names, there could have been no gift of the shares to them, since there cannot be a gift without acceptance by the donee, and the well known case of *Cochrane v. Moore* (3) was cited to support this contention. My Lords, I have some difficulty in understanding the application of *Cochrane v. Moore* (3) to the present case. There the law was expounded with a wealth of learning how a gift of a chattel can be lawfully made. Here the legal estate in the shares was vested in the appellants in the only way in which it could be vested, and the only question is whether the beneficial interest attended the legal interest by virtue of the equitable doctrine of advancement or whether there was a resulting trust. That is the question which C I have tried to answer.

Lastly, the respondents raised the plea of the Limitation Act, 1939. To this, I think, a complete and satisfactory answer is given in the judgment of DENNING, L.J., which, on this part of the case, I respectfully adopt. It was conceded by the respondents that the deceased received the consideration in cash and shares for D the appellants' shares as trustee for them, and it is clear that he could not discharge himself of that trust by purporting to act in some other capacity in a manner and in circumstances unknown to them.

I move, accordingly, that this appeal be allowed and that the following order be made:—(I) That the order of the Court of Appeal of July 1, 1953, be set aside: (II) That HARMAN, J.'s, order of Feb. 19, 1953, be varied as follows: E (i) By declaring (in lieu of the declaration on inquiry No. 5 ordered by order dated Jan. 12, 1953) that all the shares in the companies there mentioned, registered in the respective names of the appellants, were advancements to them respectively, so as to constitute each the sole beneficial owner thereof, and that their respective claims against the estate of the testator based on such beneficial ownership are not barred by laches or acquiescence, or by the Limitation F Acts, 1623 or 1939. (ii) By striking out the declarations on inquiries Nos. 7 and 10 (ordered by the said order dated Jan. 12, 1953). (iii) By declaring that the accounts and inquiries Nos. 6, 7, 9, 10 and 11 set out in the order of HARMAN, J., dated Jan. 12, 1953, should be taken and made on the basis of declaration (II) (i) above.

G The respondents Joseph Osmond Cartwright and Hedley Spain Dunk will retain their costs as between solicitor and client out of the estate of the deceased in due course of administration. The appellants will be paid their costs of this appeal and in the Court of Appeal out of the estate as between party and party. The respondent, Philip Edward Shephard, will bear his own costs of this appeal and in the Court of Appeal.

H LORD MORTON OF HENRYTON: My Lords, I entirely agree with the opinion which has just been delivered by my noble and learned friend, VISCOUNT SIMONDS, but, as we are differing from the Court of Appeal and from HARMAN, J., I shall add a few words on the question whether it is possible to find a "half-way house" between the view which my noble and learned friend has just expressed and the view that each of the appellants was a bare trustee for the deceased.

I shall first take the case of the appellant Richard David Shephard. In 1929,

when Richard became the registered owner of shares in private companies promoted by his father and Meyer, he must have taken those shares either as beneficial owner or as a trustee. I see no third possibility which would be recognised by English law. If, however, the presumption of an advancement is rebutted, the evidence may establish either (a) that he took them as a bare trustee for his father, or (b) that he took them on certain other defined trusts. My Lords, I find the latter alternative quite impossible in the present case, even if all the events set out in the judgment of the Master of the Rolls are admitted in evidence. I cannot believe that Richard's father would select him, at the age of sixteen years, to hold several separate blocks of shares as a trustee with duties to discharge and trusts to carry out. Further, it is clear that no trusts were communicated to Richard when the shares were taken up in his name or at any later date. Finally, even if these two obstacles could be surmounted, I should find it hard to formulate any trusts which explained the subsequent acts and words of the father in regard to these shares. For these reasons, I think there is no "half-way house", in Richard's case, and I think that these reasons apply equally to his sister, for, although she was twenty-three years old in 1929, she would seem to have been quite inexperienced in business matters.

I have made these observations because the Master of the Rolls and ROMER, L.J., found a "half-way house", and I feel that, out of respect for them, I ought to explain briefly why I cannot enter it with them. I add that *Deroy v. Deroy* (4), on which they relied, does not, in my opinion, afford an instance of a "half-way house". To quote the language of the report (3 Sm. & G. 403):

"The bill stated that on July 14, 1848, the plaintiff transferred the sum of £200 three and a quarter per cent. annuities (since converted into new three per cent. annuities) into the joint names of himself, his wife and his daughter Amelia Jane Devoey (in which names the stock was now standing), but the transfer note was signed by the plaintiff alone. At the date of effecting such transfer the plaintiff, who was a fellowship porter, was in easy circumstances, and his motive for so doing was that he might not be induced to have recourse to such stock except his necessities should compel him so to do, but the stock should remain as a provision for the future. The plaintiff, as the bill alleged, never intended to give the said stock to his wife or daughter, or to both jointly, or to the survivor of them, or to the survivor of the three persons into whose names the transfer was made, or any part thereof, or to declare any trust of the same or of any part thereof, or to place it beyond his own control, and did not know that the effect of transferring such stock into the said names would be to prevent him from availing himself of the said stock in case of need, and had he known that such would have been the effect he would not have made such transfer. No trust was ever declared of the said stock; but the plaintiff regularly received the dividends thereof, and applied the same to his own use."

The plaintiff, having sustained injuries which prevented him from following his calling as a fellowship porter, applied to the bank to transfer the stock into his name or to permit him to sell the same, but met with a refusal. Thus, my Lords, the allegation was, in effect, that the plaintiff always intended to retain the beneficial interest in the stock, but to remove, to some extent, the temptation to have recourse to it unless he should be forced to do so by necessity. The decision of SIR JOHN STUART, V.-C., was in the following terms (*ibid.*, at p. 406):

"Declare that the infant defendant is a trustee for the father, and the order will be in the form prescribed by the Trustee Relief (Extension) Act."

The wife was also a defendant, but it seems likely that her name was omitted from the decree because she was willing to join in a transfer. Whatever the explanation may be for the omission of her name, it would seem clear that the

learned Vice-Chancellor accepted the plaintiff's contention that he was the sole beneficial owner. In his judgment, however, the following sentence occurs (*ibid.*, at p. 405):

"Here the evidence shows that the father intended to confer only a qualified interest and not to make an absolute gift."

A My Lords, I confess I am unable to understand what was the "qualified interest" which the learned Vice-Chancellor had in mind. It may be that he was referring only to the legal estate, for neither the evidence nor the decision contains the slightest indication that any other interest was intended to be conferred either on the wife or on the daughter. I regard *Devoy v. Devoy* (4) as being simply a case in which the presumption of advancement was rebutted and the court was satisfied that the persons in whose names the investment stood were bare trustees for the plaintiff.

B I agree with the order proposed.

LORD REID: My Lords, I agree and, even if all the evidence in this case is taken into consideration, I am of opinion that the appellants must still succeed. I take first the other transactions which are said to show a course of conduct. C The argument for the respondents is that in these cases the father puts the titles to various properties in his children's names intending to retain for himself the beneficial interest and, therefore, it can be more readily established that he intended to retain the beneficial interest in the shares in question in this case. But the basis of that argument is that he, in fact, retained the beneficial interest in the other properties and that has not been proved. The first instance is a business of insurance broking, R. D. and P. E. Shephard, which the father started about D 1916, the only registered partners being the two appellants who were then only ten and three years old. No doubt he had a reason for using their names, because the terms of his employment with an insurance company forbade him to carry on such a business; but for a time at least he caused the profits of this business to be returned for income tax purposes as income of the appellants. The circumstances of this case are so special that I could draw no inference from them. E

Then the father acquired two businesses, one of which was carried on in the name of the appellant, Mrs. Cartwright, and the other in the name of the other appellant. Neither appellant was told of this, but, again, the results of these businesses were shown in the children's income tax returns by the father's direction. Here there were losses, and those losses were ultimately paid out of F the price which the father received for the shares in the names of the children with which this case is concerned. The father also took the titles of a number of houses in the children's names. The children were told of this at later dates and it is admitted that these were gifts, but it was argued that where, in contrast, the children were not told, no gift was intended. I am not sure whether it was maintained that the father intended to retain the beneficial interest in each case G until he told the children, but there is nothing to support that view. The true position of the three businesses to which I referred is far from clear and, even if it were clearer, there are obvious differences between fully paid shares registered in the children's names and businesses carried on by the father under their names. This seems to me to be a very good example of the wisdom of the rule which excludes such evidence.

H I turn to the shares with which this case is concerned. In 1929, the father and one Meyer, an undischarged bankrupt, promoted six private companies to be used in the business of speculative building. In the aggregate the father registered 725 £1 shares in his own name, one hundred in the name of his wife, 425 in the name of his daughter Winifred (now Mrs. Cartwright), 875 in the name of the appellant Richard, and 375 in the name of another son Philip, making 2,500 in all. We do not know whether the wife or Philip was told about this, but the appellants were not told. There is no contemporary evidence of any

kind to show what the father's intention was with regard to the shares registered in the appellants' names and no dividend was declared until 1934. A substantial dividend was then declared and the father instructed his accountant to show the dividend on the shares in the appellants' names as belonging to them and as their income. But they did not receive the income. There is no evidence to prove or suggest that the father was at any stage causing false returns to be made or trying to defraud the Revenue.

The respondents rely on the father's actions in 1934 and subsequent years in selling the shares and disposing of the proceeds. It appears that he was in the habit of getting his children to sign numerous documents without telling them anything about the nature of the documents, and the appellants were quite willing to do this. The companies were controlled by the father and Meyer and, in 1934, they agreed to sell all the shares for a very large sum: the consideration received for the 2,500 shares in the names of the father and his family was £145,000 in cash and a large number of shares in the purchasing company. The agreement to sell bears the appellants' signatures, but they were never told what they were signing and did not even know that they were shareholders. The father first put the whole price into the bank in his own name but, after a short time, opened deposit accounts in the names of each of the appellants and paid into each account the share of the £145,000 appropriate to the number of shares registered in each of the appellants' names less comparatively small sums which appear, at least in one case, to have been used to pay losses in businesses carried on in the children's names. The father also paid into these accounts sums received when shares in the new company allotted to the appellants were sold by him. He obtained the appellants' signatures to documents authorising him to draw on these accounts—again without telling them what these documents were. Ultimately, he used most of the money in these accounts for his own purposes: but he put about £40,000 in the name of each of the appellants and, admittedly, these sums belonged to the appellants.

Such, in outline, are the facts on which the respondents rely. The appellants agree that their father was an honourable man and the respondents say that no honourable man would have done this if he had originally intended the children to be the beneficial owners of the shares which he registered in their names in 1929. At first sight that seems a formidable argument but, on examination, I do not find it at all convincing. The father was not a lawyer. He may quite well have thought that, as he had never told the appellants anything, he was entitled—morally or perhaps legally—to take back what he had given: and he may have thought that £40,000 for each of them was a very good substitute for what he had first given—shares of a nominal value of a few hundred pounds. He may have intended to make gifts reserving a power to revoke them, or he may have thought that it was unnecessary to trouble about the legal position because he believed that his children would sign anything he put before them and he could thus make any changes which he thought desirable. But I find it very difficult to suppose that he never intended the children to be the owners of the shares. I cannot imagine any reason why he should put the shares in his children's names unless he intended at least that, if he died before making any alteration, the shares should belong to them and not to his estate. Certainly, there is nothing in the evidence which is in the least inconsistent with such an intention.

It is for the respondents to displace the presumption that, in registering the shares in the appellants' names, he intended to make them beneficial owners. Unless his statement to the Revenue that the dividends belonged to them and were part of their incomes was fraudulent, he must have intended that they should have some beneficial rights, and, in my judgment, the most that could be inferred in the respondents' favour is that he thought he was morally entitled to do what he did. Whether he thought he had reserved a power to take back

the shares, or relied on his children being willing to sign without explanation any documents necessary to enable him to deal with the shares or their proceeds in any way he thought fair is a question which on the evidence cannot be answered. So it appears to me that, on the facts of this case, the respondents are not at all prejudiced by the operation of rules of law which exclude much of the evidence.

VISCOUNT SIMONDS: My noble and learned friend, **LORD TUCKER**, who is unable to be here today, has asked me to say that he agrees with the reasons and conclusions which I have come to.

LORD SOMERVELL OF HARROW: My Lords, I agree.

Appeal allowed.

Solicitors: *Douglas & Co.* (for the appellants); *MacDonnell & Co.* (for the respondents, Joseph Osmond Cartwright and Hedley Spain Dunk); *Sidney Pearlman* (for the respondent, Philip Edward Shephard).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

PEARLMAN (VENEERS) S.A. (PTY.), LTD. v. BARTELS.

[COURT OF APPEAL (Denning and Hodson, L.JJ.), November 22, 23, 1954.]

Practice—Amendment—Judgment—Defendant wrongly described in writ, proceedings and judgment—Court's power to amend after judgment entered—R.S.C., Ord. 28, r. 12.

On or about Oct. 16, 1950, the plaintiffs entered into two contracts in writing with the defendant, who described himself in all the contractual documents as Bernhard Bartels, and who carried on business in Germany. The defendant failed to fulfil his part of the contracts and in an action for breach of contract in the English courts the plaintiffs were given judgment against the defendant Bernhard Bartels for damages and costs. The plaintiffs then sought to enforce the judgment in the German courts and in answer to their application the defendant contended that the judgment was invalid and unenforceable on the ground that his true name was Josef Bartels, that the name Bernhard Bartels was only the name in which he carried on business and that the judgment was directed against a non-existent person. On an application by the plaintiffs for leave to amend the writ, all subsequent proceedings and judgment, by substituting "Josef Bartels trading as Bernhard Bartels" for "Bernhard Bartels", the defendant contended that the court had no jurisdiction to amend a judgment after it had been entered.

HELD: the court had jurisdiction to amend the title of the action where the substantive judgment was in no way being altered, and the writ, proceedings and judgment, would be amended accordingly.

MacCarthy v. Agard ([1933] 2 K.B. 417), distinguished.

Appeal dismissed.

AS TO AMENDMENT OF JUDGMENT WHERE JUDGMENT HAS BEEN ENTERED, see 19 HALSBURY'S LAWS (2nd Edn.) 260, para. 560.

Case referred to:

(1) *MacCarthy v. Agard*, [1933] 2 K.B. 417; 102 L.J.K.B. 753; 149 L.T. 595; Digest Supp.

APPEAL by the defendant from an order of SLADE, J., in chambers, dated Oct. 29, 1954, whereby he gave the plaintiffs leave to amend the writ and all subsequent proceedings and the judgment in the action by substituting "Josef Bartels trading as Bernhard Bartels" for "Bernhard Bartels" as defendant. The facts appear in the judgment of DENNING, L.J.

Gerald Gardiner, Q.C., and *N. Lawson* for the defendant.

Maurice Lyell, Q.C., for the plaintiffs.

DENNING, L.J.: On or about Oct. 16, 1950, the plaintiffs, Pearlman (Venecers) S.A. (Pty.), Ltd., entered into two contracts in writing with a concern which described itself on its notepaper as Bernhard Bartels of Langenberg in Germany. The contracts were made in 1950. Afterwards the plaintiffs brought an action in the English courts against Bernhard Bartels for damages for breach of contract. The action was tried by SELLERS, J., in June, 1952, and in the result he ordered judgment to be entered for the plaintiffs for £47,353 2s. 6d. and costs. In due course the plaintiffs sought to enforce that judgment in the German courts. In answer to their application in the German courts the defendant in the English court said that the judgment was invalid and unenforceable on the ground that the true name of the defendant was Josef Bartels and that Bernhard Bartels was only the name in which he trades and that there was no such person as Bernhard Bartels. He said further that the judgment was directed against a supposed natural person who did not exist. That plea sounds very ill in the mouth of the defendant, who instructed solicitors in this country in the name of Bernhard Bartels, made a contract in the name of Bernhard Bartels, entered an appearance and fought the whole action in this country in the name of Bernhard Bartels and now, when it is a matter of enforcing the judgment in Germany, says there is no such person as Bernhard Bartels.

In order to overcome this very technical point, the plaintiff company apply to the English courts and ask for leave to amend the name of the defendant to "Josef Bartels trading as Bernhard Bartels". The master and the judge, SLADE, J., have made the necessary amendment, and the defendant now appeals to this court contending that these courts have no jurisdiction to amend a judgment once it has been entered. Reliance was placed on the decision of this court in *MacCarthy v. Agard* (1). The distinction between that case and the present was drawn by SLADE, J., in a judgment with which I fully agree. In *MacCarthy v. Agard* (1) the plaintiff did not seek only to amend the name or the description of the defendant. He sought to alter the very judgment itself, which was in a special form applicable to a married woman. He asked that the operative and substantive part of the judgment should be omitted. This court, by a majority, held that that could only be done by way of appeal, that is, by leave to appeal being granted and an appeal being lodged accordingly. Nevertheless, in the course of that case itself it appears that this court gave leave to amend the title of the action.

When the substantive judgment is not being altered, but only the title of the action, it is to my mind quite plain that this court has ample jurisdiction to correct any misnomer or misdescription at any time whether before or after judgment. That is what the master and the learned judge have done in this case. The judgment, which is for £47,353 2s. 6d. with costs against the defendant, is unaltered. All that is necessary to be done, which this court has ample power to do, is to alter the title by describing the defendant in the name he now says is his correct name, Josef Bartels, but adding, so that there shall be no possibility of misunderstanding, "trading as Bernhard Bartels". It is to be hoped, this amendment being made, that there will be no difficulty in enforcing this judgment in Germany according to its true intent. I think this appeal should be dismissed.

HODSON, L.J.: I agree. I also agree with the careful judgment of the learned judge and with his analysis of *MacCarthy v. Agard* (1) to which reference has been made. There is, in my view, no question of altering the judgment itself, which could not be done either under the slip rule or under the general power to amend contained in R.S.C., Ord. 28, r. 12, which provides:

"The court or a judge may at any time, and on such terms as to costs or otherwise as the court or judge may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the

purpose of determining the real question or issue raised by or depending on the proceedings."

I think the wording of that rule is wide enough to cover the amendment of the title and I do not accept the objection which counsel for the defendant has raised, that the rule must necessarily only apply to proceedings before judgment. The only question which has to my mind caused doubt in this case is whether the court really ought to have been troubled with this matter at all. Judgment was given against Bernhard Bartels. He went to the German courts and said the first name of these two was wrongly attributed to him; it was only a trading name and his real name was Josef. How he acquired the name of Josef I do not know and the German courts seem to have taken the view which I have suggested was the obvious one, namely, that there was really nothing in the point and no need to amend. There has been an appeal from the court of first instance in Germany and the plaintiffs out of abundance of caution have come to this court to have the judgment altered in order that they may be quite certain that no technical difficulty will arise on the appeal. I think, in the circumstances, the learned judge having dealt with the matter, his decision ought not to be disturbed and the appeal should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Buckeridge & Braune* (for the defendant); *Sidney Pearlman* (for the plaintiffs).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

GEORGE WIMPEY & CO., LTD. v. BRITISH OVERSEAS AIRWAYS CORPORATION.

[HOUSE OF LORDS (Viscount Simonds, Lord Porter, Lord Reid, Lord Tucker and Lord Keith of Avonholm), October 21, 25, December 1, 1954.]

Tort—Joint tortfeasors—Contribution—Action against two defendants—Action against second defendant not commenced within statutory period—First defendant's right to contribution from second defendant—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 6 (1) (c).

Statute—Construction—Words not calculated to fit events—Interpreted so as to effect least alteration of law.

On July 28, 1949, L., a workman employed by the respondents, was injured in a collision between two vehicles, one belonging to the appellants and the other to the respondents. On Apr. 26, 1951, L. commenced an action for damages for negligence against the appellants. By their defence, delivered on June 20, 1951, the appellants denied negligence and alleged negligence against the respondents, and on July 6, 1951, they issued a third-party notice against the respondents claiming contribution or indemnity under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (c). On Feb. 4, 1952, L. by leave amended his writ by adding the respondents as defendants. At the trial both the appellants and the respondents were found to have been guilty of negligence, blame being attributed to them in the proportion of two-thirds and one-third respectively, but L.'s action against the respondents was dismissed on the ground that they were a public authority and the action against them had not been commenced within one year of the accrual of the cause of action, as required by s. 21 (1) of the Limitation Act, 1939. On the appellants' claim for contribution against the respondents under s. 6 (1) (c) of the Act of 1935,

Held: (i) (by Viscount Simonds and Lord Tucker) the right conferred by s. 6 (1) (c) of the Act of 1935 to recover contribution from a joint tortfeasor who would, if sued, have been liable, does not extend to a joint tortfeasor who had been sued and held not to be liable; (by Lord Reid,

see p. 672, letter H, p. 673, post) where the language of a statute is not calculated to deal with a situation to which it has to be applied and the arguments are fairly evenly balanced, that interpretation should be chosen which involves the least alteration of the existing law; and (by VISCOUNT SIMONDS, LORD REID and LORD TUCKER; LORD PORTER and LORD KEITH of AVONHOLM dissenting) as the respondents had been sued by L. and had successfully maintained a defence based on s. 21 of the Limitation Act, 1939, against his claim, the appellants were not entitled, on the true construction of s. 6 (1) (c) of the Act of 1935, to contribution from the respondents.

(ii) in the words "other tortfeasor . . . would if sued have been liable" in s. 6 (1) (c) of the Act of 1935 the word "liable" means "held liable" (see particularly p. 673, letter D, post); and (per LORD REID with the concurrence of VISCOUNT SIMONDS), the temporal connotation of the words "if sued" in the passage quoted is such that they could mean either "if sued by the plaintiff when the joint tortfeasor claims contribution" or "if sued by the plaintiff when the tortfeasor claiming contribution was sued" (see p. 665, letter A, and p. 672, letter G, post).

Decision of the COURT OF APPEAL (sub nom. *Littlewood v. George Wimpey & Co., Ltd. British Overseas Airways Corporation* (second defendants and third parties)) ([1953] 2 All E.R. 915), affirmed.

EDITORIAL NOTE. Section 21 of the Limitation Act, 1939, has been repealed by the Law Reform (Limitation of Actions, etc.) Act, 1954, which substitutes a uniform period of limitation of three years for actions for damages for personal injuries due to negligence. In comparing the present decision with that of the Court of Appeal it should be noted that the matters which are the subject of holdings (i) and (iii) in the headnote to the report in [1953] 2 All E.R. 915 are not decided by the House of Lords (compare the opinion of VISCOUNT SIMONDS, p. 663, letter G, post).

FOR THE LAW REFORM (MARRIED WOMEN AND TORTFEASORS) ACT, 1935, s. 6 (1), see 25 HALSBURY'S STATUTES (2nd Edn.) 359.

Cases referred to:

- (1) *Merlihan v. Pope (A. C.), Ltd. (Pagnello, Third Party)*, [1945] 2 All E.R. 449; [1946] K.B. 166; 115 L.J.K.B. 90; 173 L.T. 257; 109 J.P. 231; 2nd Digest Supp.
- (2) *Horner-Richmond, Ltd. v. Duncan*, [1947] 1 All E.R. 427; [1947] K.B. 545; [1947] L.J.R. 1024; 176 L.T. 332; 2nd Digest Supp.
- (3) *Morgan v. Ashmore, Benson, Pease & Co., Ltd.*, [1953] 1 All E.R. 328; 3rd Digest Supp.
- (4) *Wolmershausen v. Gullick*, [1893] 2 Ch. 514; 62 L.J.Ch. 773; 68 L.T. 753; 26 Digest 146, 1099.
- (5) *Robinson v. Harkin*, [1896] 2 Ch. 415; 65 L.J.Ch. 773; 74 L.T. 777; 26 Digest 147, 1103.
- (6) *M'Gillivray v. Hope*, [1935] A.C. 1; 104 L.J.P.C. 11; 151 L.T. 482; 27 B.W.C.C. 348; Digest Supp.
- (7) *Brinsmead v. Harrison*, (1872), L.R. 7 C.P. 547; 41 L.J.C.P. 190; 27 L.T. 99; 21 Digest 221, 556.

APPEAL by the first defendants from an order of the Court of Appeal, dated July 27, 1953, and reported sub nom. *Littlewood v. George Wimpey & Co., Ltd. British Overseas Airways Corporation* (second defendants and third parties) [1953] 2 All E.R. 915, affirming an order of PARKER J., dated Jan. 29, 1953, and reported [1953] 1 All E.R. 583. The facts appear in the opinion of VISCOUNT SIMONDS.

Kenneth Diplock, Q.C., and *S. Rees* for the appellants.

Melford Stevenson, Q.C., and *L. G. Scarman* for the respondents.

The House took time for consideration.

Dec. 1. The following opinions were read.

VISCOUNT SIMONDS: My Lords, on July 28, 1949, one Littlewood, an aircraft cleaner, was injured in the course of his employment by the respondents, British Overseas Airways Corporation, whom I will call B.O.A.C., as the result of a collision between the vehicle in which he was travelling and a motor lorry owned by the appellants, George Wimpey & Co., Ltd., whom I will call Wimpeys, and driven by their servant. On Apr. 26, 1951, more than a year after the accident, Littlewood issued a writ against Wimpeys claiming damages on the ground that the accident was caused by the negligence of their servant. By their defence delivered on June 20, 1951, Wimpeys denied negligence and alleged that the collision was due to the negligence of the driver of the vehicle for which B.O.A.C. were responsible, and on July 6, 1951, issued a third-party notice addressed to B.O.A.C. claiming contribution or indemnity under s. 6 (1) (c) of the Law Reform (Married Women and Tortfeasors) Act, 1935, in respect of Littlewood's claim in the action. On Feb. 12, 1952, more than two and a half years after the accident, Littlewood, having obtained leave to join B.O.A.C. as co-defendants with Wimpeys in the action, delivered an amended statement of claim wherein he alleged negligence and breach of statutory duty under s. 26 of the Factories Act, 1937, against B.O.A.C. In their defence to Littlewood's claim in the action and to Wimpeys' claim in the third-party proceedings, B.O.A.C. denied negligence and breach of statutory duty and further pleaded that the claims were barred by lapse of time by reason of the provisions of the Limitation Act, 1939, s. 21 (1).

It is admitted that B.O.A.C. are a "public authority" for the purposes of the last mentioned Act. Littlewood's action against Wimpeys and B.O.A.C. and the third-party proceedings having been heard together by PARKER, J., that learned judge held (a) that Littlewood was entitled to judgment in the action against Wimpeys for £1,436 12s. damages with costs on the ground of the negligence of Wimpeys' servant; (b) that B.O.A.C. were entitled to judgment against Littlewood on the ground that his claim against them was barred by s. 21 (1) of the Limitation Act, 1939; (c) that Wimpeys were two-thirds to blame and B.O.A.C. one-third to blame for the collision which caused Littlewood's injuries; and (d) that in the third-party proceedings, B.O.A.C. were entitled to judgment against Wimpeys on the ground (which will be considered in more detail) that the latter's claim for contribution did not come within s. 6 (1) (c) of the Act of 1935. Wimpeys appealed from that part of the judgment which is stated under (d) above and their appeal was dismissed by the Court of Appeal (SINGLETON and MORRIS, L.JJ., dissentiente DENNING, L.J.).

At the hearing of the action and of the appeal two questions were raised on which there was no argument before your Lordships, the first as to the date on which Wimpeys' right to contribution arose, and the second as to the period of limitation in respect of a claim for contribution against a public authority under the Limitation Act, 1939. I am content to assume that the right to contribution arose, at any rate, not earlier than the date when the existence and amount of Wimpeys' liability to Littlewood was ascertained by judgment and that the relevant period of limitation was six years.

The third question remains, and it turns on the true construction of s. 6 (1) of the Act of 1935. That sub-section so far as relevant provides as follows:

"(1) Where damage is suffered by any person as a result of a tort (whether a crime or not) (a) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage . . . (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise . . ."

It may at once be observed on this sub-section that, whereas para. (a) relates to the rights of the injured person and substantially alters the law to his advantage, para. (c) relates to the rights of tortfeasors inter se and, to a greater or less degree according to the interpretation which is put on it, alters the law for the benefit of the tortfeasor who alone has been sued or against whom alone judgment has been recovered. How far Parliament has proceeded on this path depends on the language of the Act. If I find its meaning sufficiently clear, I do not think it right to depart from it on a speculation that it might have been wiser or more consistent to proceed further.

The question of construction, as I see it, is whether s. 6 (1) (c) can, according to its natural meaning, be so interpreted as to admit a claim for contribution by one tortfeasor against another when that other has been sued by the injured person and held not liable. I agree with PARKER, J., and SINGLETON and MORRIS, L.J., in thinking that it cannot. It appears to me that the first matter for consideration is what is the meaning of the word "liable" where it is secondly used in s. 6 (1) (c), and I think it is plain beyond argument that it means held liable in judgment. No other meaning can reasonably be attributed to it in the context "would if sued have been", for these words make a suit the condition of liability. I do not, therefore, think it necessary to discuss what the paragraph might mean, if, as has been suggested, the word "liable" bore some other significance, the precise legal content of which I do not find it easy to define, such as "responsible at law". If the word "liable", where secondly used in para. (c), bears the meaning which I have ascribed to it, I should be reluctant to give it any other meaning where it is first used in the same paragraph, nor do I think it unreasonable that the right of contribution between tortfeasors should be limited to the case where he who seeks contribution has himself been sued to judgment. In the view which I take it is immaterial whether the word, where first used, has the same meaning or another: if it were necessary for me to decide it, I should say it had the same meaning.

The question then can be simply stated. Contribution is recoverable from one who in an actual suit by the injured man had been held liable by judgment: it is recoverable from one who, if sued, would in that hypothetical suit have been held liable. Is it also recoverable from one who has been actually sued by the injured man and held not liable? It happens in the case under appeal that the reason why the party from whom contribution was claimed was held not liable was because the Limitation Act was successfully pleaded: but this is irrelevant to the issue. The same question would arise if the claimant tortfeasor alleged that the defence, though it succeeded on the merits, was successful only because the case had been inadequately presented, or even because the judge or jury had taken a wrong view of it. It appears to me that a construction leading to such a result should only be accepted if the language fairly admits of no other meaning. But, so far from this being the case, in my opinion the sub-section plainly contemplates two classes only of persons from whom contribution can be claimed, viz., those who have been sued and those who have not been sued but would, if sued, be held liable. If the intention had been to include a third class of persons who, having been already sued and found not liable, might yet in hypothetical proceedings be sued a second time and then found liable (an extravagant intention, as it appears to me, to impute to the legislature) I should have expected to find it expressed in clear and appropriate language. Not only is it not so expressed, but, on the contrary, I find in the words actually used the clear indication that the class of persons who "if sued would have been liable" does not include persons who, having been sued, have been held not liable. As MORRIS, L.J., aptly put it ([1953] 2 All E.R. at p. 926) the words "if sued" postulate the case of someone who has not been sued.

For these reasons, I am in favour of dismissing this appeal and I do not find it necessary to discuss a question of great difficulty, viz., at what date is the

hypothetical suit, in which the "other tortfeasor . . . would if sued have been liable", to be presumed to have been commenced, and I will say no more than that, having read and considered the opinion of my noble and learned friend, LORD REID, I should on this part of the case accept his conclusion, though I find myself reluctantly differing from him on the first and vital question.

LORD PORTER : My Lords, the salient facts in this case are contained in the shortest possible compass. The plaintiff, John Littlewood, was injured on July 28, 1949, in a collision between a vehicle owned by George Wimpey & Co., Ltd. (the appellants, hereinafter referred to as "Wimpeys"), and driven by one of their servants, and another vehicle owned by the British Overseas Airways Corporation (the respondents, hereinafter referred to as "B.O.A.C.") and driven by one of their servants. Littlewood was himself employed by B.O.A.C. On Apr. 26, 1951, more than a year after the accident in question, Littlewood issued a writ against Wimpeys for damages for negligence. Wimpeys delivered their defence on June 20, 1951, denying negligence and alleging that the accident was caused by the negligence of the servants of B.O.A.C., and, on July 6, issued a third-party notice addressed to B.O.A.C. claiming indemnity or contribution under the Law Reform (Married Women and Tortfeasors) Act, 1935. On Feb. 4, 1952, Littlewood obtained leave to add B.O.A.C. as defendants, and on Feb. 12 delivered an amended statement of claim alleging negligence and breach of statutory duty under s. 26 of the Factories Act, 1937, on their part. As defendants, B.O.A.C. denied negligence and breach of statutory duty, and in answer to the third-party notice denied negligence. To both claims they pleaded that the claims were barred under s. 21 of the Limitation Act, 1939, by lapse of time.

The claim against both parties and the claim by Wimpeys for contribution were heard together, evidence as to the cause of the accident being given by all the parties. PARKER, J., who tried the case, gave judgment in both matters and the result is, I think, accurately set out in para. 9 of the appellants' case in the following words:

" 9. (A) That Littlewood was entitled to judgment in the action against Wimpeys for £1,436 12s. damages with costs on the ground that Wimpeys' servant had been negligent in the driving of their motor lorry; (B) That B.O.A.C. were entitled to judgment against Littlewood in the action on the ground that his claim against them was barred by s. 21 of the Limitation Act, 1939; (C) That Wimpeys were two-thirds to blame, and B.O.A.C. were one-third to blame, for the collision which caused Littlewood's injuries; (D) That in the third-party proceedings B.O.A.C. were entitled to judgment against Wimpeys on the ground that Wimpeys' claim to contribution failed because B.O.A.C. had in fact been sued by Littlewood and held not to be liable to him because of s. 21 of the Limitation Act, 1939."

At that time the period of limitation for an action against a public authority was one year and, once it had been (as it was) held that B.O.A.C. were a public authority, Littlewood's claim against them was bound to fail. The only questions which remained and remain for your Lordships' consideration are (i) whether Littlewood's failure to sue B.O.A.C. within one year precluded Wimpeys from claiming contribution against them, and (ii) whatever be the result of that failure, whether the subsequent joinder of B.O.A.C. and the dismissal of Littlewood's action against them prevented Wimpeys from recovering in their claim to contribution.

The answer to these questions depends on the true construction of s. 6 (1) (a) and (c) of the Act of 1935. It is in the following terms:

" (1) Where damage is suffered by any person as a result of a tort (whether a crime or not) (a) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any

other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage . . . (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought."

Before I analyse the meaning of these provisions I think, in order to make my conclusion plain, it is desirable to set out the position of tortfeasors before the Act was passed and the mischief which the Act was designed to remedy. The position as regards joint tortfeasors was that the person against whom the tort was committed could sue all or any one or more of them, but, subject to certain exceptions not material to the present case, if he obtained a judgment against one only or against any number less than the whole, his remedy against others than that one, or others than that number, was thereafter barred. It did not matter that that one was, or that that number were, unable to answer for the damage sustained, the plaintiff had no further remedy. Section 6 (1) (a) of the Act of 1935 was enacted in order to alter this result. Henceforward, the fact that the injured party had recovered judgment against one or more would not prevent his suing and obtaining judgment against the rest. In this collocation, the first use of the word "liable" must mean held liable in an action because, unless there is an action, judgment cannot be recovered: the second "liable" preceded by the words "would, if sued, have been" might well be replaced by the words "any other guilty party," but is by implication limited to one who has not been sued. In such a case, no question arises as to the time at which the tortfeasor would have been liable if sued: the injured party's rights against him would be barred as soon as the period of limitation had elapsed and that period would run from the date of the tort since his cause of action arose at that moment. After the Act had been passed, therefore, the only question would be: Has he brought the second action within the period of limitation during which he could sue the second joint tortfeasor, and this period would not be affected by his having already sued or recovered judgment against the first. The relief given under s. 6 (1) (a) is on behalf of the injured party and has no bearing on the rights of the wrong-doers *inter se*.

Section 6 (1) (c) dealt with this latter problem. Before the passing of the Act it was left to the claimant to choose his victim. The person sued, whether he was a joint or a separate tortfeasor, if he was implicated as being partly responsible for the accident, had to abide by that choice. The person damaged might sue one joint tortfeasor alone and so lay the whole burden of the wrong-doing on him, or, in the case of separate tortfeasors, might sue them one by one and recover from one alone and from such as he chose to execute judgment against, provided that he did not recover more than the greatest sum awarded or, against any defendant, more than was awarded in the action against him. The object of the Act was to cure this evil and to enable those on whom the burden had been placed to recover a just proportion from those who shared the blame. No question arises in the present case as to what those proportions are; they have been settled by the learned judge who tried the case. Unless some defence such as a statute of limitations was of avail to either of the parties, judgment, as has been said, could be obtained against each tortfeasor for the sum awarded against him, and the plaintiff could then recover from each the whole sum awarded against him or such lesser sum as he chose to exact, provided that he did not recover in all more than the largest sum awarded.

In the present case, it is unnecessary to deal with such complexities as arise where each may have paid part and the correct liability of each to the other is in question. The present is a simple case where one has paid the whole and seeks

to recover from the other the proportion which the judge has decided represents his share of the blame. The quantum having been determined, the only question is, can the party against whom judgment has been given recover contribution from the other who was in part the cause of the injury? The answer depends wholly on the true construction of s. 6 (1) (c) of the Act. I cannot myself gain much assistance from the terms of s. 6 (1) (a). As I have indicated, it deals with an entirely different problem. It is not the first but the second portion of s. 6 (1) (c) which gives rise to the difficulty. The learned judge and the Court of Appeal, if I understand them rightly, accepted the view that, if B.O.A.C. had not been joined as defendants and held not liable as such, a right to contribution would have subsisted in Wimpeys.

BIRKETT, J., in *Merlihan v. A. C. Pope, Ltd. (Pagnello, Third Party)* (1), took, as I understand him, a different view. In his opinion, when s. 21 (1) of the Limitation Act, 1939, enacts that:

"No action shall be brought against any person for any act done in pursuance . . . of any public duty . . . or in respect of any neglect or default in the execution of any such . . . duty . . . unless it is commenced before the expiration of one year from the date on which the cause of action accrued "

the date to be considered both in the case of an action by the injured party and in the case of a claim by one of a pair of tortfeasors against the other for contribution is the date of the original tort and, therefore, if the party claiming contribution brings his claim after the time prescribed for limitation in the particular case, he fails, and fails none the less though he himself was not sued until after the time at which he could have brought an action against his co-tortfeasor because the limitation of time for bringing an action against that other was less than the limit of time afforded for suing him.

CASSELS, J., in *Hordern-Richmond, Ltd. v. Duncan* (2), disagreed with this view, as did DONOVAN, J., in *Morgan v. Ashmore, Benson, Pease & Co., Ltd.* (3). PARKER, J., and all the members of the Court of Appeal in the present case appear to agree in this dissent. Substantially, their view was that Wimpeys were under no liability until judgment was given against them, that their cause of action arose then and not until then, and, accordingly, their cause of action against B.O.A.C. arose at that date. I need not, I think, set out the authorities and reasoning on which these opinions are founded except to refer to such cases as *Wolmershausen v. Gullick* (4), and *Robinson v. Harkin* (5), both of which were claims to contribution between co-sureties and *McGillirray v. Hope* (6), which was a claim involving the right of present and former employers to contribution inter se in respect of damages awarded to a workman employed by them consecutively.

If this view be true, Wimpeys' liability did not come into existence until judgment had been given against them and, therefore, they had whatever was the appropriate period of limitation from that date. What that appropriate period may be—whether it is a year because B.O.A.C. is a public authority and the action is brought in respect of any act, neglect or default, or whether it is six years, because the claim is not in respect of any act, neglect or default but for contribution, is immaterial in the present case, inasmuch as Wimpeys made their claim to contribution in the original action before judgment was given.

The learned judge, however, and two members of the Court of Appeal decided against Wimpeys on another ground. They interpreted s. 6 (1) (c) of the Act of 1935 as dividing the persons concerned into two classes, those who had been sued and those who had not. B.O.A.C. were in the first class as they had been sued and escaped liability; they, therefore, could not be included in the second class because the words "if sued" excluded them from inclusion in it. The natural construction of s. 6 (1) (c), it was contended, was that it permitted contribution to be exacted from those who had been successfully sued in respect

of the same tort or from those who had not been sued, but not from those who had been sued unsuccessfully. These last had been sued and held not liable; therefore, they were not persons who would have been liable if sued. There was no "would have" about it; their non-liability had been established. As I have indicated, some support for this view may be obtained if the provisions of s. 6 (1) (a) are to be read as parallel to those of s. 6 (1) (c). Speaking for myself, they seem to me to deal with two essentially different matters. In para. (a) there is only one person to sue and the person liable can only be sued, or not sued, as the case may be, by the person injured. In para. (c), it has been held that those *who have not been sued*, but who if sued would have been liable, alone were included. For myself, I see no reason for adding the words in italics, nor, on the other hand, would I bolster up Wimpeys' case by adding or implying "if sued in time". To me, the wording naturally refers to persons who were implicated in the tort. B.O.A.C. were implicated and, therefore, would have been liable if sued. Any additional words are, I think, unnecessary, but if I had to make any implication it would be to add the words "as a result of the commission of the tort" to the words "would have been liable if sued".

I prefer to interpret s. 6 (1) (c) as it stands. It stipulates nothing as to time, but, to my mind, B.O.A.C. in terms come within the category of those who would have been liable if sued, and, unless some qualification is placed on those words, Wimpeys can recover the contribution they ask. In my view, the two types of person referred to are simply those who have been sued or those who would have been liable, if sued, and I see no reason for making the classes mutually exclusive. I think that I should qualify this opinion in one respect. If contribution is to be obtained, the tortfeasor who has not been sued and never could be sued by the plaintiff is not liable to contribute to the party held liable, e.g., the husband sues some wrong-doer in respect of a wrong for which his wife was partly responsible. In that case no contribution is recoverable because the wife would never, if sued, be liable.

I have reached my opinion as to the true construction of s. 6 (1) (c) of the Act on its wording alone without adding to or subtracting from its phraseology, but if there is thought to be any ambiguity, then, in my view, that ambiguity should be resolved in favour of Wimpeys. I have set out what I believe to be the object of the section. The anomalies of the construction adopted below are fully recognised by the learned judge. Its result is, in certain cases, to do away with the relief given. Before 1935 the injured party could, at his option, choose the party whom he wished to make liable and that party could obtain no redress from those implicated in the wrong. Under the construction adopted by the learned judge and the Court of Appeal in this case, he can still do so, though it may take a little more ingenuity than once it did.

Nor am I moved by the suggestion that to allow the appeal would expose a public authority to the danger of being sued at least seven years after the event, i.e., six years before the action was brought and another one year until the Limitation Act had run in their favour, or by the fact that, unless the view of BIRKETT J., in *Merlihan v. Pope* (1) be adopted, an ordinary tortfeasor whose limitation is six years may have to wait twelve, viz., six whilst his companion in fault is sued and six more until that companion, having had judgment given against him, brings his claim for contribution. In fact, so long a period is unlikely to elapse in either case. The party sued, whether his co-tortfeasor is sued at the same time or not, is likely, as soon as he can and, indeed, as in this case he did, as soon as he was sued, to bring in the other party alleged to be in fault by third-party proceedings. Similar considerations, in my opinion, apply to the objection urged on behalf of B.O.A.C. that to allow an action by a tortfeasor against a co-tortfeasor for contribution after the latter had for any reason of fact or law been held not liable to the injured party would be an unexpected and undesirable result. I should feel the force of this argument more acutely

if it were not a necessary result in some cases of the law as it stands. Two injured persons may sue separately and in different courts in respect of the same accidents and on identical facts. Yet one court may come to one conclusion and the second to another, a circumstance which has, indeed, occurred within my own experience. But here, again, such an incident is unlikely to happen and the more unlikely in a case where there are two tortfeasors who may well both be liable and require contribution the one from the other. In such a case a third-party notice will almost certainly be given at once and it is only in an exceptional case such as the present, where limitation of time is a factor in the decision, that any difficulty would arise. In such circumstances as the present, one party or the other must be at a disadvantage and, having regard to the language used and the mischief desired to be cured, both in construction alone and in case of ambiguity, I would allow the appeal.

LORD REID: My Lords, the essential facts of this case can be shortly stated. A workman, Littlewood, suffered personal injuries on July 28, 1949. He did not raise any action until Apr. 26, 1951, when he sued the appellants. The appellants denied negligence, alleged negligence against the respondents and served a third-party notice on the respondents claiming contribution under s. 6 (1) (c) of the Law Reform (Married Women and Tortfeasors) Act, 1935. Littlewood then added the respondents as defendants. The respondents defended the case on the merits and also relied on s. 21 of the Limitation Act, 1939. PARKER, J., awarded damages against the appellants, held that the respondents were entitled to rely on s. 21 of the Act of 1939, and further held that, as the respondents had been successful against Littlewood, the appellants had no right under s. 6 of the Act of 1935 to claim contribution from them. But he stated that if he were wrong in so deciding he would apportion the blame two-thirds to the appellants and one-third to the respondents.

The sole question in this appeal is whether the appellants, having paid the damages awarded to Littlewood and having in their favour a finding that the respondents were one-third to blame for the accident to him, are or are not entitled under s. 6 (1) (c) of the Act of 1935 to claim contribution from the respondents. I think it necessary first to consider the proper interpretation of s. 6 (1) of the Act without reference to the facts of this particular case. It is possible to find a construction of this sub-section which would lead to a decision of the present case but which, in my opinion, would not be applicable to other cases to which the sub-section must be applied. Such a construction is, in my judgment, to be avoided, and it is necessary to find a construction which is generally applicable.

Section 6 (1) (c) appears to be intended to be generally applicable to cases in which one tortfeasor seeks to recover contribution

“from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage.”

I agree with your Lordships that the word “liable” in this context must necessarily mean held liable by judgment, and, so reading the word, s. 6 (1) (c) in my judgment first requires an answer to the question whether that other tortfeasor has already been held liable in respect of that damage. If he has, and if the other conditions of the section are satisfied, then the Act gives a right to contribution. But if he has not, a second question must be asked: Would that other tortfeasor, if sued, have been held liable in respect of that damage? I do not think that it is disputed that this must mean if sued by the person who suffered the damage. But still there are many cases where that question, as it stands, cannot be answered yes or no. A person may be held liable if sued at one time but not if sued at another time: for example, a person who would have been held liable if sued at an earlier date may at a later date have a good defence under the Limitation Act or because he has had his liability discharged

by the grant to him of a release. If s. 6 (1) (c) is to be capable of application to such cases the words "if sued" must have a temporal connotation. The words "would . . . have been liable" show that the hypothetical action must be supposed to have been brought at some time between the date when the damage was suffered and the date when the claim for contribution is determined, but, as I have said, that is often not sufficiently definite to enable the question to be answered. No matter what may be the true construction of the rest of the sub-section, this difficulty remains, and if s. 6 (1) (c) is to be operative generally something beyond the bare words of the enactment must at this point be read into it. There are at least four possibilities. The meaning may be "would if sued immediately after the damage was suffered have been held liable," or it may be "if sued when the tortfeasor claiming contribution was sued," or it may be "if sued when the claim for contribution was made," or it may be enough that there was at least some time between these dates when the action would have succeeded.

I can illustrate the practical difference between these interpretations by taking the facts of the present case but supposing that Littlewood had never added the respondents, B.O.A.C., as defendants. If it had been realised that B.O.A.C. were protected by s. 21 (1) of the Limitation Act, 1939, they never would have been added as defendants. The action by Littlewood against the appellants, Wimpeys, and Wimpeys' claim against B.O.A.C. for contribution would have been tried together and, as B.O.A.C. had never been sued by Littlewood, it would, on any interpretation of s. 6 (1) (c) of the Act of 1935, have been necessary to ask the question, would B.O.A.C. if sued by Littlewood have been held liable to Littlewood, and it would have been impossible to answer that question in that form. If B.O.A.C. had been sued by Littlewood before July 28, 1950, they would have been held liable, but if sued after that date they would have been held not liable. The Act of 1935 must, if possible, be construed so as to make it applicable to that case and it can only be made to apply by holding that in their context the words "if sued" mean if sued at some particular date or during some particular period.

Let me assume for the moment that the first of the four possible meanings which I have mentioned is held on a construction of the sub-section as a whole to be the true meaning. The question then would be: Would B.O.A.C. if sued by Littlewood immediately after the accident have been held liable to him? The answer would be, Yes, and Wimpeys would be entitled to contribution. Now let me take the facts of the present case. B.O.A.C. were sued by Littlewood, but not until a defence under the Limitation Act was available to them, and they were held not liable. So the first question—Have they been held liable?—must still be answered no. The second question must then be asked, and it must still be the same as before—Would B.O.A.C. if sued immediately after the accident have been held liable?—and the answer must still be yes. "If sued" must still have the same meaning: its meaning depends on the construction of the sub-section and cannot alter with the facts of the particular case. The argument against this view is, as I understand it, that the words "would if sued have been liable" imply that that tortfeasor has not, in fact, been sued at any time. I would agree if the words "if sued" did not refer to any particular time. But if they must be construed as referring to a particular time, then, in my view, all that can be implied from them is that that tortfeasor was not, in fact, sued at that time. If the time to which "if sued" refers were immediately after the accident, then the fact that B.O.A.C. were sued unsuccessfully at the wrong time would not alter the fact that, if sued at the right time, they would have been held liable.

If, however, the true meaning of "if sued" is if sued at the time when the tortfeasor claiming contribution was being sued, then Wimpeys, the appellants in this case, must fail and they must equally have failed if Littlewood had never

sued B.O.A.C. at all. In neither case could there be an affirmative answer to either of the questions posed by s. 6 (1) (c), because on that construction the second question would be: Would B.O.A.C. if sued when Wimpeys were sued have been held liable?

It is, therefore, in my judgment, necessary for the decision of this case to determine as a matter of construction to what period the words "if sued" refer, and that can only be determined by considering the sub-section as a whole. I begin by considering the terms of s. 6 (1) (a). It is true that this only deals with joint tortfeasors and, therefore, has no application to the present case, but it may be important because in structure and phraseology it closely resembles sub-s. (1) (c). It provides:

"(1) Where damage is suffered by any person as a result of a tort (whether a crime or not)—(a) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage;"

Before 1935, if judgment was recovered against one joint tortfeasor that judgment was a bar to any action against another joint tortfeasor even although no sum had been or could be recovered under that judgment. This provision removes that bar.

There are two points in sub-s. (1) (a) which should, I think, be noted. In the first place the word "liable" occurs twice, and in each case it is clear that it must mean held liable. And, secondly, in the phrase "who would, if sued, have been liable as a joint tortfeasor", it appears to me that "if sued" most probably means if he had been sued together with the tortfeasor first mentioned, because a person cannot properly be said to be held liable "as a joint tortfeasor" if he is sued alone. If that is right, not only must the words "if sued" here have a temporal connotation, but they must refer to the time when the other tortfeasor was sued. But that conclusion depends on an assumption that the language of the provision is used accurately, and looking to the defective drafting of other parts of the sub-section it would, I think, be unsafe to rely on any inference from the form of drafting of sub-s. (1) (a). With regard to sub-s. (1) (b), I need only observe that the word "liable" is there used in a context where it cannot possibly mean held liable. The context is

"if more than one action is brought . . . against tortfeasors liable in respect of the damage",

and "liable" there can only mean against whom there is a cause of action. So on any construction of the sub-section the word "liable" must be held to have quite different meanings in different places in the sub-section. I am not prepared in this case to base my decision on any inference from similarities of expression in either sub-s. (1) (a) or sub-s. (1) (b).

Next I would consider the mischief against which sub-s. (1) (c) is directed. Before 1935, if separate torts by two different tortfeasors contributed to cause the same damage, the plaintiff could, and, I think, commonly did, sue and get judgment against both tortfeasors in the same action. He could then proceed to recover the damages from whichever one he chose and the tortfeasor who had been made to pay had no right to require the other to contribute. Plainly that was thought by Parliament to be unjust and that case is undoubtedly covered by the first alternative in sub-s. (1) (c)—

"any tortfeasor liable . . . may recover contribution from any other tortfeasor who is . . . liable in respect of the same damage . . ."

But a plaintiff might, and sometimes did, choose to sue only one when he might have sued and succeeded against both, and the second alternative—

"any tortfeasor liable . . . may recover contribution from any other

tortfeasor who . . . would if sued have been, liable in respect of the same damage . . . ”

is, I think, designed to cover that case. The second tortfeasor is put in no worse position than he would have been in if the plaintiff had taken the ordinary course of suing both.

But in cases like the present the position is very different. By virtue of statutory protection, when a year had elapsed without the plaintiff, Littlewood, raising any action, the respondents, B.O.A.C., had a complete defence against him and, before 1935, would have been free of all liability. If the appellants' argument is right, in effect Parliament in 1935 partially withdrew that statutory protection and B.O.A.C., although not sued within the year, would now be liable to make a payment in respect of the damage caused by their negligence. It is true that they are not liable to the plaintiff directly, but Wimpeys, the appellants, could only recover from B.O.A.C. because the negligence of B.O.A.C. caused damage to Littlewood. If it had been intended to modify in this way the statutory protection afforded by an earlier Act, I would have expected at least some indication of such an intention in s. 6. But I can find none. The words of sub-s. (1) (c) are amply satisfied if “if sued” is held to mean if sued at the time when action was being taken against the other tortfeasor. I have said that for other reasons “if sued” must have a temporal connotation, and, if that be so, then it seems to me that, if one merely looks at the context, that is, at least, as likely a connotation as any other.

Counsel for the appellants first argued that “if sued” should be held to mean “if sued immediately after the accident,” but ultimately, and I think wisely, preferred the meaning “if sued at some time or if sued at the time most favourable to the plaintiff”. That argument can be supported on two grounds. If one looks at the matter from the point of view of the tortfeasor claiming contribution, it can be said that, if the statute prevents him from being prejudiced by the whim of the plaintiff in choosing to make him pay when both have been held liable or in choosing to sue him alone when both could have been sued successfully, then it would be reasonable that it should also prevent him from being prejudiced by the plaintiff choosing to delay bringing his action until a time when the other tortfeasor has a statutory defence. The second argument in favour of the appellants' contention arises in this way: a tortfeasor, instead of waiting to be sued, may admit liability and pay damages, and it is said that the statute should be so construed as to entitle him to the same contribution from a second tortfeasor as he would have been entitled to if the plaintiff had sued him and obtained judgment. If that is right, then the words “if sued” cannot mean if sued together with the first tortfeasor and, it is said, must, therefore, have the meaning for which the appellants contend. But sub-s. (1) (c) could mean that a tortfeasor can recover contribution from another tortfeasor if the latter would, if sued by the plaintiff at the time when the former tortfeasor claims contribution, have been held liable; and that would avoid this difficulty. It is not necessary in the present case to decide whether this or “if sued when the tortfeasor claiming contribution was sued” is the true meaning. On either meaning this appeal would fail and this question may arise for decision in some future case.

I think that there is much force in the appellants' arguments and without the aid of more general considerations I would find the case narrow and difficult. But, viewing the case as a whole, there is one matter which confirms me in my opinion. I think that it is clear that the draftsman of s. 6 failed to notice that cases like the present might occur and failed to make any express provision for them. This is, therefore, an example of the not uncommon situation where language not calculated to deal with an unforeseen case must, nevertheless, be so interpreted as to apply to it. In such cases it is, I think, right to hold that, if the arguments are fairly evenly balanced, that interpretation should be chosen which involves

the least alteration of the existing law. If the appellants are right, the effect of s. 21 of the Limitation Act, 1939, would be considerably modified but that is not so if the respondents are right. I am, accordingly, of opinion that the appeal should be dismissed.

LORD TUCKER: My Lords, this appeal raises a short point of construction. The words which fall to be construed are contained in s. 6 (1) of the Law Reform (Married Women and Tortfeasors) Act, 1935, and so far as material are as follows:

"Where damage is suffered by any person as a result of a tort . . . (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise . . ."

The appellants (hereinafter referred to as "Wimpeys") are tortfeasors who have been held liable in damages in an action at the suit of one Littlewood claiming damages for personal injuries, in which action the respondents (hereinafter referred to as "B.O.A.C."), though not originally sued, had at a later stage been added as defendants. There was also a claim for contribution or indemnity by means of third-party proceedings by Wimpeys against B.O.A.C. The plaintiff's claim against B.O.A.C. was defeated by a plea of s. 21 of the Limitation Act, 1939, by which the Public Authorities Protection Act, 1893, had been amended. Wimpeys' claim to contribution was held by the trial judge (PARKER, J.) necessarily to fail by reason of the judgment in favour of B.O.A.C. His decision was upheld by the Court of Appeal (DENNING, L.J., dissenting).

My Lords, I understand that all your Lordships agree with the trial judge and the majority of the Court of Appeal that the word "liable", where it appears for the second time in para. (c) of sub-s. (1) must, owing to the presence of the words "would if sued have been", mean "held liable". I agree, and, accordingly, pass to consider the construction of the sub-section on this basis. The construction which has prevailed below is that para. (c) draws a distinction between persons who have been sued and those who have not been sued. Contribution may be recovered against the former if they have been held liable in the suit, and against the latter if they would have been held liable had they been sued. There are two separate and exclusive categories. If an alleged tortfeasor comes into the first category, his liability to make contribution will be conclusively determined by the result of the suit. If he is in the first category it is immaterial to speculate what his fate would or might have been if he had fallen in the second category.

For Wimpeys, the appellants, it was contended by leading counsel that such an interpretation necessitated the addition of the words "is sued and held liable or who has not been sued but would if he had been sued have been held liable", whereas the language of the second part of s. 6 (1) (c) without the addition of any words was apt to include persons who had, in fact, been sued and held not liable, but who would, if sued at some other time, or in another action on different evidence, now shown to have been available, have been held liable. The judgment in favour of the alleged tortfeasor against whom contribution is claimed (whom I will refer to for convenience as the "contributor") not being *res judicata* as against the person claiming contribution (whom I will call "the claimant") there is—it is said—no impediment in the way of the claimant bringing the contributor within the second limb of s. 6 (1) (c), notwithstanding that he cannot be brought within the first limb. My Lords, this seems to me to do violence to language which is tolerably plain—albeit inapt to cover a situation clearly never envisaged by those responsible for its enactment. It is to be remembered that this Act is giving to the claimant a new cause of action against the contributor which did not previously exist, and it would, in my view, require very clear language to lead to the conclusion that, in addition to the categories consisting of (i) those sued and held liable, and (ii) those not sued but who, if

sued, would have been held liable, there is to be added a third class consisting of those who have been sued and held not liable, but who may now be proved liable in further proceedings.

The construction which found favour with the trial judge and has been approved by the majority of the Court of Appeal appears to me—with due deference to those who take a different view—to give effect to the natural meaning of the sub-section read as a whole without requiring the addition of further words. The words “if sued” necessarily involve a contrast between those who have been sued and those who have not been sued and cannot, in my view, be read so as to include persons who have been sued.

Taking this view of the construction of the sub-section, I find it unnecessary to express any opinion whether the word “liable”, where it first appears in para. (c), is to be confined to those already “held liable” by judgment, or with regard to the date of the hypothetical action contemplated in the case of persons who have not been sued and fall in the second category. Nor is it necessary to consider the date at which the cause of action afforded by the Act of 1935 in favour of the claimant accrues against the contributor or the period of limitation applicable to such claims, but I am not to be taken as in any way dissenting from the views on these matters expressed in the Court of Appeal. My Lords, I would dismiss this appeal.

LORD KEITH OF AVONHOLM : My Lords, the events and dates material to this appeal can be briefly stated. A workman named Littlewood employed by the respondents was injured as a result of a collision between a vehicle on which he was being conveyed, belonging to the respondents and driven by one of their servants, and another vehicle, belonging to the appellants and driven by one of their servants. This happened on July 28, 1949. Littlewood brought an action for damages for negligence against the appellants on Apr. 26, 1951. The appellants denied negligence, alleged negligence against the respondents and, on July 6, 1951, issued a third-party notice to the respondents claiming contribution or indemnity, in respect of Littlewood's claim against them, under the Law Reform (Married Women and Tortfeasors) Act, 1935. On Feb. 4, 1952, Littlewood joined the respondents as co-defendants in his action for damages. On Jan. 29, 1953, PARKER, J., gave judgment against the appellants for £1,436 12s., held that the respondents could claim the benefit of s. 21 of the Limitation Act, 1939, against Littlewood, and gave judgment for them against him, and in the third-party proceedings gave judgment for the respondents against the appellants. PARKER, J., added that, if he was wrong in rejecting the appellants' claim for contribution from the respondents, he would apportion the blame two-thirds to the appellants and one-third to the respondents. This appeal is concerned only with the judgment in the third-party proceedings. The appellants appealed against that part of the judgment that concerned the third-party proceedings, seeking to recover from the respondents a third part of the damages and costs awarded against them in Littlewood's action. The Court of Appeal has affirmed the judgment of PARKER, J., and dismissed the appeal.

Your Lordships are not now concerned with a question which was considered in the courts below, namely, when the cause of action in the claim for contribution accrued. It is conceded, in conformity with the view taken by the Court of Appeal, that the cause of action accrued at earliest at the date when judgment was given in favour of Littlewood against the appellants. As third-party proceedings were already in being at that time, no plea under the Limitation Act, 1939, could be available to the respondents against the appellants.

That leaves for consideration the question whether the judgment for the respondents in Littlewood's action is a conclusive answer to the appellants' claim for contribution. The answer depends on what is the proper construction to be put on s. 6 (1) (c) of the Law Reform (Married Women and Tortfeasors) Act, 1935. Agreeing on this point with my noble and learned friend, LORD REID,

I find myself unable to approach this matter in the way in which it was dealt with by the Court of Appeal. The material words are:

" 6 (1) Where damage is suffered by any person as a result of a tort (whether a crime or not) . . . (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise . . . "

The appellants are clearly tortfeasors liable in respect of the damage suffered by Littlewood. The respondents have been held not liable. But that does not, in my opinion, conclude the matter. They have been held not liable on the technical plea that the action so far as directed against them was out of time. The learned judge who tried the action was of the view that, on the merits of the action, they were blameworthy to the extent of one-third. The argument that commended itself to the majority of the Court of Appeal is that the words " would if sued have been liable " do not apply to the respondents because they have been sued and found not liable; and the words " who is liable " are equally inapplicable because they have been found not liable. But that is not the true issue. The question is to what point of time do the words " would if sued " refer? If Littlewood's suit had commenced six months after the accident a different judgment would have been given from that which was given in the suit which began two years six months after the accident. The contention for the appellants is that, if there was some point of time at which the respondents could have been sued and found liable, the words of the statute are satisfied. If the appellants are right, it is no answer to say that the respondents were sued at some other point of time at which they could not be held liable. That fact is quite irrelevant. The point would be obvious if the Act had said " would if sued when the cause of action arose ". As the words must have the same meaning in all circumstances, it is necessary, in my opinion, to arrive at some conclusion as to what period of time the legislature had in view.

In this matter some assistance is to be got, in my opinion, from other parts of s. 6 of the Act. In sub-s. (1) (a) the same words are used:

" judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who *would, if sued, have been liable* as a joint tortfeasor *in respect of the same damage.* "

The language is curious. It contemplates the possibility of an action by an injured party against a person liable as a joint tortfeasor and at the same time regards him as having been sued by the injured party in a hypothetical action in the past. But the purpose of the provision is clear. It is to get rid of the rule settled since *Brinsmead v. Harrison* (7). There BLACKBURN, J., said (L.R. 7 C.P. at p. 553):

" Is it for the general interest that, having once established and made certain his right by having obtained a judgment against one of several joint wrong-doers, a plaintiff should be allowed to bring a multiplicity of actions in respect of the same wrong? I apprehend it is not; and that, having established his right against one, the recovery in that action is a bar to any further proceedings against the others. "

Having this passage and the provision of the statute in view, it seems to me clear that the hypothetical action envisaged by the statute is an action that could be competently raised against one joint tortfeasor if there was no bar in the shape of a judgment recovered against another joint tortfeasor. This hypothetical action does not appear to me to be tied to any point of time other than that when the cause of action arose. I see no reason why it should be tied to the date of the commencement of the action against the tortfeasor first sued. If there are any limitation pleas or other pleas in bar which can be stated by the second tortfeasor they will be available to him in the action actually

raised, and no purpose would be served by considering them with reference to the hypothetical action. This hypothetical action, in my opinion, must be regarded in isolation as if it were the only action raised by the injured party. The reference to joint tortfeasors in the sub-section indicates the kind of tort with which the sub-section is concerned and not the kind of decree that might be obtained if both tortfeasors were sued jointly in one action. Sub-section (1) (b) itself speaks of separate actions against persons liable as joint tortfeasors, and in sub-s. (1) (a) I see no necessity to read similar words as referring to a hypothetical action in which one joint tortfeasor is sued along with another joint tortfeasor in the same action. The words "if sued" need not, therefore, be read as meaning if sued at the date of the action in which judgment was recovered against the other tortfeasor.

The position is clearer when sub-s. (1) (c) is considered. This provision is not limited to joint tortfeasors. It expressly covers liability "as a joint tortfeasor or otherwise". It was always open to an injured party to sue tortfeasors who were not joint tortfeasors in separate actions so long as judgment against one of the tortfeasors was not satisfied. Accordingly, in my opinion, there is no reason for holding that, in sub-s. (1) (c), the words "would if sued" mean if sued at the same time or in the same action as the tortfeasor seeking contribution was sued.

This view is, in my opinion, supported by another consideration. The word "liable" appears twice in sub-s. (1) (a), once in sub-s. (1) (b), and twice in sub-s. (1) (c). The word "liability" also appears in sub-s. (1) (c) and sub-s. (2). It is clear that "liable" does not mean the same thing in all these instances. Where used second in sub-s. (1) (a) and sub-s. (1) (c) it clearly means "found liable". In sub-s. (1) (b) it clearly cannot have that meaning. It means there no more than "liable in respect of the damage" as the Act says, or liable to have a decree entered against him if sued to judgment. Where, at the beginning of sub-s. (1) (c), there are found the precise words used in sub-s. (1) (b) "tortfeasor liable in respect of that damage", I am unable to give the words a different meaning from what they have in sub-s. (1) (b). I reach the result that "liable" where first found in sub-s. (1) (c) does not mean "found liable". If so, the words "would if sued have been liable" cannot be read as "would if sued have been found liable in the same action in which the tortfeasor seeking contribution was found liable." The date to be attached to the words "if sued" is thus thrown completely loose and, in my opinion, the words should be referred to a time at which the words will be given efficacy in all cases, a time at which the question of liability for the damage can be sole issue to the exclusion of all special defences. I would only add that the word "liability" where found in the section seems to me to strengthen the view which I take of the meaning of "liable" at the outset of sub-s. (1) (c), as do also the reasons given by DENNING, L.J., in the Court of Appeal.

As it is conceded that the cause of action in an action for contribution does not arise earlier in this case than the date when judgment was given against the appellants, it follows that the action for contribution from the respondents is in time. It may seem a strange result that the action by the injured man against the respondents failed for being out of time and that the action for contribution against them is in time. But no question of policy in this matter can, in my opinion, be appealed to as an aid to arriving at the proper construction of the statute. The apparent anomaly results from the cause of action in the two cases being ascribed to a different point of time. It is to be observed, further, that the construction of the statute contended for by the respondents would put it in the power of the injured party, whether by accident or design, to determine in many cases whether contribution could be got or not. I would allow the appeal.

Appeal dismissed.

Solicitors: *Stanley & Co.* (for the appellants); *J. H. Milner & Son* (for the respondents).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

JONES BROTHERS (HUNSTANTON), LTD. v. STEVENS.

[COURT OF APPEAL (Lord Goddard, C.J., Hodson and Romer, L.JJ.), November 8, 9, 19, 1954.]

Master and Servant—Loss of service—Harbouring of servant—Servant's departure in breach of contract—Employment by new master after notice of breach—Liability of new master—Need to prove damage.

Without giving notice to determine his employment, a servant at the plaintiffs' fried fish bar, employed on a weekly basis at a wage of £8 10s. a week, applied to the defendant for the post of assistant chef at his hotel at a wage of £7 a week. He was engaged subject to permission being given by the labour exchange under the Notification of Vacancies Order, 1952, and on procuring this he started work at the defendant's hotel. On the same evening a director of the plaintiffs, having learnt what had happened, protested to the defendant in person and by letter, but the defendant, acting in the bona fide belief that the permission of the labour exchange left him free to employ the servant, retained him in his employment.

HELD: (i) maliciously harbouring a former servant, who has left another master's employment in breach of his contract of service, by employing or continuing to employ the servant after notice of the breach of his contract of service, is not actionable without proof of damage to the former master flowing from the new employment as distinct from the breach of the contract of service; *Marys's Case* (1612) (9 Co. Rep. 111b), and *Bird v. Randall* (1762) (3 Burr. 1345), applied.

(ii) in relation to the tort of maliciously harbouring a servant, "maliciously" means knowingly; *Lumley v. Gye* (1853) (2 E. & B. 216), *Bromage v. Prosser* (1825) (4 B. & C. 247), followed; *British Industrial Plastics, Ltd. v. Ferguson* ([1940] 1 All E.R. 479), distinguished.

(iii) on the facts, the plaintiffs had suffered no damage because their former servant would not have returned to them even if he had not been taken into the defendant's employment, and, accordingly, the plaintiffs had no cause of action against the defendant.

Blake v. Lanyon (1795) (6 Term. Rep. 221), explained and distinguished. Appeal dismissed, but on different grounds.

EDITORIAL NOTE. An action lies not only for knowingly enticing a servant away from subsisting employment with a master, but also for knowingly harbouring a servant, that is to say, employing him or continuing to employ him knowing that he is under a subsisting obligation to work for a former master. The judgment in the present case is concerned only with this latter tort. Such an action is also to be distinguished from those where the employee's service is of a confidential nature, so that for another employer to employ him in his spare time on light duties may constitute the procuring of a breach of the contract of fidelity with his principal employer; see *Hirac, Ltd. v. Park Royal Scientific Instruments, Ltd.* ([1946] 1 All E.R. 350).

AS TO THE ACTION FOR HARBOURING A SERVANT, see 22 HALSBURY'S LAWS (2nd Edn.) 246, para. 426; and FOR CASES, see 34 DIGEST 169, 170, 1323-1332.

Cases referred to:

- (1) *Blake v. Lanyon*, (1795), 6 Term. Rep. 221; 101 E.R. 521; 34 Digest 170, 1331.
- (2) *De Francesco v. Barnum*, (1890), 63 L.T. 514; 34 Digest 170, 1332.
- (3) *Wilkins (Fred) & Brothers, Ltd. v. Weaver*, [1915] 2 Ch. 322; 84 L.J.Ch. 929; 34 Digest 170, 1329.
- (4) *Thomson (D. C.) & Co., Ltd. v. Deakin*, [1952] 2 All E.R. 361; [1952] Ch. 646, 666; 3rd Digest Supp.

- (5) *Lumley v. Gye*, (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 118 E.R. 749; 34 Digest 168, 1307.
- (6) *Quinn v. Leatham*, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 34 Digest 169, 1320.
- (7) *Best v. Samuel Fox & Co., Ltd.*, [1952] 2 All E.R. 394; [1952] A.C. 716; 3rd Digest Supp.
- (8) *Bromage v. Prosser*, (1825), 4 B. & C. 247; 3 L.J.O.S.K.B. 203; 107 E.R. 1051; 33 Digest 485, 232.
- (9) *British Industrial Plastics, Ltd. v. Ferguson*, [1940] 1 All E.R. 479; 162 L.T. 313; 2nd Digest Supp.
- (10) *Ashby v. White*, (1703), as reported in 2 Ld. Raym. 938 (92 E.R. 126); 6 Mod. Rep. 45 (88 E.R. 808); 33 Digest 549, 317.
- (11) *Ditcham v. Bond*, (1814), 2 M. & S. 436; 105 E.R. 443; 34 Digest 180, 1454.
- (12) *Mary's Case*, (1612), 9 Co. Rep. 111b; 77 E.R. 895; 34 Digest 181, 1468.
- (13) *Bird v. Randall*, (1762), 3 Burr. 1345; 97 E.R. 866; 34 Digest 171, 1337.

APPEAL by the plaintiffs from a judgment of HALLETT, J., dated June 10, 1954, at Norwich Assizes, dismissing an action for damages for wrongfully enticing and procuring two servants of the plaintiffs to break their contract of service and for harbouring them by taking them into and keeping them in his employment after the defendant knew that they had broken their contract of service. HALLETT, J., held that there was no evidence that the defendant enticed or procured the servants to break their contract and that the defendant was not liable for maliciously harbouring the second of the two servants since he had acted in the bona fide belief that, permission for the engagement having been given by the labour exchange, he was entitled to do so. The plaintiffs appealed against the latter part of the judgment only.

J. B. Elton (with him *M. C. Parker*) for the plaintiffs.

Viscount Hailsham, Q.C., and *C. C. Bülow* for the defendant.

Cur. adv. vult.

Nov. 19. LORD GODDARD, C.J., read the following judgment of the court. This is an appeal from a judgment of HALLETT, J., given at the last assizes for Norfolk, dismissing an action brought by the plaintiffs against the defendant for wrongfully enticing and procuring two servants of the plaintiffs to break their contracts of service and for harbouring those servants by taking them into and keeping them in his employment when he knew they had broken their contracts of service with the plaintiffs. The learned judge held that there was no evidence that the defendant enticed or procured the servants to break their contracts and against this there is no appeal.

With regard to one of the servants, one Mickleborough, we were told that the plaintiffs attached no value to his services, as he was easily and promptly replaced. This appeal is, therefore, concerned only with the question whether the learned judge was right in holding that the plaintiffs had no cause of action in respect of the defendant having harboured one Nicholson, by keeping him in his service after notice that he had broken his contract with the plaintiffs. Mickleborough can disappear from the case.

We will state as succinctly as we can the relevant facts which appear to have been found by the learned judge in the course of a very long and careful, if somewhat discursive, judgment. The plaintiffs have a business at Hunstanton, and carry on a restaurant and also a fried fish bar. The defendant is a hotel proprietor in the same town, and the engagement of servants for the hotel is undertaken by his wife on his behalf. On July 22, 1952, the plaintiffs' director engaged Nicholson as a fish fryer and apparently it is not easy in these days to get a competent man for this particular work. He was engaged by the week, though no doubt the plaintiffs hoped he would stay in their service for the summer

season. His wages were £8 10s. a week. He entered on his service and stayed there till Aug. 6. At 11 a.m. that day, Nicholson asked if he could go out for a short time. On getting permission, he went off to the defendant's hotel and applied to the defendant's wife for the job of assistant chef. She agreed to engage him, and he was to start work on the following morning. This was later made subject to his obtaining the permission of the labour exchange under the Notification of Vacancies Order, 1952 (S.I. 1952 No. 136), at a wage of £7. A Considering that this was 30s. less than he was paid by the plaintiffs, it is clear, as the judge held, that Nicholson certainly did not intend to return to the plaintiffs' service. In fact, however, he did return that afternoon, because in the hurry of leaving he had left his watch behind. He went back and got his watch and worked till closing time that day, but that evening, without a word B to the plaintiffs, finally took himself off about 6 p.m. He obtained from the labour exchange a permit to enter the defendant's service and, on producing that to the defendant's wife the next day, he entered on his work at the hotel as assistant chef.

About 6.30 p.m., Mr. Myers, the plaintiffs' director, having discovered what was afoot, went to the defendant's hotel and told the defendant that Nicholson C was in his service and protested against the defendant's taking him on, and followed this up by sending a letter to a like effect, which was delivered the next morning before Nicholson presented himself for work. So there is no doubt that, when the defendant retained him in his service, he had notice that he had broken his contract with the plaintiffs.

The defendant and his wife appear to have been under the belief, and, as the D judge found, the bona fide belief, that, as Nicholson had the permission of the labour exchange to enter their employment, that was all that mattered and that notwithstanding the notice they had received from Mr. Myers they were free to employ Nicholson. That, of course, was an entire misconception and it is not contended that the labour exchange officials had any power to authorise or excuse a breach of contract on his part; but we understand from the judgment of the E learned judge that he has held that, as the defendant had this honest belief, he could not be said to have maliciously harboured the plaintiffs' servant, and it was on that ground that judgment was given for the defendant. While, as will be seen, we are of opinion that in the result the judgment was right, we cannot agree with the view of the learned judge on this point.

There can be no question, subject to what we have to say about proof of damage, F that it is actionable to continue to employ the servant of another after notice, though the person so continuing to employ the servant did not procure him to leave his master or know when he employed him that he was the servant of another. We are quoting the perfectly accurate marginal note to *Blake v. Lamjon* (1). This case has frequently been recognised and followed and we need only quote *De Francesco v. Barnum* (2), and *Fred Wilkins & Brothers, Ltd. v. Weaver* (3). In *D. C. Thomson & Co., Ltd. v. Deakin* (4), this doctrine was G distinctly asserted in this court, see especially per JENKINS, L.J. ([1952] 2 All E.R. at p. 378). It is now established beyond controversy that the violation of a legal right committed knowingly is a cause of action if damage is caused thereby: *Lumley v. Gye* (5), *Quinn v. Leathem* (6), *Best v. Samuel Fox & Co., Ltd.* (7) ([1952] 2 All E.R. at p. 397, per LORD GODDARD). A person who violates the H right of another cannot be heard to say that he believed he was acting lawfully, or that he did not understand that he was violating a right.

The misconception in this case has perhaps arisen from the fact that it is said in this class of case that the defendant must act maliciously. For this purpose maliciously means no more than knowingly. This was distinctly laid down in *Lumley v. Gye* (5) where CROMPTON, J., said (2 E. & B. at p. 224) that it was clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation of master and servant by harbouring

and keeping the servant after he has quitted his master during his period of service, commits a wrongful act for which he is responsible in law. Malice in law means the doing of a wrongful act intentionally without just cause or excuse—*Bromage v. Prosser* (8). “Intentionally” refers to the doing of the act; it does not mean that the defendant meant to be spiteful, though sometimes, as for instance to rebut a plea of privilege in defamation, malice in fact has to be proved. In holding that acting under a bona fide belief afforded a defence, the learned judge relied on *British Industrial Plastics, Ltd. v. Ferguson* (9), a decision of the House of Lords. In that case the defendants were approached by a former servant of the plaintiffs, who offered them a secret process which he was under contract with the plaintiffs not to disclose. Though the defendants at first suspected that the process was the property of the plaintiffs, they sent the matter to patent agents, and hearing from them that the process was patentable they foolishly but honestly thought the servant could lawfully offer it to them. It was held that this honest belief afforded a defence. The essential difference between that case and this is that the defendants were never warned by, or had any notice from, the plaintiffs that they owned the process. Accordingly, it was held that they did not act maliciously because they had not the requisite knowledge. The question of bona fides was material on the question whether the defendants had deliberately shut their eyes to the obvious. Had they done so, it would have been equivalent to knowledge; as, however, they had only acted in a muddleheaded manner but not dishonestly, knowledge was not to be imputed to them. Properly understood, that case has no application to the present.

The learned judge held that the defendant in this case was under the honest belief, in spite of the notice he had received, that Nicholson was free to be employed by him, apparently mainly at any rate because of the permit from the labour exchange, and, accordingly, he did not consider whether damage or injury was necessary to support the action. He found as a fact, and this court agrees with him, that clearly Nicholson would not have gone back to the plaintiffs' service whether the defendant continued to employ him or not. Although Nicholson was not called, his actions speak for themselves on this matter, and the inference was, on the facts, abundantly justified. He accepted the job at the defendant's hotel at a less wage than the plaintiffs were paying him and twice took himself off or, to use the common expression in such cases, “walked out on” the plaintiffs. If, therefore, he would not have returned to them, how can it be said they suffered any damage because the defendant employed him? The question then is, is this a case of *damnum sine injuria* or, as the legal right of the plaintiffs was violated, must injury or damage be presumed? A short way of stating the problem is: does the action lie in trespass or in case?

It is curious but none the less the fact that this point has never been discussed in the more recent of the cases to which we have referred, though it did arise in *Blake v. Lanyon* (1), and it is the decision in that case which causes the difficulty. The report states that, on getting notice of the former service, the defendant requested the servant to return to his master and finish his work and when he refused to do so the defendant continued to employ him. The court said (6 Term. Rep. 222):

“A person who contracts with another to do certain work for him is the servant of that other till the work is finished, and no other person can employ such servant to the prejudice of the first master: the very act of giving him employment is affording him the means of keeping out of his former service.”

Now, there is no doubt, as appears from the cases already cited, that the violation of a legal right is a ground of action provided it causes injury or damage. Nowhere does this appear more clearly than in LORD LINDLEY'S speech in *Quinn v. Leatham* (6) ([1901] A.C. at p. 532 et seq.). True, the damage need not be

pecuniary. In the famous case of *Ashby v. White* (10), HOLT, C.J., put it thus (2 Ld. Raym. at p. 955):

"My brother POWELL indeed thinks, that an action upon the case is not maintainable, because here is no hurt or damage to the plaintiff; but surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right."

There, it will be remembered, the action was brought against a returning officer for refusing to allow the plaintiff to vote. That was the injury; he was deprived of his vote and damages were therefore at large.

What, then, is the explanation of the view which the court took in *Blake v. Lanyon* (1)? We think that the explanation is this: in the eighteenth, and indeed into the next, century, the relation of master and servant differed in material respects from that which obtains today. Ever since the Statute of Labourers, 1349, an artificer or labourer or person of that degree was bound to work for any person willing to employ him. If he refused to do so, he became a vagrant, a masterless man was the expression sometimes used. He was liable to be dealt with by the justices and subject to penalties, probably the least of which was being set in the stocks. Not only was the statute unrepealed till the Statute Law Revision Act, 1863, but it was confirmed, amended, extended and modified by a whole series of Acts, notably by 5 Eliz. I, c. 4, passed in 1562 and not repealed till 1875. We do not propose to burden this judgment by setting them out; they and their main provisions will be found in STEPHENS' HISTORY OF THE CRIMINAL LAW, vol. 3, at pp. 202-206, and the powers of justices and the punishments at pp. 266-273. If, therefore, the defendant Lanyon had, on receiving notice from Blake, discharged the servant, he would have had to return to Blake's service or suffer the penalties for refusing work which was offered. The court could, therefore, easily infer that, had the defendant discharged him, he would have returned to the plaintiff's service, so the continuance of the harbouring did injure the plaintiff. Ideas which had come down from the days of serfdom and villainage lingered on, so that a master was regarded as having a proprietary right in his servant. An act per quod servitium amisit violated his proprietary right.

Another species of the same action was that for criminal conversation; a husband had in the eye of the old law a certain proprietary right in his wife; cf. *Bracton De Legibus Angliæ* (Twiss's Edn., vol. 2, p. 54), BLACKSTONE'S COMMENTARIES, 8th Edn., vol. 3, ch. 8, pp. 139, 140. So firmly fixed was this idea of a proprietary right both in a wife and in a servant, that it appears that pleaders were accustomed to lay the action of criminal conversation, or of depriving one of the services of a servant, either in trespass or in case—see *Ditcham v. Boud* (11). The wrong to the husband or master was regarded as direct and not consequential. But that the action lay in case there is no doubt, and now that the idea of a proprietary right can no longer persist it is an action on the case pure and simple. Ever since *Mary's Case* (12) it has been essential that the master should have sustained some damage, and the matter is really put beyond controversy by *Bird v. Randall* (13). There LORD MANSFIELD, delivering the judgment of the King's Bench, held that, where a servant had paid his master the penalty stipulated for leaving him in breach of his articles, no action would lie by the master for the seduction of the servant. No doubt at the present day, if a servant, domestic or otherwise, breaks his contract of service, he or she may put his employer to the greatest inconvenience and may cause him actual pecuniary loss. For so doing the servant is liable to an action for damages and, if a third party has enticed or procured the breach, he, too, is liable. But if, not having enticed the breach, a person employs that servant who would not in any case have returned to the

first employer, while the servant remains liable, the second employer is not, for his action has caused no injury to the original master.

For this reason, though different from that on which the learned judge decided the case, we are of opinion that the appeal fails and it is dismissed with costs.

Appeal dismissed.

Solicitors: *Stuart C. Myers* (for the plaintiffs); *Metcalf, Copeman & Pettefar* (for the defendant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.] A

BAMBRIDGE v. INLAND REVENUE COMMISSIONERS. SAME v. SAME. B

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Birkett, L.J.J.),
November 17, 18, 1954.]

Income Tax—Avoidance—Transfer of assets to company in Canada—"Associated operations"—Whether in relation to any transfer of assets—Residuary bequest in will—Finance Act, 1936 (c. 34), s. 18 (1) (2). C

In December, 1933, the taxpayer's parents, who were ordinarily resident in the United Kingdom, transferred certain shares and debentures to a Canadian company, in which they received shares and debentures in return. In January, 1934, they executed settlements on trusts whereunder each received a life interest with remainder to the other for life, with remainder to the taxpayer for life. The mother subsequently revoked her settlement but executed a will conferring a life interest on the taxpayer in her residuary estate. After the death of her father and, subsequently, of her mother, the taxpayer became entitled to the income for life of the fund settled by her father and to a life interest in her mother's residuary estate which included shares and debentures in the Canadian company. The transfers of assets to the Canadian company were admittedly transfers of assets, and the settlements were admittedly associated operations, within s. 18 (1) of the Finance Act, 1936, and the taxpayer was assessed to income tax and surtax on the basis that the section applied to her income from the Canadian company's shares and debentures comprised in her father's settlement and her mother's property. D

HELD: the taxpayer was properly assessed to income tax and surtax under the section, since (i) she acquired her rights under her father's settlement by virtue of the settlement and not through the death of her father, which, though not an associated operation, was merely an event bringing her interest under the settlement into possession; and (ii) she acquired her rights in her mother's property, again not through her mother's death leaving the will unrevoked, which was merely the fulfilment of a condition essential to the efficacy of the testamentary disposition, but under the will, which was an associated operation under the section notwithstanding that the bequest to the taxpayer was by a residuary gift. E

Decision of HARMAN, J. (ante, p. 86), affirmed in part and reversed in part. F

FOR THE FINANCE ACT, 1936, s. 18, see 12 HALSBURY'S STATUTES (2nd Edn.) 354; see now the INCOME TAX ACT, 1952, s. 412, 31 HALSBURY'S STATUTES (2nd Edn.) 390. G

Case referred to:

(1) *Congreve v. Inland Revenue Comrs.*, [1948] 1 All E.R. 948; [1948] L.J.R. 1229; 30 Tax Cas. 163; 2nd Digest Supp.

APPEAL against an order of HARMAN, J., dated June 16, 1954, and noted ante, p. 86, dismissing in part and allowing in part the taxpayer's appeal by

way of Case Stated from a decision of the Special Commissioners of Income Tax.

The taxpayer appealed against assessments to income tax and surtax made under Case VI of sched. D to the Income Tax Act, 1918, and s. 18 (1) of the Finance Act, 1936, for 1948-49 and 1949-50 in respect of the income of a company resident abroad. The grounds of appeal were that the assessments were not competent and that the amounts ought not to be included in the taxpayer's total income for surtax purposes. In December, 1933, the taxpayer's parents, Mr. and Mrs. J. Rudyard Kipling, who were ordinarily resident in the United Kingdom, had transferred shares and debentures to Kamouraska Investments, Ltd., a company incorporated in Prince Edward Island, Canada, and resident or domiciled there, receiving in consideration therefor shares and debentures in that company. In January, 1934, they executed settlements transferring these shares and debentures to Canadian trustees on trusts whereunder each received a first life interest in his or her settlement with remainder to the other for life, with remainder to the taxpayer for life. The settlement by the taxpayer's father was admittedly an associated operation and the transfers to Kamouraska Investments, Ltd., were admittedly transfers of assets within s. 18 (1) of the Finance Act, 1936. The taxpayer's mother subsequently revoked her settlement and made a will conferring a life interest on the taxpayer in her residuary estate. The taxpayer's father died in January, 1936, and her mother died in December, 1939. The taxpayer thereupon became entitled to the income for life of the fund settled by her father and to a life interest in her mother's residuary estate which included shares and debentures in Kamouraska Investments, Ltd. The taxpayer contended that s. 18 (1) of the Finance Act, 1936, did not apply (i) to the case of her father's settlement, because she acquired her rights by virtue, not only of the transfers and her father's settlement, but also of the death of her father; and (ii) to the case of her mother's property, because she acquired her rights by virtue, not only of the transfers, but also of her mother's will and death; and that the deaths and the making of the will were not "transfers of assets" or "associated operations" within the meaning of the section. The Crown contended that all the transactions were transfers or associated operations and that the deaths were the occasions or points of time when the operations affected the taxpayer. The commissioners held that all the transactions, including the will, were transfers of assets or associated operations within s. 18 (1) and that the deaths of the father and mother, though not associated operations, were points in time in which previously associated operations affected the taxpayer, bringing her within the section. On appeal, HARMAN, J. (*ante*, p. 86), held that the two deaths were merely events which happened, bringing the taxpayer's interest into possession, and not means by which she acquired the rights; she was, therefore, liable in respect of the income from her father's settlement. But he held, further, that the will was not an associated operation, since the residuary bequest was not an operation effected in relation to any of the assets transferred within s. 18 (2) of the Act. He therefore dismissed the appeal as to property emanating from the father and allowed it in relation to the mother's securities. The Crown appealed against the second part of the decision and the taxpayer appealed against the first part.

R. E. Borneman, Q.C., and R. A. Watson for the taxpayer.

J. Pennyquick, Q.C., Sir Reginald Hills and J. H. Stamp for the Crown.

JENKINS, L.J.: These are an appeal by the Crown and a cross-appeal by the taxpayer from a judgment of HARMAN, J., dated June 16, 1954, allowing in part an appeal by the taxpayer from a decision of the Special Commissioners to the effect that she was liable to income tax and surtax on the income of Kamouraska Investments, Ltd., a company incorporated in Prince Edward Island in the Dominion of Canada, under s. 18 of the Finance Act, 1936. Section

18, as amended by the Finance Act, 1938, s. 55 (7) and sched. V, and by s. 28 of that Act, so far as relevant provides:

“ For the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfers of assets by virtue of or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the United Kingdom, it is hereby enacted as follows (1) Where such an individual has by means of any such transfer, either alone or in conjunction with associated operations, acquired any rights by virtue of which he has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled out of the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all the purposes of the Income Tax Acts . . . (1A) . . . (1B) The last two foregoing sub-sections shall not apply if the individual shows in writing or otherwise to the satisfaction of the Special Commissioners either—(a) that the purpose of avoiding liability to taxation was not the purpose or one of the purposes for which the transfer or associated operations or any of them were effected: . . . (2) For the purposes of this section an associated operation means, in relation to any transfer, an operation of any kind effected by any person in relation to any of the assets transferred or any assets representing, whether directly or indirectly, any of the assets transferred, or to the income arising from any such assets, or to any assets representing, whether directly or indirectly, the accumulations of income arising from any such assets.”

The circumstances in which these claims for income tax and surtax were raised against the taxpayer were briefly these. On Dec. 14, 1933, the parents of the taxpayer, Mr. and Mrs. Rudyard Kipling, made transfers of assets to Kamouraska Investments, Ltd. They had already in 1915 transferred certain investments to another Canadian company, but that company was later put into liquidation and all its assets were acquired by Kamouraska Investments, Ltd. It is agreed, for the purposes of the present case, that the matter can be regarded as if all the assets acquired by Kamouraska Investments, Ltd., had been directly transferred to it by Mr. and Mrs. Kipling on Dec. 14, 1933.

On Jan. 12, 1934, Mr. Kipling settled the shares and debentures in Kamouraska Investments, Ltd., which he had received as consideration for the assets transferred by him on trusts whereunder, so far as material, Mr. Kipling received a first life interest with remainder to Mrs. Kipling for life, with remainder to the taxpayer for life. That settlement contained a power of revocation reserved to Mr. Kipling which was never, in fact, exercised. On the same date Mrs. Kipling made a settlement in similar terms of the shares and debentures in Kamouraska Investments, Ltd., which she had received as consideration for the assets transferred by her to that company. The trusts of that settlement closely resembled those of the settlement made by Mr. Kipling, the only difference being that the first life interest was taken by Mrs. Kipling with remainder to Mr. Kipling for life, followed by a remainder to the taxpayer for life, as in Mr. Kipling's settlement. There was also in this settlement a similar power of revocation exercisable by Mrs. Kipling which, as will appear in a moment, was in fact exercised.

On Jan. 18, 1936, Mr. Kipling died; on Dec. 19, 1939, Mrs. Kipling died, and on the death of both her parents the taxpayer became entitled in possession to the life interest given to her under Mr. Kipling's settlement. Mrs. Kipling, after Mr. Kipling's death, wholly revoked the trusts of her settlement on June 16,

1936. On Dec. 6, 1938, Mrs. Kipling made a will containing a residuary gift under which her residuary estate was to be held on trusts which included a first life interest to the taxpayer. That will contained no specific reference at all to Mrs. Kipling's shares and debentures in Kamouraska Investments, Ltd.

A Mrs. Kipling never revoked or altered her will, which was duly proved on Feb. 19, 1940. As a result the taxpayer became entitled to the whole, or virtually the whole, of the share and loan capital of Kamouraska Investments, Ltd., and in those circumstances it was claimed by the Crown that, under the provisions of s. 18 (1) of the Act of 1936, she had acquired the rights by virtue of which she had power to enjoy the income of Kamouraska Investments, Ltd., with the result that the whole of the income should be treated as hers for the purposes of income tax and surtax.

B The Special Commissioners upheld the assessments. On appeal HARMAN, J., held that the assessments should stand so far as they related to the proportion of the income of Kamouraska Investments, Ltd., attributable to the shares and debentures comprised in Mr. Kipling's settlement; but he held that the assessments should be discharged so far as they related to the proportion of the income of Kamouraska Investments, Ltd., attributable to the shares and debentures taken by the taxpayer under her mother's will. The learned judge's C reason for that view was that, inasmuch as the will did not dispose specifically of Mrs. Kipling's shares and debentures, the making of it could not be said to be an operation effected "in relation to" any relevant assets within the meaning of s. 18 (2), and, therefore, could not be regarded as an "associated operation" for the purposes of the section. As regards the taxpayer's interest under Mr. D Kipling's settlement, the learned judge held that the settlement was an associated operation within the meaning of the section, and, consequently, that the claim to tax was made out as regards the corresponding part of the income of the Canadian company.

E From HARMAN, J.'s decision both parties now appeal to this court, the Crown contending that the Special Commissioners' decision should be restored, and the taxpayer that the assessments should be wholly discharged, as neither Mr. Kipling's settlement nor Mrs. Kipling's will could rightly be regarded as associated operations within the meaning of the section.

F The Case was stated by the Special Commissioners with great amplitude and elaboration but the matters debated before us fall within a narrow compass. There is no doubt that Mr. and Mrs. Kipling did, within the meaning of s. 18 (1) of the Act of 1936, make transfers of assets by virtue or in consequence whereof, either alone or in conjunction with associated operations, income became payable to a person resident or domiciled outside the United Kingdom, namely Kamouraska Investments, Ltd. There is further no doubt that the taxpayer did, within the meaning of the section, acquire rights by virtue of which she had power to enjoy the income of Kamouraska Investments, Ltd., partly under the provisions of her father's settlement and partly under the provisions of her G mother's will.

H It is contended on the part of the taxpayer that she did not acquire those rights by means of the transfers, either alone or in conjunction with associated operations, within the meaning of the section. The argument for the Crown as regards the taxpayer's interest under her father's settlement is to the effect that she acquired the rights in question by means of the transfer to Kamouraska Investments, Ltd., made by her father, in conjunction with an associated operation in the shape of his settlement of his shares and debentures in Kamouraska Investments, Ltd.; and this argument was accepted by the learned judge. The argument for the taxpayer as regards this same interest is to the effect that she acquired the rights in question, not by means simply of the transfer and the settlement, but by means of those two transactions together with the deaths of her father and mother. It is said that such deaths constituted essential links in

the taxpayer's title to the rights in question, which links were not associated operations within the meaning of the section; and that, in order to bring the rights in question within the mischief of the section, it must be shown that the taxpayer acquired them strictly in the way postulated by the section, that is to say by means either of the transfer alone or of the transfer in conjunction with associated operations, and by no other alternative or ancillary means.

I agree with the submission that the deaths of Mr. and Mrs. Kipling were not associated operations within the meaning of the section, but I cannot accept the conclusion sought to be adduced from that submission. In my opinion the taxpayer did acquire the rights in question by means of the transfer and settlement within the meaning of the section, and the deaths of Mr. and Mrs. Kipling were merely events on the happening of which the rights acquired by the taxpayer by means of the transfer and settlement, or, in other words, her interest under the settlement, fell into possession by virtue of the terms and provisions of the settlement itself.

It would, to my mind, be an abuse of language to say that the taxpayer acquired her interest under the settlement by means of the deaths of her father and mother. An interest in remainder, or, for that matter a contingent interest, given by settlement, is given by means of the settlement and not by means of the happening of the event which brings the interest into possession or, as the case may be, fulfils the contingency. The prior interest, or, as the case may be, the contingency, is in the nature of a qualification on the interest given, and forms no part of the means or instrumentality whereby the interest is given by the settlor or acquired by the beneficiary, which consist in the settlement and nothing but the settlement. The point is not one which can be usefully further elaborated, and on this part of the case I am content to accept the learned judge's conclusion and the reasons on which it is based.

As regards the taxpayer's interest under her mother's will, the argument on her side was to the effect that, while the making of the will might have been an associated operation if it had referred specifically to Mrs. Kipling's shares and debentures in Kamouraska Investments, Ltd., the mere making of the will effected nothing, as it was also necessary, before the taxpayer could acquire any interest under it, that Mrs. Kipling should die in the lifetime of the taxpayer, leaving her will unrevoked; and it was further argued that, as the will only disposed of Mrs. Kipling's shares and debentures in Kamouraska Investments, Ltd., by means of the general residuary gift contained in it, the making of the will was not an operation "in relation to the assets transferred" within the meaning of s. 18 (2). The learned judge rejected the former branch of this argument but accepted the latter. In my opinion he should have rejected both.

I agree with the submission made on the taxpayer's side that the compound event in which alone the provision made for the taxpayer in the residuary gift could become effective, namely, the death of Mrs. Kipling in the taxpayer's lifetime leaving the will unrevoked, was not an associated operation within the meaning of the section. But I think the happening of this compound event amounted to no more than the fulfilment of the conditions essential to the efficacy of any testamentary disposition. In the events which happened, the testamentary disposition in this case did become effective, and accordingly the taxpayer acquired the relevant interest under and by virtue of, or in other words by means of, her mother's will. Certain events might have happened which would have prevented her from so taking, but none of them did happen. One event had to happen before she could take anything under the will, namely the death of her mother, the testatrix, and, of course, that event did happen. But it does not follow that she acquired her interest otherwise than by means of the will, which, by its very nature, could only take effect on the death of the testatrix. I would say that the taxpayer took by means of the will on the happening of the event in which alone it could take effect as a will.

As to the second branch of the argument on this part of the case, which the learned judge accepted, namely the argument to the effect that the residuary gift, although it undoubtedly disposed of the shares and debentures in question, did not suffice to make the will an operation "in relation to" such shares and debentures, I confess I find myself wholly unable to follow it. I fail to see how a will which disposes of property can reasonably be said not to have been made "in relation to" the property of which it disposes; nor can I see any justification for distinguishing between property specifically disposed of and property comprised in a residuary gift, and holding that the will relates to the former but not to the latter. It seems to me abundantly plain that, where a testator has made a will containing a residuary gift, he has made a will in relation to every item of property comprised in that gift, just as much as he would have done if he had disposed specifically of each item comprised in the residuary gift.

I am not impressed by the argument, by way of *reductio ad absurdum*, which the learned judge seems to have found conclusive, to the effect that, if a will containing a residuary gift under which relevant assets passed amounted to an associated operation, any will containing a residuary gift would amount to an associated operation, even though made before the date of any transfer, provided only that a transfer was made between the date of the will and the date of the testator's death, and that on the happening of the latter event relevant assets passed under the residuary gift. It is not necessary for the purposes of the present case to decide whether this would be so or not, but, if the supposition is well founded, I cannot see anything manifestly absurd in it. If a testator makes a will containing a general residuary bequest, then embarks on what I may call a s. 18 transaction, as a result of which he receives shares and debentures in a foreign company, and leaves his will unrevoked, he must be taken to know that, if he retains the shares and debentures until his death, they will pass under the residuary gift, and must be taken to intend that result, just as much as if, after acquiring the shares and debentures, he had made a fresh will in identical terms.

Both counsel for the taxpayer urged on us, as a reason for rejecting the Crown's arguments, the extension of liability to an indefinite succession of persons which acceptance of those arguments would entail. The answer to this submission in *terrorem*—if I may so describe it—seems to me to be that, once it is recognised, as in view of the decision of the House of Lords in *Congreve v. Inland Revenue Comrs.* (1) it must be recognised, that liability under the section extends to persons who are in no way parties to the offending transfer, the result must be that the liability attaches to every person who, for the time being, has power to enjoy the income in question, and has acquired the right giving rise to such power by means which bring him within the mischief of the section, and continues so long as there is any person who fulfils these conditions.

A further point was taken that, if the making of a will was to be considered as an associated operation, a capricious result would ensue, inasmuch as a case in which shares or debentures of a foreign company devolved under a will would, or might, fix the legatee with liability, whereas a devolution of similar property on an intestacy could have no such result. I agree that it is indeed difficult to see how mere inactivity resulting in intestate succession could be held to amount to an associated operation, and it may well be, therefore, that in such a case the person taking under the intestacy would escape liability under the section; but the mere fact that such a case may be outside the net is no ground for excluding from the net cases which appear to fall fairly within the terms of the section.

Paying the best attention I can to its terms, I am of opinion that the taxpayer acquired the rights which gave her power to enjoy the income of *Kamouraska Investments, Ltd.*, wholly by means of transfers and associated

operations within the meaning of s. 18 (1). For these reasons I would allow the appeal of the Crown and dismiss the cross-appeal of the taxpayer, and direct that the assessments should be restored.

SIR RAYMOND EVERSHED, M.R.: I am of the same opinion. On the cross-appeal, our view is coincident with that of **HARMAN, J.**, and the Special Commissioners, and I say but little on it. I can appreciate the point of view which underlay the argument of counsel for the taxpayer, that until the House of Lords in the *Congreve* case (1) had pointed out the true scope of the language used by Parliament in s. 18 (1) of the Finance Act, 1936, it was not, perhaps, generally realised how far-reaching that section might be. Counsel for the taxpayer therefore sought, on a priori grounds, to give a construction to the Act which would exclude its operation on a person like the taxpayer, not herself a transferor or a party to the transfers or any of the operations associated therewith, but a daughter of the transferors, taking as a beneficiary under their dispositions, testamentary or inter vivos, as the case might be. But having regard to the decision in *Congreve's* case (1) and on a fair construction of the language of the section, it seems to me that the limitation counsel seeks to put on the section is not open to him.

On the appeal we have taken a different view from that which commended itself to **HARMAN, J.** As **JENKINS, L.J.**, has observed, the argument is within a narrow compass and is not capable of long reasoning or much analysis. **HARMAN, J.**, said:

"Can this will be said to have been made 'in relation to any of the assets transferred'? . . . If it had contained a specific bequest of these securities that would no doubt have been in relation to them, but a mere general bequest does not seem to me properly to be described as made 'in relation to' any assets that happen to fall within it because they belong to the testator at his death."

On my first approach to the case, I was inclined to be sympathetic to that view; but I have since been persuaded by the argument that it cannot be sustained. Counsel for the Crown posed this question: To what property does a will relate? I think the answer must be as counsel submitted: To all the property that is comprised in it when it takes effect, whether the property is the subject of a specific devise or bequest, or is comprised within a residuary gift. In the light of that question and answer it seems to me that this will was made "in relation to" the assets here in question. For that reason, and for those which **JENKINS, L.J.**, has already expressed, I think that the appeal should be allowed. The cross-appeal, as I have already indicated, will be dismissed.

BIRKETT, L.J.: I agree with the two judgments which have just been delivered.

Appeal by the Crown allowed. Cross-appeal by the taxpayer dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Field, Roscoe & Co.* (for the taxpayer); *Solicitor of Inland Revenue.*
[Reported by **F. A. AMIES, Esq., Barrister-at-Law.**]

BARNETT v. BARNETT.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), October 15, November 24, 1954.]

Divorce—Desertion—Continuance of desertion—Determination of deserted spouse not to take back deserting spouse—Effect.

The parties were married in 1933. On an evening in August, 1950, the husband left the matrimonial home taking a few personal belongings. On Aug. 26, 1950, the husband returned to the matrimonial home to collect some more clothes but found that the locks of the doors had been changed so that he was unable to obtain entry. He sought the aid of a police sergeant, collected his clothes and left. On Aug. 29, 1950, the wife's solicitors wrote to the husband: "We have been consulted by your wife whom you deserted . . . and our instructions are to require you to enter into a separation agreement agreeing not to return to the home and to live separate". On Sept. 14 the same solicitors wrote to the wife: "Your husband . . . has agreed to sign the separation agreement and to pay you £2 a week maintenance." The agreement was never in fact signed but the husband sent the wife £2 a week.

On Dec. 10, 1953, the husband presented a petition for divorce on the ground of the wife's desertion, the wife denied that she had been guilty of desertion and cross-prayed for a decree on the ground of the husband's desertion when he left the matrimonial home in August, 1950. The husband contended that, although he admittedly deserted the wife when he left the matrimonial home in August, 1950, he had attempted unsuccessfully to resume matrimonial life on Aug. 26, 1950.

HELD: (i) on the facts, the husband had made no attempt to resume matrimonial life and his petition failed.

(ii) if a husband has recently left his wife and the possibility of his return to her has been decisively negated by her, then she so rejects her husband as to render herself unable to maintain that she has been deserted by him: principle derived from *Pratt v. Pratt* ([1939] 3 All E.R. 437), *Cohen v. Cohen* ([1940] 2 All E.R. 331), and *Harriman v. Harriman* ([1909] P. 123) stated and applied; accordingly, as the wife had firmly and decisively rejected her husband, her cross-prayer for divorce on the ground of her husband's desertion failed.

Observations in *Church v. Church* ([1952] 2 All E.R. at p. 443), not followed.

(iii) even if the wife's cross-prayer for divorce on the ground of desertion had not failed by reason of any rejection of his return by her, yet, by Sept. 18, 1950, both parties were agreed that they should live apart and, accordingly, the separation then became consensual, and on this ground also the wife's cross-prayer failed.

Per curiam: I am not concerned with the position which may arise when a deserted wife determines not to have her husband back but does not make that fact clear to him (see p. 694, letter B, post).

AS TO REFUSAL BY PETITIONER TO RESUME CONJUGAL RELATIONS, see 10 HALSBURY'S LAWS (2nd Edn.) 657, para. 967; and FOR CASES, see 27 DIGEST (Repl.) 347-350, 2877-2896.

Cases referred to:

- (1) *Galler v. Galler*, [1954] 1 All E.R. 536; [1954] P. 252; 118 J.P. 216.
- (2) *Pratt v. Pratt*, [1939] 3 All E.R. 437; [1939] A.C. 417; 108 L.J.P. 97; 161 L.T. 49; 27 Digest (Repl.) 350, 2895.
- (3) *Cohen v. Cohen*, [1940] 2 All E.R. 331; [1940] A.C. 631; 109 L.J.P. 53; 163 L.T. 183; 27 Digest (Repl.) 362, 2996.
- (4) *Harriman v. Harriman*, [1909] P. 123; 78 L.J.P. 62; 100 L.T. 557; 73 J.P. 193; 27 Digest (Repl.) 363, 3005.

- (5) *Ward v. Ward*, (1858), 1 Sw. & Tr. 185; 27 L.J.P. & M. 63; 31 L.T.O.S. 238; 164 E.R. 685; 27 Digest (Repl.) 343, 2840.
- (6) *Church v. Church*, [1952] 2 All E.R. 441; [1952] P. 313; 3rd Digest Supp.
- (7) *Sifton v. Sifton*, [1939] 1 All E.R. 109; [1939] P. 221; 108 L.J.P. 131; 27 Digest (Repl.) 324, 2697.
- (8) *Herod v. Herod*, [1938] 3 All E.R. 722; [1939] P. 11; 108 L.J.P. 27; 159 L.T. 530; 27 Digest (Repl.) 360, 2978.
- (9) *W. v. W.* (No. 2), [1954] 2 All E.R. 829; 118 J.P. 467.

PETITION by the husband for divorce on the ground of the wife's desertion; cross-prayer by the wife for divorce on the ground of the husband's desertion. The facts appear in the judgment.

G. H. Crispin for the husband.

K. B. Campbell for the wife.

Cur. adv. vult.

Nov. 24. **SACHS, J.**, read the following judgment: The parties were married in 1933. There are living three children, issue of the marriage, born respectively in 1933, 1935 and 1940. In 1946 the wife bore a child named Beverley, who only lived a matter of hours and whose paternity is in dispute. In August, 1950, the husband left the matrimonial home in circumstances to which I will later refer more fully. On Dec. 10, 1953, the husband presented a petition seeking a divorce on the ground of his wife's desertion. His case as originally pleaded was based on an alleged expulsive act by the wife—conduct alleged to have consisted of improper associations with other men with whom she had confessed adultery. This conduct is alleged to have culminated in an incident in mid-August, 1950. After the evidence was completed, however, counsel for the husband very properly abandoned any claim to have established expulsive conduct, but he sought to amend the petition by alleging as desertion a refusal by the wife later in August, 1950, to allow the husband to return to the matrimonial home. Counsel for the wife expressly disclaimed any objection to the amendment and I allowed it to be made. It is on that amendment that the husband now rests his case. The wife alleged in her answer that the husband deserted her in mid-August, 1950, by leaving the matrimonial home, and that desertion continued to the date of the commencement of these proceedings. As an alternative plea, she alleges that if her conduct at the end of August, 1950, put her in desertion, such desertion was terminated by her having written on Nov. 14, 1951, a letter making a bona fide request to the husband to come back.

Each party by counsel concedes that the desertion alleged by both spouses is simple desertion, and that in neither case was any need to tender amends pleaded, proved, or argued. That has not prevented either husband or wife in turn making in the witness-box vitriolic accusations against the other. The husband on his side spared no effort to label his wife a faithless and adulterous woman. The wife, with uninhibited venom, tried to picture the husband as a cruel drunkard and a philanderer—charges for which one can search the pleadings without avail. As witnesses, husband and wife are not ill-matched. Each in turn showed a fine disregard for accuracy on matters which were obviously within his or her knowledge. The observable manner in which each in turn gave testimony was such as to make it seem singularly unconvincing. In so far as either made allegations of affirmative facts in furtherance of their respective cases, or in attempted destruction of that of the opposite party, neither reached the lowest standard of reliability needed to secure a judgment of a court on any matter. A fortiori, they did not attain anything like the standard of reliability referred to in *Galler v. Galler* (1)—indeed, save for the police sergeant called as to some incidents on Aug. 26, 1950, there was no witness on which a court could reasonably rely. In these circumstances I asked both counsel at the close of the evidence to consider the pleadings so as to make sure that they raised such points as they

might seek to argue. It was then that counsel for the husband asked and obtained the leave to amend referred to earlier in this judgment. This cause thus falls to be determined substantially on those matters which are common ground, or which are so plain that reliance need not be placed on self-interested assertions by either party.

For a number of years before August, 1950, the husband and wife led what both counsel conceded to have been a cat and dog life. In view of the paucity—or rather the absence—of reliable evidence as to the causes of this state of affairs, I do not propose to attempt to determine who was the more to blame. On an evening in mid-August, 1950, when both the wife's sister and the husband of that sister were staying at the matrimonial home, some sort of scene occurred there. As to the precise course that events took that evening, none of the witnesses appears to be reliable. Accordingly, the only facts that I am prepared to find are first, that at some time before 11 p.m. the husband left with a few personal belongings. Secondly, that he left because he was fed up. Thirdly, that before leaving he used words to the effect that he had had quite enough of it, that he was leaving, that they were not to trouble to find him, and that they would never see him again; and fourthly, that he is far from having proved that his departure was due to any expulsive conduct by his wife. On Aug. 26, 1950, the husband decided that he wanted to fetch some more of his clothes. When he got to the matrimonial home he found, however, that his wife had changed the locks on the doors so that he could not get in. He sought the aid of a police sergeant, from whose testimony the above date can be fixed, and returned to the house and secured entry for the sole purpose of getting his clothes which he duly took away. Neither on that nor on any other date has the husband made the vestige of an approach to his wife with a view to returning to the matrimonial home to live there, and I do not accept his evidence that on Aug. 26, either he was minded or he attempted so to do.

Just as the husband was and remained glad to be gone, so the wife was and remained glad that he had departed. She, in her turn, evinced a firm and settled determination never to have him back. The fact that she did not want to see him again (a fact which she admitted in evidence) was made clear to her husband at the time and to the court at trial, first by the change of the locks with the intention of barring him from the home, secondly, by her attitude on Aug. 26, as observed by the police sergeant, and thirdly, by the letters written on her behalf by her solicitors immediately following the above incidents. After watching her in court I was left in no doubt as to her determination being unshakable, or as to the clarity with which it was evinced to the husband. Turning now to the correspondence of that period, the wife's solicitors on Aug. 29, 1950, wrote:

"We have been consulted by your wife whom you deserted and your three children on the 13th inst., and our instructions are to require you to enter into a separation agreement . . . not to return to the home and to live separate . . ."

A claim for maintenance was also made. On Sept. 14 the same solicitors wrote to the wife:

" . . . your husband called on us. He has agreed to sign the separation agreement and to pay you £2 a week maintenance. We are writing him again asking him to call and sign this agreement."

On Sept. 18 the same solicitors wrote to the wife:

" . . . the agreement is now prepared and ready for your signature and we shall be glad if you will call here for this purpose."

In fact, however, the separation agreement does not appear to have been executed. The husband nevertheless sent his wife the £2 a week. Neither party elected to explain the reason for not signing a document as to the terms of which

they appear to have been in agreement. As regards the year that followed the departure of the husband, there is no evidence that the wife changed her attitude towards him, or that he changed his towards her; and the inferences are all the other way. The only other fact to which reference need at this stage be made is that on Nov. 14, 1951, the wife wrote an admirably phrased letter asking the husband to return. That letter is wholly out of character with what the wife has revealed herself to be in later letters, by her outbursts in this court, and by her conduct in the second half of 1950. I am far from prepared to hold that the letter of Nov. 14 was written bona fide. On the contrary, the rest of the evidence points to a continuation of her bitter determination not to have him back.

On the above facts counsel for the husband conceded that the husband put himself in simple desertion when he left the matrimonial home. His plea that the husband made an attempt to resume matrimonial life on Aug. 26, I have rejected, and thus his petition fails. There remains his submission—in apparent favour of his opponent's case—that once the husband was in a state of simple desertion nothing that the wife said or did in August and September, 1950, prevented her from claiming that the desertion continued to run. His point was that as the deserted spouse did not in any way intend to return (as is the fact) he was in no way prevented from returning, by the wife being delighted to see him go or by the determination she evinced not to have him back. Thus, counsel for the husband submitted, the husband remained in a state of continuing desertion as from that date in mid-August, when he left the matrimonial home. For the wife, reference was made by counsel—again in his turn in apparent favour of his opponent's case—to *RAYDEN ON DIVORCE* (6th Edn.), pp. 144 and 147. There it is set out in effect that the wife must not have become a consenting party to that separation by reason of which she asserts she is deserted. Counsel accordingly submitted that in the present case the separation had by, at any rate Aug. 29, become a separation by mutual consent to be implied from the conduct of the parties and the documents before the court.

That being the state of the submissions by counsel, the first point for decision relates to the effect of the wife's clearly evinced determination not to have her husband back. Desertion is a continuing matrimonial offence. Prima facie, it seems contrary to sound sense for a wife to be able to claim that she is being wronged by the continuing absence of a husband whom she has decisively declared that she will not have back. No authorities were cited to me on that point. I find, however, that in *Pratt v. Pratt* (2), when considering the principles applicable to the position where a deserted spouse refused to consider an offer by the offending spouse to return, LORD MACMILLAN, with the support of LORD THANKERTON, said ([1939] 3 All E.R. at p. 438):

"In my opinion, what is required of a petitioner for divorce on the ground of desertion is proof that throughout the whole course of the three years the respondent has without cause been in desertion. The deserting spouse must be shown to have persisted in the intention to desert throughout the whole period. In fulfilling its duty of determining whether, on the evidence, a case of desertion without cause has been proved, the court ought not, in my opinion, to leave out of account the attitude of mind of the petitioner. If, on the facts, it appears that a petitioning husband has made it plain to his deserting wife that he will not receive her back, or if he has repelled all the advances which she may have made towards a resumption of married life, he cannot complain that she has persisted without cause in her desertion."

It is to be noted that this passage was quoted with approval by LORD ROMER (himself a member of the House which considered *Pratt v. Pratt* (2)) when in *Cohen v. Cohen* (3) he delivered the speech with which all the other noble Lords concurred. Further, there are passages in *Harriman v. Harriman* (4) which seem to indicate a principle applicable to the position in the present case.

Whilst BUCKLEY, L.J., made it, on the one hand, clear ([1909] P. at p. 148) that the mere fact of a wife being thankful that her husband has gone does not of itself prevent him from being in a state of desertion, VAUGHAN WILLIAMS, L.J., when dealing with the effect of a separation order, stated ([1909] P. at p. 134) that it

"negated the possibility of the husband returning to the wife unless by her consent"

and so precluded him from being in desertion. FLETCHER MOULTON, L.J., said (ibid., at p. 137):

"It is impossible to hold that a husband is committing a marital offence by non-cohabitation when he has not the right to co-habit."

FARWELL, L.J., refers (ibid., at p. 146) to the fact that

"the wife who has rejected her husband cannot call herself deserted by him"

and cites COCKBURN, C.J., in *Ward v. Ward* (5) where he says (1 Sw. & Tr. at p. 186): "The act of desertion must be done against the will of the wife". Finally KENNEDY, L.J., refers ([1909] P. at p. 154) to the difficulty of holding a husband to be in desertion when he is debarred from returning to the wife. *Harriman v. Harriman* (4) was summarised by LORD ROMER in *Cohen v. Cohen* (3) ([1940] 2 All E.R. at p. 337) as being a case in which

"it was out of the question that the husband should make any attempt to return to the matrimonial domicile."

It was also referred to (ibid., at p. 338) as being unquestionable rightly decided.

As against the above passages, I assume that if authorities had been cited in support of counsel for the husband's point, there would have been prayed in aid *Church v. Church* (6) where WILLMER, J., in deciding a case where the deserted spouse had confessed to adultery regarded ([1952] 2 All E.R. at p. 443) the relevant part of LORD MACMILLAN's statement of the law in *Pratt v. Pratt* (2) as being obiter, unsupported by authority, and indeed to some degree contrary to authority. That view of WILLMER, J., appears, however, to have been founded to a considerable extent on the decision of HENN COLLINS, J., in *Sifton v. Sifton* (7), where the question turned largely on presumptions arising in a case where the deserted spouse had not evinced a determination parallel to that of the wife in the present case. Further, *Cohen v. Cohen* (3) was not cited to the court in *Church v. Church* (6), and *Harriman v. Harriman* (4) appears not to have been mentioned either in *Church v. Church* (6) or in *Sifton v. Sifton* (7). It seems in any event doubtful whether the series of cases from *Herod v. Herod* (8) onwards, in which a deserted spouse has committed adultery (a fact which may or may not influence the mind and actions of the deserting spouse) are strictly in point here, when the wife has specifically and firmly barred the husband from that precise cohabitation the lack of which she now complains. Those cases are in the main concerned, as was *W. v. W.* (No. 2) (9), with presumptions relating to the intentions of the deserting spouse, and the facts which may rebut those presumptions, rather than with the effect of a specific and firm bar against return imposed on that deserting spouse. That distinction also appears implicit in an observation of LORD ROMER made during counsel's argument as it appears in *Cohen v. Cohen* (3) ([1940] A.C. at p. 633). It seems to be a vital distinction—though I am not unconscious that some of the dicta in the cases relating to the effect of a deserted spouse's adultery are in terms wide enough to affect the position which arises in the present case.

For a wife to be in a position to assert in one and the same breath "I will not on any account have you back" and "You are deserting me" would, however, constitute a somewhat artificial situation. That applies equally whether one looks at the position of the wife who would be blowing hot and cold, or that of the husband who would be found guilty of not doing something which his wife was

proceeding deliberately to bar him from doing. As I understand the principles enunciated in and inherent in *Pratt v. Pratt* (2), *Cohen v. Cohen* (3) and *Harriman v. Harriman* (4) no such artificial situation is created by the law as it stands. On the contrary, they are to my mind authorities at least for the proposition that if the possibility of the husband returning has been decisively negated by the wife then she so rejects her husband as to make her unable to call herself deserted by him. If, in the other line of cases to which I have referred, passages occur which could be read in a contrary sense, then it yet seems to be my duty to follow these three authorities, viz., *Pratt v. Pratt* (2), *Cohen v. Cohen* (3) and *Harriman v. Harriman* (4). Each case must, of course, turn on its own facts, and in each case it is a question of degree whether the wife has to the above extent rejected her husband. On the facts of the present case I take the view that the wife cannot set up that the desertion of the husband continued over the period during which she had evinced to him a firm and decisive determination that he should not return to her. She firmly rejected her husband, and it was from a practical angle out of the question that he should make any attempt to return home. On that point, accordingly, the wife's prayer fails. It is scarcely necessary to add that I am not, of course, in the present case concerned with the position which may arise when a deserted wife determines not to have her husband back but does not make that fact clear to him.

I would also be prepared to dismiss the wife's prayer on the ground that the separation became consensual shortly after it occurred. A state of separation is not desertion without cause once the spouse alleging desertion consents to that state. The consent may be written, oral or by conduct. In the present case, the evidence shows that by Sept. 18 both parties were in agreement, both as to the fact that they should live apart and as to the terms on which they should so live. Accordingly, in the absence of further evidence, on the facts of the present case the separation became consensual. I am inclined to think that the consent might also be put on another ground, viz., that both parties having made it plain to the other that they would on no account live with that other in future, such a state of affairs constitutes in itself a separation by consent; but I prefer to base the rejection of the wife's prayer on the other ways of putting the position. In the result, the prayers in the petition and answer are alike rejected.

Prayer of petition and prayer of answer rejected.

Solicitors: *Pennington & Son*, agents for *Church, Bruce & Co.*, Gravesend (for the husband); *G. E. C. Dougherty* (for the wife).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

Re HARTLEY BAIRD, LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), November 29, 1954.]

Company—Meeting—Quorum—Quorum present when meeting proceeded to business but not when vote taken.

A The articles of association of a company limited by shares provided for the modification of rights of shareholders and the holding of separate meetings of any class of shareholders whose rights were intended to be varied. To any such separate meeting the provisions of the articles relating to general meetings were applied, but so that the necessary quorum should be members of the class holding one-third of the capital paid up on the shares of that class. The articles also provided: " 52. No business shall be transacted at any general meeting unless a quorum is present when the meeting proceeds to business . . . 53. If within half an hour from the time appointed for the holding of a general meeting a quorum is not present, the meeting . . . shall stand adjourned to the same day in the next week . . . and if at such adjourned meeting a quorum is not present within half an hour from the time appointed . . . the members present shall be a quorum ". At a meeting of a class of shareholders of the company a quorum was present when the meeting proceeded to business, but before a vote was taken on the resolution, one member left, reducing the meeting to less than a quorum. On the question whether the resolution, which received the requisite majority of votes cast, was validly passed,

D HELD: although art. 52 required that a quorum should be present when the meeting proceeded to business, it was not necessary that the quorum should also be present when the vote was taken, particularly as this construction of the article was the only one which could prevent there being a gap in the scheme of art. 52 and art 53; accordingly, the resolution was validly passed.

E Dictum of the Lord President in *Henderson v. Louttit & Co., Ltd.* (1894) (21 R. (Ct. of Sess.) 674), not followed.

F EDITORIAL NOTE. This case was decided on the terms of articles of association which specifically excluded Table A to the Companies Act, 1929. The decision, however, seems to be an authority on the interpretation of art. 53 of Table A to the Companies Act, 1948, 3 HALSBURY'S STATUTES (2nd Edn.) 807, as both that article and art. 54 of Table A are similar to art. 52 and art. 53 respectively of the articles of association of the company in the present case.

AS TO QUORUM AT GENERAL MEETINGS, see 6 HALSBURY'S LAWS (3rd Edn.) 67, 337, paras. 134, 661; and FOR CASES, see 9 DIGEST 570, 3780-3783.

Case referred to:

(1) *Henderson v. Louttit & Co., Ltd.*, (1894), 21 R. (Ct. of Sess.) 674; 31 Sc. L.R. 555; 9 Digest 570g.

G PETITION to confirm the reduction of the capital of Hartley Baird, Ltd.

A preliminary point arose on the validity of a resolution of a separate meeting of the holders of B ordinary shares of the company, at which meeting a quorum was present when the meeting proceeded to business, but no quorum was present when the vote was taken. The company was incorporated on Apr. 4, 1935. The relevant articles of the company's articles of association were:

H " 46. Subject to the provisions of s. 72 of the [Companies Act, 1948] all or any of the rights, privileges or conditions for the time being attached or belonging to any class of shares for the time being forming part of the capital of the company may from time to time be modified, varied, extended or surrendered in any manner with the consent in writing of the holders of not less than three-fourths of the issued shares of that class or with the sanction of an extraordinary resolution passed at a separate meeting of the

members of that class. To any such separate meeting all the provisions of these articles as to general meetings of the company (including the obligation to notify members as to their right to appoint proxies) shall *mutatis mutandis* apply, but so that the necessary quorum shall be members of the class holding or representing by proxy one-third of the capital paid or credited as paid on the issued shares of the class, and every holder of shares of the class in question shall be entitled on a poll to one vote for every such share held by him.

" 52. No business shall be transacted at any general meeting unless a quorum is present when the meeting proceeds to business. For all purposes the quorum shall be ten members personally present.

" 53. If within half an hour from the time appointed for the holding of a general meeting a quorum is not present, the meeting, if convened on the requisition of members, shall be dissolved. In any other case it shall stand adjourned to the same day in the next week, at the same time and place, and if at such adjourned meeting a quorum is not present within half an hour from the time appointed for holding the meeting, the members present shall be a quorum."

Charles Russell, Q.C., and K. W. Mackinnon for the company.

The petition was unopposed.

WYNN-PARRY, J.: This is a petition for the confirmation of the reduction of the company's capital, and in the course of hearing it I was told that the class meetings had been held of the A ordinary shareholders and B ordinary shareholders. No question arises as regards the meeting of the A ordinary shareholders, but as regards the meeting of the B ordinary shareholders, a curious position arises, because whereas at the beginning of the meeting there was a quorum as provided by art. 46 of the articles of association, which deals with the modification of class rights, one holder who objected to the proposed reduction left the meeting after it had proceeded to consider the business for which it had been called, thus reducing the numbers present to a number below the quorum provided for by art. 46. The question is whether that act of that then dissenting shareholder, who does not appear to oppose today, resulted in no valid resolution being passed at the meeting.

It is necessary to look both at art. 52 and art. 53. Article 52 is in the same terms as the relevant article in Table A to the Companies Act, 1929, and, indeed, in the earlier Acts. [HIS LORDSHIP read art. 52 and art. 53 of the articles of association, and continued:] In my view, interpreting such a commercial document as articles of association, the maxim *ut res magis valeat quam pereat* should certainly be applied, and I propose to interpret these articles in the light of that maxim. The language of art. 52, on the face of it, is quite clear. It provides that no business is to be transacted at a general meeting unless a condition is fulfilled, and that condition is a composite one. It requires not only that a quorum is to be present, but qualifies that by saying that the quorum is to be present when the meeting proceeds to business, then it sets out a formula for calculating the number who are to form the quorum. It could only be by implication that that language could be extended to cover the position when the meeting proceeds to the vote, because on the face of it, the condition of the article is fulfilled if the quorum is present when the meeting proceeds to consider the business for which it was convened.

Looking still only at these articles, I think that interpretation is underlined when one comes to consider and analyse art. 53. That article is designed to cover the position which would arise if a quorum were not at any time present, and not merely a case where the numbers present are reduced to below the number required for a quorum under art. 52, because art. 53 says: " If within half an hour from the time appointed for the holding of a general meeting a

quorum is not present . . .", then certain consequences are to follow. Putting aside the case of a meeting convened on the requisition of members, the result will be that there is an automatic adjournment for one week, and then the members present will form a quorum. That article is clearly designed to save a meeting which has been properly convened, but which cannot proceed to business because no quorum is at any time present, but it does not meet the case of a meeting at which a quorum is present at the beginning and when the meeting proceeds to business, but at which a quorum has ceased to be present at the time when the meeting proceeds to vote on any resolution put before it. Either, then, there is a gap in the scheme of the articles, which would be unfortunate, or else there is no gap, but there can only be no gap if the interpretation which I have placed on art. 52 is the right one. I should myself have felt no doubt whatsoever on the matter, but for *Henderson v. Lountit & Co., Ltd.* (1), a Scottish case, where the court had to consider a petition for the winding-up of the company under the supervision of the court. In the course of it, the court had to consider an article in all material respects similar to art. 52, but so far as I can see from a study of the report, the article corresponding to art. 53 in the company's articles in this case was not cited to the court, nor was the argument put before me by counsel in any way adumbrated. In the course of his judgment, the Lord President (the RIGHT HON. J. P. B. ROBERTSON), who took the view, a view concurred in by LORD ADAM and LORD KINNEAR, the other two members of the court, that a quorum must not only be present at the commencement of the meeting, but also at the time when the business is transacted, said (21 R. (Ct. of Sess.) at p. 676):

"It would be a highly inconvenient, not to say unnatural meaning to attribute to it [i.e., the article] to hold that all that is necessary to the validity of the proceedings is, that at the earliest stage of the meeting a quorum should be present, but that after the real business of the meeting is started and under consideration the quorum might go away."

Prima facie those are words which are apt to apply to the case before me, but, reading the somewhat short report, and looking at the facts, it appears to me that that statement can properly be regarded as obiter dictum. In any event, with all respect to that decision of the Court of Session, I feel compelled primarily to concentrate on the language of the two relevant articles before me. From the force of that language, I come to the conclusion that I ought not to follow the Scottish case, but that I ought to conclude that the meeting in question, of the holders of the B ordinary shares, was one at which a valid class resolution was passed, because at the commencement of the meeting, i.e., when the meeting proceeded to business, there was a quorum as provided by art. 46 of the articles of association.

[HIS LORDSHIP then continued the hearing of the petition and confirmed the reduction of capital.]

Solicitors: *Frere, Cholmeley & Nicholsons* (for the company).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

PRESCOTT v. BIRMINGHAM CORPORATION.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Birkett, L.JJ.), November 23, 24, 25, 30, 1954.]

Local Government—Benefits to old people—Discrimination in favour of class—Transport undertaking—Free travel facilities for aged persons—Whether ultra vires.

The defendants, a local authority, were authorised by statute to maintain and operate their transport undertaking and to charge such fares to passengers travelling on their vehicles as they thought fit, subject to any prescribed statutory maxima for the time being in force, and subject also to their obligation under the Road Traffic Act, 1930, to adhere to any scales of fares fixed by the licensing authority. The defendants provided with the consent of the licensing authority free travelling facilities at certain hours on trams and omnibuses within their district for a limited class of women over sixty-four years of age and men over sixty-nine. The scheme was estimated to cost £90,000 per annum which was to be provided out of the general rate fund. There was no express statutory provision enabling the defendants to introduce the scheme.

HELD: although as proprietors of the transport undertaking the defendants had power to discriminate in the charges made to different people, they were not entitled to use that discriminatory power in order to confer out of the rates a special benefit on some particular class of inhabitants whom the defendants, in their capacity as local authority for the City of Birmingham, might think deserving of such assistance; such a proceeding was illegal, in the absence of clear statutory authority (which a mere general power to charge differential fares was not), because it amounted to the making of a gift in money's worth to a particular section of the local community at the expense of the general body of ratepayers; and accordingly the scheme was invalid as being *ultra vires* the defendants.

Per curiam: the defendants owe a duty to their ratepayers to operate their transport undertaking substantially on business lines . . . in adopting the scheme the defendants misapprehended the nature and scope of the discretion conferred on them . . . accordingly, if the case were to be regarded as turning on the question whether the decision to adopt the scheme was a proper exercise of discretion conferred on the defendants with respect to the differential treatment of passengers in the matter of fares, the answer . . . must be that it was not a proper exercise of such discretion (see particularly p. 707, letters A and H, and p. 706, letter D, post).

Roberts v. Hopwood ([1925] A.C. 578), considered.

Decision of **VAISEY, J.** (ante, p. 299), affirmed.

Cases referred to:

- (1) *Hungerford Market Co. v. City Steamboat Co.*, (1860), 3 E. & E. 365; 30 L.J.Q.B. 25; 3 L.T. 732; 25 J.P. 213; 121 E.R. 479; 44 Digest 99, 787.
- (2) *Newcastle (Duke) v. Workson Urban Council*, [1902] 2 Ch. 145; 71 L.J.Ch. 487; 86 L.T. 405; 38 Digest 108, 775.
- (3) *Northampton Corp'n. v. Ellen*, [1904] 1 K.B. 299; 73 L.J.K.B. 329; 90 L.T. 71; 68 J.P. 197; 43 Digest 1091, 227.
- (4) *Short v. Poole Corp'n.*, [1926] Ch. 66; 95 L.J.Ch. 110; 134 L.T. 110; 90 J.P. 25; Digest Supp.
- (5) *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp'n.*, [1947] 2 All E.R. 680; [1948] 1 K.B. 223; [1948] L.J.R. 190; 177 L.T. 641; 112 J.P. 55; 2nd Digest Supp.
- (6) *Roberts v. Hopwood*, [1925] A.C. 578; 94 L.J.K.B. 542; 133 L.T. 289; 89 J.P. 105; 33 Digest 20, 83.

APPEAL by the defendants, the Corporation of the City of Birmingham, from an order of VAISEY, J., dated Oct. 15, 1954, and reported ante, p. 299.

By his writ the plaintiff, a ratepayer of the City of Birmingham, claimed, among other things, a declaration (i) that a scheme adopted by the defendants by resolution dated Jan. 6, 1953, for the provision of free travel facilities for certain old people defined in the said resolution was illegal as being ultra vires the defendants; and (ii) that the defendants were not entitled to apply any part of the general rate fund in operating the said scheme. By their defence the defendants alleged that they had statutory authority to operate the scheme which was approved by the licensing authority. VAISEY, J., declared that the scheme was illegal as being beyond the powers of the defendants on the ground that the subsidising of particular classes of society was a matter for Parliament alone, and that the local authority had no general inherent power to provide such benefits.

The defendants appealed.

M. E. Rowe, Q.C., and Harold Lightman for the defendants.

F. Blennerhassett for the plaintiff.

Cur. adv. vult.

Nov. 30. **JENKINS, L.J.**, read the judgment of the court. This is an appeal by the Lord Mayor, Aldermen and Citizens of the City of Birmingham from a judgment of VAISEY, J., dated Oct. 15, 1954, in an action brought against them by the respondent, Gregory Vincent Prescott, a ratepayer of the City of Birmingham, whereby the learned judge made a declaration to the effect that a scheme adopted and approved by the defendants by resolution dated Jan. 6, 1953, for the provision of free transport facilities for certain categories of old people mentioned in the scheme was illegal as being beyond the powers of the defendants.

Under certain Acts of Parliament, to which we will later refer, the defendants own and operate a passenger road transport undertaking in the City of Birmingham, and are empowered to charge, as they normally do charge, fares to passengers travelling on their vehicles. At a meeting of the defendants' council held on Oct. 14, 1952, it was resolved as follows:

"41,967 . . . that this council being of opinion it is desirable that women of the age of sixty-five years and over and men of the age of seventy years and over should have free use of the corporation's public transport services between the hours of 10 a.m. and 4 p.m. on every day except Saturdays, the general purposes committee be, and they are hereby, requested . . . to submit to this council as soon as possible a scheme for the provision of such free travel facilities together with an estimate of the cost which it is intended shall be borne by the general rate fund."

At a further meeting of the defendants' council held on Jan. 6, 1953, the general purposes committee submitted their report, in which, after mentioning that inquiries had been made of twenty-five transport authorities believed to be affording free or concessionary travel to old people, and referring to doubts which had been raised as to the legality of what was proposed, they dismissed on grounds of delay the possibility of obtaining by private Act of Parliament whatever additional powers might be necessary, and continued:

"Seeing, however, that about twenty transport authorities are already operating various types of schemes for the provision of free or concessionary travel for old people, and seeing that some of those schemes have been in operation for a number of years—so far as is known without challenge to their legality—your committee are of opinion that effect should be given to the desire of the council as expressed in resolution No. 41,967, notwithstanding that there may not be specific statutory enabling power."

Then after calling attention to the necessity for approval of the scheme by the licensing authorities under the Road Traffic Act, 1930, the report sets out the

committee's recommendations, the more material passages in which are the following:

" 1. *Class of persons entitled to participate in the scheme.* Although it is not laid down in council minute No. 41.967 your committee think that it would be in accordance with the intention of the council that the scheme should be limited to old age pensioners being women of the age of sixty-five years and over and men of the age of seventy years and over and who are residing in the city. It appears that the term 'old age pensioner' might well be taken to cover the undermentioned classes: (a) persons in receipt of a 'retirement pension' payable under the National Insurance Act, 1946, and, (b) persons in receipt of an old age pension granted by the National Assistance Board under the Old Age Pensions Act, 1936, to persons who were not contributors to national insurance. In addition to the above two classes of pensioners, your committee consider that a further class of person is in a position of need which is at least equal to that of the pensioners. It is understood that certain persons, who are in receipt of neither of the above pensions, are granted assistance by the National Assistance Board by way of a weekly payment under an order book. Your committee feel that persons in this category who are above the specified ages should be equally entitled to participate in the scheme. It is therefore recommended that the scheme be applied to all women of the age of sixty-five years and over and men of the age of seventy years and over who are either on the register of parliamentary electors for the city or who otherwise satisfy the general manager of the transport department of bona fide residence in the city and who come into the following categories: (a) persons in receipt of a 'retirement pension' payable under the National Insurance Act, 1946; (b) persons in receipt of an old age pension granted by the National Assistance Board under the Old Age Pensions Act, 1936, to persons who were not contributors to national insurance; (c) persons in receipt of national assistance payable by order book.

" 2. *Initial issue of passes.* In the opinion of your committee the most satisfactory method of operating the scheme is by the issue of passes to the persons eligible . . .

" 3. *Estimated cost of initial issue of passes.* . . . Total: approximately £3,100.

" 4. *Issue of passes after scheme is introduced.* It is recommended that all applications for passes after the scheme is introduced be made in person and dealt with at the head office of the transport department. It is estimated that at least twelve thousand new and replacement passes will have to be issued annually (approximately forty per day). This will require a staff of two but it is anticipated that they will also be able to deal with scholars' permits, blind and disabled persons' passes, etc.

" 7. *Availability of passes . . .* On the Dudley Road services jointly operated with the Birmingham and Midland Motor Omnibus, Co., Ltd., and in the case of that company's services partly or wholly operated within the city on behalf of the corporation transport department which are subject to a financial agreement with the company, it will be necessary to arrange with them for the passes to be honoured within the city on these services and, possibly, to negotiate a financial adjustment to compensate for loss of revenue. With regard to the Dudley and Wednesbury services jointly operated with the West Bromwich Corporation, it will be necessary to arrange with them for the passes to be honoured on these services within the city.

" 8. *Cost of operating scheme.* The estimated number of women of the age of sixty-five years and over and men of the age of seventy years and over in receipt of government old age pensions and residing in the city is 65,925, to

A which number must be added approximately 5,500 persons in receipt of national assistance payable by order book. The proportion of the people in the three categories eligible to apply who will in fact apply can only be determined in the light of experience. It is also impossible to forecast what proportion of the free journeys taken by persons entitled to this concession will actually represent loss of revenue and what proportion will represent entirely new traffic, or to what extent it may become necessary to augment services, but it appears reasonable to assume that some augmentation will be inevitable, particularly during lunch hour periods and from approximately 3.30 p.m. to 4 p.m. weekdays and also on Sundays. In view of the impossibility of making precise estimates as to the cost, your committee recommend that a sum of £90,000 be paid to the transport committee in consideration of their operating the scheme for a period of twelve months commencing Apr. 1, 1953, but that in the event of the scheme not being brought into operation until after that date, the said sum of £90,000 shall be reduced proportionately, and that the financial position be further reviewed at the expiration of that period when more reliable statistics are available."

B
C The report concludes with a summary of the committee's recommendations substantially in the terms appearing from the following resolution which was passed at the same meeting of the defendants' council:

D "Resolved—42,085. That, subject to the approval of the licensing authority for public service vehicles, the scheme, as more particularly referred to in the foregoing report, for the provision of free travel facilities for the categories of old people mentioned therein, be, and is hereby, approved and adopted with effect on and from Apr. 1, 1953, or as soon as possible thereafter; that a sum of £90,000 be transferred from the general rate fund to the transport committee in consideration of their operating the scheme for a period of twelve months from Apr. 1, 1953 (provided that in the event of the scheme not being brought into operation until after that date, the said sum of £90,000 shall be reduced proportionately); that the financial position be further reviewed at the expiration of that period in the light of information then available; and that the finance committee be, and they are hereby, authorised and requested to make provision for this expenditure in their estimates for the ensuing financial year."

E
F Such being the scheme the validity of which has been so far successfully disputed by the plaintiff, we should next refer to the statutory powers relied on by the defendants as authorising them to adopt it.

By the Birmingham Corporation Act, 1903, the defendants were empowered to operate tramways and to construct an additional tramway as therein mentioned. Section 31 of this Act provided:

G "The corporation may demand and take for every passenger travelling upon the corporation tramways or any part or parts thereof including every expense incidental to such conveyance a fare not exceeding one penny per mile and in computing the said fare the fraction of a mile shall be deemed a mile."

H Section 34 prohibited the corporation from making any charge for a passenger's personal luggage not exceeding twenty-eight pounds in weight. Section 35 empowered the corporation to charge in respect of animals, goods and parcels any rates or charges not exceeding those specified in sched. III. Section 38 required the defendants to operate services for artisans, mechanics and daily labourers every morning and evening at fares not exceeding one halfpenny for every mile or fraction of that distance. Section 39 provided for the periodical revision of rates and charges by the Board of Trade (but subject to the maximum fares and charges authorised by the Act) on representations in writing made by twenty inhabitant ratepayers of the city or by the corporation. Section 52

provided by sub-s. (1) for the application of revenue derived from the defendants' tramway undertaking, and by sub-s. (2) that any deficiency in the revenue of the defendants' tramway undertaking should be made good out of the borough rate of the city made next after such deficiency was ascertained.

The Birmingham Corporation Act, 1914, empowered the defendants to provide and run motor omnibuses, s. 12 (1) of that Act being in these terms:

"The corporation may provide (but shall not manufacture) and maintain motor omnibuses and may run the same within the city demanding and taking the like tolls fares and charges for the conveyance of passengers therein as they are for the time being authorised to demand and take for passengers travelling on the tramways of the corporation."

Sub-section (9) of the same section applied to the defendants' omnibus undertaking the provisions of (inter alia) the Act of 1903, including s. 52 of that Act.

Under the Road Traffic Act, 1930, it became necessary for the defendants to obtain road service licences in respect of the routes worked by their omnibus undertaking: see s. 72 which (by sub-s. (1)) empowers the traffic commissioners for any traffic area to grant to any person applying therefor a road service licence to provide such a road service as may be specified therein, and prohibits the use of any vehicle as a stage carriage or express carriage except under such a licence; and (by sub-s. (2) (as amended by the Road Traffic Act, 1934)) provides, in effect, that a road service licence does not cover the use of a vehicle as a stage carriage or an express carriage unless it is so used by the holder of the licence and (except in so far as compliance with the provisions of the licence may have been dispensed with by the appropriate traffic commissioners) in accordance with the provisions thereof: and by sub-s. (8) applies the requirements as to road service licences to local authorities authorised by the Act of 1930, or (as in the defendants' case) by special Act, to provide a service of stage carriages or express carriages. Section 72 of the Act of 1930 also by sub-s. (6) empowers the traffic commissioners, where an application for a road service licence has been made and it is represented by any person interested that it is necessary or desirable in the public interest for them to do so, to fix minimum or maximum fares and make it a condition of the licence that fares shall not be charged under or in excess of the minimum or maximum; this is, however, subject to sub-s. (7) which says that this section is not to be taken to authorise the commissioners to fix maximum fares in respect of any service or stage where provision is made by any Act for the fixing of fares or maximum fares in respect thereof, or to fix a minimum fare for any stage in excess of any fare or maximum fare for the time being fixed for that stage under any such Act.

By s. 101 (1) of the Act of 1930 a local authority who, under any local Act or order, are operating (inter alia) a tramway or omnibus undertaking may as part of that undertaking run public service vehicles on any road within their district. By s. 104 of the Act of 1930:

"(1) A local authority authorised to run public service vehicles under this Part of this Act may demand and take for passengers and parcels carried on such vehicles such fares and charges as they may think fit: Provided that every passenger may take with him personal luggage not exceeding twenty-eight pounds in weight without extra charge. (2) A local authority authorised to run public service vehicles under this Part of this Act may if they think fit carry on such vehicles small parcels not exceeding fifty-six pounds in weight and dogs in the care of passengers, the charge for any such dog to be a sum not exceeding the fare payable by the passenger, but they shall not carry on such vehicles any other goods or animals."

Under the provisions of the Defence (General) Regulations, 1939, reg. 56 (1) (B), certain changes were made, and a longer period was allowed for the debiting of any loss on the defendants' transport undertakings to the general rate fund.

We were not referred to these changes in detail, and we do not think anything turns on them for the purposes of the present case.

The defendants duly complied with the requirements of the Act of 1930 with respect to road service licences. From a copy of one of such licences produced to the court by way of specimen it appears that one of the conditions on which such licences were granted was that the fares to be charged by the defendants should be those shown in a schedule to the licence. Thus the specimen produced shows in sched. III thereto three different scales of fares in columns headed respectively "Ordinary fares", "Children's fares" and "Workmen's fares", with the following notes:

"Workmen's tickets are not to be issued or accepted on Sundays and such other days as may be announced. Children's fares: Children under five years of age—free provided they do not occupy a seat required by an adult. Children who have attained the age of five years but have not yet attained the age of fourteen years, half the adult fare."

As the conditions attached to the defendants' road service licences included the fares to be charged, it was necessary for the defendants before carrying their scheme for free travel facilities into effect to obtain from the licensing authority a dispensation from compliance with the conditions attached to their licences to the extent required for the purpose of affording the free travel facilities contemplated by the scheme. The appropriate dispensation was applied for by the defendants and was granted for the period of one year from May 3, 1953, by a letter from the licensing authority dated Feb. 14, 1953. The two concluding paragraphs of that letter were in these terms:

"This authority is subject to the payment by the city council to the transport undertaking of the sum of £90,000 for the first year's operation of the concession and is issued in accordance with the proviso to s. 72 (10) of the Road Traffic Act, 1930 and with reference to s. 72 (2) of the Road Traffic Act, 1930 as amended by s. 40 of the Road Traffic Act, 1934, and sched. III to this Act. If it is desired to continue this free travel facility beyond the period for which authority has now been given, you will no doubt make further application to the licensing authority for continuing authority in sufficient time to enable due consideration to be given to the application, and at the same time the licensing authority would desire to be furnished with an up-to-date report on the first year's operation of the scheme in all its aspects."

The writ in the present action having been issued on Dec. 18, 1953, it appears that the defendants applied to the licensing authority for an extension of the dispensation pending the decision of the court on the legality of the scheme, and were granted an extension of three months from May 3, 1954, which was later supplemented by a further three months' extension expiring on Nov. 2, 1954. Since the issue of the writ in the present action, the Birmingham Corporation Act, 1954 (which came into force on July 30, 1954) has (by s. 51) repealed s. 52 (2) of the Act of 1903 as extended by s. 12 of the Act of 1914, and has (by s. 55) amended s. 12 (1) of the Act of 1914 to read as follows:

"The corporation may provide (but shall not manufacture) and maintain motor omnibuses and may run the same within the city demanding and taking for passengers and parcels carried thereon such fares and charges as they may think fit subject to the provisions of the Road Traffic Act, 1930."

Inasmuch as the Act of 1954 did not become law until after action brought, it cannot affect the question whether the scheme was or was not invalid when the plaintiff commenced his action, or his justification for bringing it, if the scheme was invalid as the law then stood; though if the Act of 1954 could be shown to have had the effect of validating a previously invalid scheme, or of

authorising the adoption of an identical scheme, it would have an important bearing on the nature and extent of the relief which could properly be granted to the plaintiff. In our view, however, s. 55 of the Act of 1954 did not affect the issue as to the validity or invalidity of the scheme. Whether the defendants' power of charging fares is treated as referable to s. 31 of the Act of 1903, s. 12 (1) of the Act of 1914, s. 104 of the Road Traffic Act, 1930, or s. 55 of the Act of 1954, the position at all material times appears to have been that the defendants were, and are, authorised by statute to maintain and operate their transport undertaking (which has, we understand, latterly become exclusively a motor omnibus as distinct from a tramway or trolley-bus undertaking) and to charge such fares to passengers travelling on their vehicles as the defendants think fit, subject to any prescribed statutory maxima for the time being in force, and subject also to their obligation under the Road Traffic Act, 1930, to adhere to any scales of fares fixed by the licensing authority as part of the conditions attached to the defendants' road service licences. The licensing authority's interest in the matter is to see that the fares charged are reasonable. Hence the importance attached by that authority, when granting the dispensation referred to above, to the stipulation that the dispensation was to be subject to the payment by the city council to the transport undertaking of £90,000 for the first year's operation of the scheme, which must, we think, be understood as requiring, in effect, that the cost of the scheme should be met out of the general rate fund, as opposed to being provided by means of an increase in fares. It would seem that, even on the assumption that the scheme was valid, the defendants might be in a difficulty in the event of the licensing authority insisting on conditions as to fares which would prevent effect being given to it. On the other hand, it is not suggested that on the assumption that the scheme was otherwise invalid it could be validated by the approval of the licensing authority.

The repeal of s. 52 (2) of the Act of 1903 by s. 51 of the Act of 1954, does not, we think, in any material way affect the issue. The effect of the repeal seems to be merely to bring the defendants' transport undertaking into line with their various other undertakings for accounting purposes, the system now in force being that prescribed by the Birmingham Corporation Act, 1929, s. 62 and s. 63, the effect of which (to put it very shortly) is that while separate accounts are kept in respect of each undertaking under the latter section, all revenue and expenditure chargeable to revenue in respect of every undertaking is carried to or, as the case may be, paid out of, the general rate fund. But, however the accounts are managed, it is clear that any deficit resulting from the operation of the transport undertaking, so far as not made good out of subsequent profits resulting from such operation, or from surpluses derived from other sources, must ultimately be provided out of the general rate or, in other words, out of the pockets of the general body of ratepayers. It seems clearly to have been the intention of the defendants that the £90,000 estimated annual cost of the scheme should not be charged in account against the transport undertaking, but should be borne by the general rate, and it was included in the defendants' schedule of estimates for general rate for the year from Apr. 1, 1953, to Mar. 31, 1954. We understand that the accounts of the transport undertaking showed at the date of the resolution approving the scheme, and still show, a substantial accumulated deficit, amounting to some £700,000, though there has latterly been some slight degree of current profit. There was, thus, never any question of the transport undertaking being able itself to provide the £90,000 estimated annual cost of the scheme.

We think we have now sufficiently noticed the relevant circumstances and statutory provisions bearing on the question to be decided, viz., whether the disputed scheme is, as VAISEY, J., has held, illegal as being beyond the powers of the defendants.

The argument of counsel for the defendants has all the attractions of simplicity.

It is to this effect: (i) Under the relevant statutory provisions the defendants are empowered (not enjoined) to charge fares, and are, moreover, empowered to charge such fares as they think fit, provided they do not exceed any prescribed statutory maxima for the time being in force. The legislation contains no equality clause. Therefore the defendants are not obliged to charge at the same rate for every passenger, but can charge different rates for different passengers, or, indeed, allow some passengers to travel free while charging others. For that matter, as the provisions in regard to the charging of fares are permissive and not imperative, the defendants could, if so minded, allow everyone to travel free of charge and defray the entire cost of their transport undertaking out of the rates. By way of authority for the proposition that, in the absence of some equality clause or necessary implication to the like effect, a person or body authorised to levy tolls or rates is not obliged to treat equally everyone who becomes liable to the toll or rate, but can charge some more than others, or, indeed, charge some while remitting the toll or rate altogether as regards others, counsel for the defendants refers us to *Hungerford Market Co. v. City Steamboat Co.* (1), *Duke of Newcastle v. Workson Urban Council* (2), and *Northampton Corpn. v. Ellen* (3). It follows, says counsel, that the defendants in this case have power under the relevant legislation to discriminate between different passengers or categories of passengers on the defendants' vehicles by allowing some to travel free while charging fares for others. (ii) Counsel for the defendants admits that acceptance of the proposition that the defendants have power to discriminate in this way does not conclude the case in his favour, for it still remains to consider whether the adoption of the discriminatory scheme now in question would be a proper exercise of the power. He does not contend that a purely arbitrary or capricious course of discrimination would be permissible, but he says that, given the power, the question whether a particular mode of exercising it is a proper one is primarily a matter for the discretion of the defendants, and submits that the court should not override a decision reached by the defendants in exercise of that discretion unless satisfied (apart from mala fides, of which, of course, there is no suggestion here) that the defendants in exercising it failed to take into account relevant matters, or took into account irrelevant matters, or exercised it, in short, in such an unreasonable or irrational fashion that there was in truth no real exercise of it at all. By way of authority for this proposition, counsel for the defendants refers us to *Short v. Poole Corpn.* (4), and *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corpn.* (5). (iii) Counsel for the defendants finally submits that, given that the defendants did have a discretionary power of discrimination, there is no ground for holding that the defendants have exercised their discretion improperly in using the power for the purpose of introducing the scheme now under consideration. He says it appears from the report of the general purposes committee that all relevant matters such as hours, routes and so forth were considered. He says, further, that the age, means and health of potential passengers are all matters relevant to be taken into account in deciding whether any, and if so what, discrimination should be made in their favour. He adds that the transport undertaking is not to be regarded purely as a business enterprise, and that the function of the defendants in relation to it is to provide a transport service (whether remunerative or not) for the benefit of the inhabitants of their city, and says that any scheme of discrimination calculated to make the service more useful to those inhabitants is intra vires the defendants. He gives as examples of legitimate discrimination the carriage of workmen at reduced rates (which was, indeed, enjoined by the Act of 1903), the carriage of children free or at half fares according to age, and the practice which has apparently been pursued by the defendants, of carrying blind and disabled persons free, and submits that the scheme now in question is no more than another example of equally legitimate discrimination. In sum, he submits that it is a proper exercise of the discretionary power to grant rights

of free travel to categories of persons defined by reference to advanced age and limited means as are the "old people" for whose benefit the scheme now in question was devised.

We cannot accept the argument of counsel for the defendants. We do not doubt this proposition (for which there appears to be clear authority) that in the absence of an equality clause, or some necessary implication to the like effect, a person or body having statutory power to charge tolls or rates, or, for that matter, fares, is entitled to discriminate in the charges made to different people. But this, as a general proposition, only means that the person discriminated against cannot object merely on the ground that he is charged more than the other man. It does not necessarily follow that nobody else can object. No doubt that might be the position if the power was exercisable simply and solely for the benefit of the person or body on whom it was conferred. Take, however, the case of a trustee running an omnibus service with a statutory power to charge fares to passengers, and no equality clause. If such a trustee chose from motives of philanthropy to allow some person or class of persons considered by him to be badly off to travel free or at reduced fares, it may be that passengers charged the full fare could not object on that account. But we apprehend that the *cestuis que trustent* certainly could. A similar situation might arise as between a company, or the directors of a company, running an omnibus undertaking with a similar right to charge fares, and the shareholders of such company: see the *Hungerford Market* case (1) where COCKBURN, C.J., said (3 E. & E. at p. 381):

"If the service be rendered and the accommodation afforded, the obligation of the company is fulfilled. If it omit to exact the toll which is the consideration for the service, the shareholders would seem to be the only persons who can have a right to complain."

Local authorities are not, of course, trustees for their ratepayers, but they do, we think, owe an analogous fiduciary duty to their ratepayers in relation to the application of funds contributed by the latter. Thus local authorities running an omnibus undertaking at the risk of their ratepayers, in the sense that any deficiencies must be met by an addition to the rates, are not, in our view, entitled, merely on the strength of a general power, to charge different fares to different passengers or classes of passengers, to make a gift to a particular class of persons of rights of free travel on their vehicles simply because the local authority concerned are of opinion that the favoured class of persons ought, on benevolent or philanthropic grounds, to be accorded that benefit. In other words they are not, in our view, entitled to use their discriminatory power as proprietors of the transport undertaking in order to confer out of rates a special benefit on some particular class of inhabitants whom they, as the local authority for the town or district in question, may think deserving of such assistance. In the absence of clear statutory authority for such a proceeding (which to our mind a mere general power to charge differential fares certainly is not), we would for our part regard it as illegal on the ground that, to put the matter bluntly, it would amount simply to the making of a gift or present in money's worth to a particular section of the local community at the expense of the general body of ratepayers. *Northampton Corpn. v. Ellen* (3) does not, in our view, assist the defendants, for in that case the object of reducing the water rate as regards one district and not as regards another district was not to confer a benefit on the inhabitants of the former district as compared with the inhabitants of the latter, but to secure that the inhabitants of the former should, through the medium of the district rate, make a fair contribution towards the cost of the water supply.

We are not persuaded by the argument of counsel for the defendants to the effect that the relevant legislation would allow the defendants to charge no fares at all to anyone and to finance their transport undertaking entirely out of the rates. We think it is clearly implicit in the legislation that while it was left to the defendants to decide what fares should be charged within any prescribed

A statutory maxima for the time being in force, the undertaking was to be run as a business venture, or, in other words, that fares fixed by the defendants at their discretion, in accordance with ordinary business principles, were to be charged. That is not to say that in operating their transport undertaking the defendants should be guided by considerations of profit to the exclusion of all other considerations. They should, no doubt, aim at providing an efficient service of omnibuses at reasonable cost, and it may be that this objective is impossible of attainment without some degree of loss. But it by no means follows that they should go out of their way to make losses by giving away rights of free travel.

B As to the instances of legitimate discrimination given by counsel for the defendants, the concession in favour of workmen is enjoined by statute, and therefore does not advance his argument. The concessions in favour of children (who travel free or at half fares according to age) are of a kind commonly, if not universally, accorded by transport undertakings, and, we should have thought, readily justifiable on business principles. The practice of allowing free travel to blind and disabled persons may, or may not, be strictly justifiable, but may perhaps be classed as a minor act of elementary charity to which no reasonable ratepayer would be likely to object. In our opinion, the scheme now in question
C goes beyond anything which can reasonably be regarded as authorised by the discretionary power of fixing fares and differentiation in the fares charged to different passengers or classes of passengers possessed by the defendants under the relevant legislation, and is, accordingly, ultra vires the defendants.

D In the course of the argument we asked counsel for the defendants whether, if the omnibus undertaking in Birmingham had been owned and operated by some other concern and not by the defendants themselves, the defendants could have paid £90,000 per annum to the other concern in consideration of their operating a scheme of free travel for old people on the lines of the scheme now in question. Counsel admitted that the defendants could not have done this. It seems to us that in substance and in result the scheme as it actually stands does not materially differ from a transaction of that kind, the only difference being that as the
E omnibus undertaking is owned and operated by the defendants themselves, the subsidy out of the general rate required to defray the cost of the free travel facilities is to be applied by the defendants themselves in the provision of those facilities instead of being paid to some other body to be so applied. It is not without significance that the scheme as actually adopted did in fact contemplate that some payment to the Midland Omnibus Co., Ltd., would, or might, be
F necessary as consideration for their agreeing to honour the defendants' free travel passes.

G As appears from what we have said above, we think the disputed scheme is wholly beyond the powers of the corporation. In our view the scheme fares no better if its adoption is considered as a purported exercise by the defendants of their discretion in a matter not, on the face of it, necessarily outside the general ambit of the discretionary power of differentiation of fares conferred on them by the relevant legislation. What the defendants did was simply to form the opinion that women of or over the age of sixty-five and men of or over the age of seventy fulfilling one or other of the conditions as regards means referred to in the scheme ought to be allowed free travel facilities, and then call for and adopt a scheme giving effect to that opinion. If we are right in thinking that, after all
H allowance is made for their special position as a local authority, the defendants owe a duty to their ratepayers to operate their transport undertaking substantially on business lines, we think it must necessarily follow that in adopting the scheme the defendants misapprehended the nature and scope of the discretion conferred on them, and mistakenly supposed that it enabled them to confer benefits in the shape of rights of free travel on any class or classes of the local inhabitants appearing to them to be deserving of such benefits by reason of their advanced age and limited means. Accordingly, if the case is to be regarded as

turning on the question whether the decision to adopt the scheme was a proper exercise of a discretion conferred on the defendants with respect to the differential treatment of passengers in the matter of fares, the answer, in our opinion, must be that it was not a proper exercise of such discretion. We think some support for this view is to be derived from the speeches in the House of Lords in *Roberts v. Hopwood* (6).

For these reasons which we have endeavoured to state, we are of opinion that the learned judge came to a right conclusion in this case, and we would accordingly dismiss the appeal.

[On the defendants applying for leave to appeal to the House of Lords, leave was granted after discussion on costs, the defendants undertaking not to seek to disturb the orders for costs so far made in favour of the plaintiff and not to ask for costs in the House of Lords.]

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Town Clerk*, Birmingham (for the defendants); *Stanley & Co.*, agents for *R. Evans Parr & Co.*, Birmingham (for the plaintiff).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

ASSOCIATED BROADCASTING CO., LTD. AND OTHERS v. COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA, LTD.

[PRIVY COUNCIL (Viscount Simonds, Lord Oaksey, Lord Reid, Lord Tucker and Lord Somervell of Harrow), October 7, 11, 12, December 1, 1954.]

Privy Council—Canada—Ontario—Copyright—Infringement—Music—“Public performance by means of . . . gramophone”—Copyright Amendment Act, 1931 (c. 8 of the Statutes of Canada, 1931), s. 10B, as amended by the Copyright Amendment Act, 1936 (c. 28 of the Statutes of Canada, 1936), s. 1, and the Copyright Amendment Act, 1938 (c. 27 of the Statutes of Canada, 1938), s. 4.

By the Canadian Copyright Amendment Act, 1931, s. 10B (6) (a): “In respect of public performances by means of any . . . gramophone in any place other than a theatre which is ordinarily and regularly used for entertainments to which an admission charge is made, no fees, charges or royalties shall be collectable from the owner or user of the . . . gramophone . . .”

The first appellants carried on the business of providing musical programmes to subscribers by means of sending electrical impulses originating from records or discs played on a turn-table in a studio controlled by them through electrical connecting wires, belonging to the Bell Telephone Co. of Canada and running from the building in which the studio was to other buildings where the premises (which were not theatres within the meaning of s. 10B (6) (a)) of the other appellants were, and in these premises performances which were public performances were given. The sole right to perform certain musical works in public throughout Canada, which were used by the appellants in this manner, was vested in the respondents, who claimed that the appellants had infringed their copyright.

Held: the popular or commercial meaning of “gramophone” did not embrace a mechanism which included an undefined length of electrical wiring laid by an independent authority under powers given by Parliament; accordingly, a public performance by means of the equipment or mechanism used was not a public performance by means of a gramophone within the meaning of s. 10B (6) (a).

Appeal dismissed.

EDITORIAL NOTE. Statutory provisions relating to performing rights societies carrying on business in Canada are contained in ss. 48-51 of the Copyright Act (R.S. 1952 c. 55). These provide for the tariffs of fees chargeable by

such societies to be filed annually, and establish a Copyright Appeal Board to consider objections to proposed tariffs. A right of action for infringement of copyright vested in such a society is barred if fees lawfully payable in accordance with these tariffs have been tendered or paid (*ibid.*, s. 50 (10)). Section 10B (6) (a) of the Copyright Amendment Act, 1931, as amended, is reproduced as s. 50 (7) of the Copyright Act (R.S. 1952 c. 55). If, in the present case, fees had been collectable and paid pursuant to this enactment, the right of action for infringement of copyright would have been barred by virtue of the provisions which are now s. 50 (10).

AS TO INFRINGEMENT OF COPYRIGHT BY PERFORMANCE IN PUBLIC, see 8 HALSBURY'S LAWS (3rd Edn.) 429, 430, paras. 779, 780; and FOR CASES, see 13 DIGEST 212, 213, 481-489.

APPEAL by special leave from an order of the Court of Appeal for Ontario, dated Mar. 5, 1952, reversing an order of the Supreme Court of Ontario, dated Jan. 29, 1951. The facts appear in the judgment.

Harold Fox, Q.C. (of the Canadian Bar), and *P. J. S. Beran* for the appellants.

H. E. Manning, Q.C. (of the Canadian Bar), and *F. E. Skone James* for the respondents.

VISCOUNT SIMONDS: The short question in this appeal, which is brought by special leave from an order of the Court of Appeal for Ontario, is whether the appellants have infringed the copyright in certain musical works which, so far as concerns the sole right to perform those works in public throughout Canada, is vested in the respondents, the Composers, Authors and Publishers Association of Canada, Ltd. The answer to this question turns on the true meaning and effect of s. 10B (6) (a) of the Copyright Amendment Act, 1931, as amended by the Copyright Amendment Act, 1938, s. 4, which is in these terms:

"In respect of public performances by means of any radio receiving set or gramophone in any place other than a theatre which is ordinarily and regularly used for entertainments to which an admission charge is made, no fees, charges or royalties shall be collectable from the owner or user of the radio receiving set or gramophone, but the Copyright Appeal Board shall, so far as possible, provide for the collection in advance from radio broadcasting stations or gramophone manufacturers, as the case may be, of fees, charges and royalties appropriate to the new conditions produced by the provisions of this sub-section and shall fix the amount of the same. In so doing the board shall take into account all expenses of collection and other outlays, if any, saved or saveable by, for or on behalf of the owner of the copyright or performing right concerned or his agents, in consequence of the provisions of this sub-section."

It is not disputed either that copyright subsists in the works in question, or that it is vested in the respondents, or that they have been performed in public. The performances were, in fact, given in certain premises in Toronto occupied by the appellants, Reibstein, Dennis and Westminster Hotel, Ltd., respectively. None of these premises was a

"theatre which is ordinarily and regularly used for entertainments to which an admission charge is made."

No fees were, therefore, collectable from the appellants or any of them if, within the meaning of the section, the performances were given by means of any radio receiving set or gramophone, or, more specifically, by means of any gramophone as it is not alleged that they were given by means of any radio receiving set.

It is necessary then to consider in some detail what are the means by which the performance is given, and their Lordships find an accurate and sufficiently comprehensive account of this in the judgment of the Court of Appeal for

Ontario which they substantially adopt. The equipment (to use a neutral word) which in this case is alleged to constitute a gramophone can best be described by reference to a drawing which was filed as an exhibit in the case. A verbal description of its component parts as shown and numbered on that drawing is as follows:

Part No. 1 is an electric motor.

No. 2 is a turn-table.

No. 2a is a spindle of the motor operating the turn-table.

No. 3 is a stylus or needle.

No. 4 is a playing head holding the needle and having a magnetic pick-up; that is, a coil in a magnetic field.

No. 5 is a suspension arm.

No. 6 are electrical connecting wires from the coil in the playing head leading to an amplifier which is No. 7.

No. 7a are electrical connecting wires.

No. 8 is a loudspeaker connected with the amplifier (No. 9) by electrical wires.

No. 9 is an amplifier.

The instrumentalities numbered 1 to 7 inclusive are located in the studio of the appellants, the Associated Broadcasting Co., Ltd., hereinafter called A.B.C., and are under the sole control of A.B.C., its servants or agents. Instrumentalities numbered 9 and 8 are located in the premises of each of the other appellants and are under their control. They are owned by A.B.C. and were installed in the premises of the other appellants by A.B.C. pursuant to its contract with those other appellants. Instrumentalities numbered 7a are wires of the Bell Telephone Co. of Canada running between the building in which A.B.C. has its studio and the buildings in which the other appellants carry on their respective businesses.

That drawing is not quite complete. Inserted between No. 7 and No. 7a is a step transformer. This is made necessary by the fact that, in order to prevent electrical induction interfering with parallel wires of the Bell Telephone system serving other customers, only a low current is transmitted over the wires shown as No. 7a on the drawing. The drawing shows only one turn-table. In fact, there are four turn-tables connected by gears, so that the operator in the studio of A.B.C. may disengage one turn-table and engage another without any appreciable interruption of the programme.

The equipment in the premises of each of the appellants other than A.B.C. may be disconnected from the balance of the equipment by the operation of a switch, not shown in the drawing, so that, at any given time, one or more subscribers and the patrons in his or their premises may be hearing a musical programme originating in the studio of A.B.C. and other subscribers and their patrons may not. If all the subscribers leave the instrumentalities which are located in their premises connected with the balance of the system, they all hear the same programme. By throwing out that switch, any subscriber may use parts numbered 8 and 9 together with microphones to make more audible programmes originating in his own premises.

The contracts between A.B.C. and the other appellants are all similar in form. They are headed "Arrangement for 'Music by Muzak' service". By these contracts A.B.C. agrees to supply to the subscriber "Music by Muzak" programme service to the localities therein described between the opening and closing hours of the subscribers' establishment. As part of the Muzak Service A.B.C. agrees to install and keep in operating condition for the reception of Muzak Programmes in the subscribers' premises certain equipment specified in the contract.

This system is operated as follows:—An employee of A.B.C. places a record or disc on turn-table No. 2. That turn-table is then made to revolve by the

A power of the motor No. 1. The stylus or needle No. 3 is placed in contact with the sinuous groove in the record and transmits to the playing head, No. 4, sound waves identical with those which impressed the record when it was made. Those sound waves are converted into electrical impulses in the playing head by the action of the magnetic coil and are carried along the wires No. 6 to the amplifier No. 7. At that point, all the operations in the studio of A.B.C. end. The electrical impulses leave the amplifier No. 7 and are transmitted over the Bell Telephone wires to the premises of the subscriber. The step transformer—not shown in the sketch—increases the force of those electrical impulses and they are carried to the No. 9 and thence to the loudspeaker No. 8 where they are transmitted back into sound vibrations and emitted into the air as an acoustic reproduction of the musical work contained in the record.

B It is claimed, and so the learned trial judge found, that a public performance by means of this equipment, mechanism, or sum total of instrumentalities, is a public performance by means of a gramophone within the meaning of the section. The argument in favour of this claim is neatly summed up in the appellants' case by saying that

C "the component parts or means used by the appellants for the performance in public of musical works are the component parts or means composing a gramophone and producing the same result."

It appears to their Lordships, however, that the short answer to this argument, and, therefore, to the appellants' case, is that it begs a question, what is the meaning of the word "gramophone" in the section, by assuming that whatever mechanism on an analysis of its functions is seen to do what a gramophone does is, therefore, properly called a gramophone. It was, as their Lordships understood the argument, conceded that each one of the several components of the mechanism that has been described was an essential part of the gramophone. Therefore, to take a crucial test, the wires under the control of the Bell Telephone Co., which were laid under Parliamentary authority and might have extended for any distance, were a part of the gramophone. Their Lordships agreed with the learned judges of the Court of Appeal in thinking that this is nothing less than to distort the meaning of the word "gramophone". It does not appear that that word has acquired a scientific meaning other than its popular or commercial meaning, and in the latter meaning it clearly does not embrace a mechanism which (to take the same test) includes an undefined length of wiring laid, perhaps under or over public streets, under the powers given by Parliament not by the manufacturer or user of the mechanism, but by an independent authority.

F This concludes the case and their Lordships do not think it necessary to examine the arguments which were based on the use in the section of the words "owner", "user" or "manufacturer" in connection with "gramophone" though they appear to support the view they have taken. Nor can they derive any assistance from an examination of the section in the light of the alleged policy of the Act. It is no doubt proper and useful to be informed of the state of the law and of the development of the industry at the time when the relevant section of the Copyright Act was enacted, but, to whatever conclusion such an examination might lead, their Lordships find it impossible to ascribe to the familiar word "gramophone" a meaning which, now as then, it is incapable of bearing.

H Their Lordships will, therefore, humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Sydney Morse & Co.* (for the appellants); *Syrett & Sons* (for the respondents).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

Re WEBBER (*deceased*). BARCLAYS BANK, LTD. v.
WEBBER AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), November 30, 1954.]

Charity—Education—Gift for furthering the "Boy Scouts Movement", by helping to purchase camping sites and outfits.

A
A testator by his will directed his executors to devote the remainder of the income of his estate to the furthering of the Boy Scouts Movement, by helping to purchase sites for camping, outfits, etc. The Boy Scouts Association, which had general control over the Boy Scouts Movement, was incorporated by royal charter on Jan. 4, 1912, and its purpose was the instruction of "boys of all classes in the principles of discipline, loyalty and good citizenship".

B
HELD: the purpose for which the Boy Scouts exist is a charitable purpose, within that branch of charity which arises from the purpose being educational, and the Boy Scouts Association, the Boy Scouts Movement and the Boy Scouts Organisation are similarly charitable objects; accordingly, the direction in the testator's will for the devotion of income of the remainder of his estate for furthering the Boy Scouts Movement constituted a good charitable trust.

C
Re Alexander (June 30, 1932) (The Times), applied.

AS TO CHARITABLE GIFTS FOR EDUCATIONAL PURPOSES, see 4 HALSBURY'S LAWS (3rd Edn.) 218, 219, paras. 496, 497; and FOR CASES, see 8 DIGEST 245-248, 51-73.

Case referred to:

D
(1) *Re Alexander*, (June 30, 1932), The Times.

ADJOURNED SUMMONS to determine among other questions whether on the true construction of the will of the testator a direction to devote certain income from his residuary estate to the furthering of

E
"the Boy Scouts Movement, by helping to purchase sights (sic) for camping, outfits, etc."

constituted a valid charitable trust.

By his will made on Aug. 23, 1940, the testator appointed the plaintiff to be executor and trustee thereof and, after making certain gifts in favour of his widow, provided in words spelt as here indicated:

F
"The remaindind income from my estate to be invested in gilt edged securitys, the dividends accruing from same after Mrs. Nellie E. O. Webber's yearly amount of £312 three hundred and twelve pounds is payed and all outgoings are settled, the remainder shall be devoted to the furthing of the Boy Scouts Movement, by helping to purchase sights for camping, outfits, etc."

G
The testator died on Feb. 20, 1954, and his will was proved by the plaintiff on June 21, 1954. The affidavit of the secretary to the committee of the Boy Scouts Association included evidence to the following effect: that an unincorporated organisation called "the Boy Scouts," often referred to as "the Boy Scouts Movement" was founded in the year 1908 for the purpose of instructing boys of all classes in the principles of discipline, loyalty and good citizenship; that by royal charter dated Jan. 4, 1912, the organisation was incorporated under the name of "the Boy Scouts Association" and that the expressions "the Boy Scout Movement" and "the Boy Scouts Movement" had been in common use in connection with the work carried on by the association both before and since the incorporation of the association.

H
R. Cozens-Hardy Horne for the plaintiffs, the trustees.

R. O. Wilberforce, Q.C., and *Ian Campbell* for the first defendant, the widow.

N. C. H. Browne-Wilkinson for the second, third and fourth defendants, sisters of the testator.

Geoffrey Cross, Q.C., and *R. R. A. Walker* for the fifth defendants, the Boy Scouts Association.

Denys B. Buckley for the Attorney-General.

- VAISEY, J.:** The first point which I have to consider in this case is the meaning and effect of a few words in the will of the testator, the late Mr. Alexander Webber. He directed that certain surplus income should be devoted to the furthering of "the Boy Scouts Movement, by helping to purchase sights for camping, outfits, etc." The orthography of the will is imperfect as I have read it, but I have no doubt what the words were meant to convey; that is to say, "sights", in my view, means "sites", and not "sights" as written in the will.
- A** I am very surprised to hear that anyone suggests that the Boy Scouts Movement, as distinguished from the Boy Scouts Association or the Boy Scouts Organisation, is other than an educational charity. I should have thought that it was well settled and well understood that the objects of the organisation of boy scouts were educational, and none the less educational by reason of the fact that the education is, no doubt, of a very special kind. The testator wants this
- B** income to be devoted to the purpose of furthering the Boy Scouts Movement, and then particularises his purpose by saying that he wants to help the Boy Scouts Movement by helping with the purchase of sites for camping, for outfits, and so forth; and I should have thought that that was a very good and correct description of one of the most notable activities of the movement, or the association, or organisation.
- C** I do not think that it is really necessary for me to go into the constitution of the association, which was incorporated by royal charter on Jan. 4, 1912. The outstanding purpose of the incorporation appears in the first paragraph of the first clause. The purpose of the association is the instruction of "boys of all classes in the principles of discipline, loyalty and good citizenship". That seems to me to be a description of one of the most important elements in education.
- D** The association, that is to say, the body incorporated by royal charter, has been treated as a charity ever since 1912. Nobody seems to have doubted that it was a charity, and it has been so recognised for very many purposes.
- E**

It is rather strange that this exact point, that is to say, the exact position of the Boy Scouts Association under the law relating to charities, does not seem to have come before the courts except on one occasion to which I will refer in a

- F** moment. Quite apart from authority, however, and in spite of the argument of counsel for the first defendant, the widow, which argument was very properly devoted to endeavouring to analyse the particular words of the will and to find from them something which fell short of a charitable purpose, I feel, on my own understanding of these matters, as a judge, and from what I know of the Boy Scouts Movement, that it is quite plainly a charitable body established for
- G** charitable purposes.

It appears that on June 29, 1932, a similar question arose before CLAUSON, J., in *Re Alexander* (1), where the testator, Mr. Anthony Alexander, gave the trust funds comprising his residuary estate to a branch of the Boy Scouts Association and directed that the income should be applied

- H** "for the purpose of creating a fund for providing holiday camps for the boy scouts of Clapham and Brixton."

A summons was taken out by the trustee of Mr. Alexander's will asking whether the gift was a charitable trust. CLAUSON, J., declared that it was a good charitable trust, and gave liberty to apply for a scheme. In his judgment, as reported in "The Times" of June 30, 1932, CLAUSON, J., referred to the fact

"that there was a body called the Boy Scouts Association, which was incorporated by royal charter, and which had general control over the

Boy Scout Movement. The Boy Scouts Association and Boy Scout Movement were clearly an educational organisation and as such a charitable organisation in the technical sense."

The words of Mr. Alexander's will seem to me to be very near to those which I have to consider in the present case. The apparent identification by CLAUSON, J., of "Association" and "Movement" seem to me to be so near to the present case that I should hesitate a long time before I differed from the judge's decision or even attempted to distinguish it. I am glad to know that the matter will be put beyond reasonable doubt and that the Boy Scouts Association, the Boy Scouts Movement, the Boy Scouts Organisation, and the object and purpose for which the boy scouts exist are again, in this case, held to be quite plainly within that department of charity which arises from the purpose being educational. In answer to the question put to me in the summons, I shall declare that the direction contained in the will to devote the income therein mentioned to furthering the Boy Scouts Movement by helping to purchase sites for camping, outfits, etc., constitutes a valid charitable trust.

Declaration accordingly.

Solicitors: *Freshfields* (for the plaintiffs and first defendant); *Taylor, Willcocks & Co.* (for the second, third and fourth defendants); *Longbourne, Stevens & Powell* (for the fifth defendants); *Treasury Solicitor*.

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

Re FORSTER'S SETTLEMENT. MICHELMORE v. BYATT AND OTHERS.

[CHANCERY DIVISION (Harman, J.), November 4, 24, 1954.]

Settlement—Variation of trusts—Jurisdiction of court to authorise transaction not authorised by settlement—Administrative purpose—Special circumstances—Trustee Act, 1925 (c. 19), s. 57 (1).

By a settlement dated July 9, 1919, a fund was vested in trustees on protective trusts for F. during his life, and, subject thereto, in the events which happened, on trust for F.'s then wife A. for her life with remainder to F.'s children, by his subsequent marriage, at age twenty-one or on marriage. In 1941 F. died, being survived by his first wife, A., and three children of his second marriage born in 1928, 1931, and 1935 respectively. Under the authority of orders of the Chancery Division, in 1942, 1943, 1944 and 1945, the children mortgaged their contingent reversionary interests to provide for their maintenance, the mortgagee agreeing that he would not call in the borrowed sums during A.'s lifetime, but interest being charged at five per cent. per annum. In 1953 the trustee of the settlement received a demand for estate duty exigible on the settled fund on the death of F. A scheme was evolved under which the trustee should purchase the life interest of A. (who was willing to sell it at less than its actuarial value), pay the estate duty and the principal sums and interest due in respect of the mortgages, and divide the remaining assets equally between the three children, the share of the youngest, who was still an infant, to be held on trust for him absolutely. The trustee issued a summons to obtain the sanction of the court to the scheme on behalf of the infant.

HELD: (i) the scheme could not be sanctioned under the general jurisdiction of the court because, although it was desirable to prevent the accumulation of mortgage interest, no emergency had arisen so as to entitle the court to intervene on the "salvage" principle, and the court had otherwise no power under its general jurisdiction to give its sanction.

Dictum of LORD MORTON OF HENRYTON in *Chapman v. Chapman* ([1954] 1 All E.R. at p. 815), and *Re New, Re Leavers, Re Morley* ([1901] 2 Ch. 534), considered.

(ii) in the special circumstances of this case, and particularly in view of the fact that the court had authorised four transactions resulting in the charges which it was now proposed to redeem and which might be said to have affected beneficial interests, the scheme would be authorised under the Trustee Act, 1925, s. 57, notwithstanding that it involved the acquisition of the beneficial interest of the tenant for life, as it was clearly expedient to stop the accumulation of mortgage interest and to accept the offer made by A., the tenant for life, to sell her interest at a low price.

Re Salting ([1932] 2 Ch. 57), *Municipal & General Securities Co., Ltd. v. Lloyds Bank, Ltd.* ([1949] 2 All E.R. 937), and *Re B.'s Settlement* ([1952] 2 All E.R. 647), considered.

AS TO GENERAL POWER TO EFFECT TRANSACTIONS UNDER ORDER OF COURT, see 29 HALSBURY'S LAWS (2nd Edn.) 745, para. 1037 and 33 HALSBURY'S LAWS (2nd Edn.) 296-299, paras. 519-521; and FOR CASES, see 43 DIGEST 839-841, 2857-2867.

FOR THE TRUSTEE ACT, 1925, s. 57 (1), see 26 HALSBURY'S STATUTES (2nd Edn.) 138.

Cases referred to: -

- (1) *Chapman v. Chapman*, [1954] 1 All E.R. 798; [1954] A.C. 429.
- (2) *Re Trenchard*, [1902] 1 Ch. 378; 71 L.J.Ch. 178; 86 L.T. 196; 40 Digest 743, 2732.
- (3) *Re New, Re Leavers, Re Morley*, [1901] 2 Ch. 534; sub nom. *Re New's Settlement*, 70 L.J.Ch. 710; 85 L.T. 174; 43 Digest 840, 2866.
- (4) *Re Downshire's Settled Estates, Re Chapman's Settlement Trusts, Re Blackwell's Settlement Trusts*, [1953] 1 All E.R. 103; [1953] Ch. 218; on appeal, H.L. sub nom. *Chapman v. Chapman*, [1954] 1 All E.R. 798; [1954] A.C. 429; 3rd Digest Supp.
- (5) *Municipal & General Securities Co., Ltd. v. Lloyds Bank, Ltd.*, [1949] 2 All E.R. 937; [1950] Ch. 212; 2nd Digest Supp.
- (6) *Re B.'s Settlement*, [1952] 2 All E.R. 647; *revsd.* C.A. *Re Blackwell's Settlement Trusts*, [1953] 1 All E.R. 103; [1953] Ch. 218; on appeal, H.L. sub nom. *Chapman v. Chapman*, [1954] 1 All E.R. 798; [1954] A.C. 429; 3rd Digest Supp.
- (7) *Re Salting*, [1932] 2 Ch. 57; 101 L.J.Ch. 305; 147 L.T. 432; Digest Supp.

ADJOURNED SUMMONS for the following relief pursuant to R.S.C., Ord. 55, r. 3, viz., that a deed of agreement, a draft of which was before the court, be sanctioned and approved and that the plaintiff, the sole surviving trustee of a settlement dated July 9, 1919, be authorised and directed to carry the same into effect.

By a settlement dated July 9, 1919, and made pursuant to an order of the High Court dated Dec. 18, 1918, made between John Henry Bacon Forster, Evelyn Amy Eleanor Forster, and Yvonne Isabella Dyson of the first part, Eric Leigh Douglas Forster and Albinia Mathilde Byatt, the first defendant, of the second part, and Harold Gaye Michelmores, the plaintiff, and Frederick William Marshall of the third part, £10,000 provided by the parties of the first part was vested in the plaintiff and Frederick William Marshall as trustees on trust to invest the same and to stand possessed thereof and the investments for the time being representing the same (hereinafter called "the trust fund") on protective trusts for Eric Leigh Douglas Forster (hereinafter called "Mr. Forster") during his life and after his death on trust to pay the income of the trust fund to the first defendant (then Mr. Forster's wife and referred to in the settlement as Albinia Mathilde Forster) if she should survive Mr. Forster during the remainder of her life without power of anticipation, and after the death of the survivor of them to hold the capital and income of the trust fund for the issue of Mr. Forster by any marriage as he should by deed or will appoint, and, in default of and subject to any such appointment, for all or any of the

children or child of Mr. Forster by any marriage who should attain the age of twenty-one years or being female marry under it and if more than one in equal shares. There was no issue of the marriage of Mr. Forster and the first defendant and the said marriage was dissolved by a decree absolute of the Divorce Division on May 5, 1924.

On Nov. 11, 1927, Mr. Forster re-married, and there was issue of that marriage three children, the defendants Dorothy May Forster, born on May 2, 1928, Olivia Jane Forster, born on Nov. 15, 1931, and Anthony Charles Forster, born on Oct. 9, 1935.

On May 31, 1941, Mr. Forster died intestate without having exercised the power of appointment given to him by the settlement and leaving the second, third and fourth defendants his only issue surviving him. At that time, the first defendant was residing on the Continent with her second husband, an Austrian subject, and was an enemy within the meaning of the Trading with the Enemy Act, 1939. The income of the trust fund, therefore, was payable to the Custodian of Enemy Property and could not be made available for the maintenance of the other defendants. Accordingly by fixed charges (which are not material to this report) and by a mortgage dated May 4, 1942, between the second, third and fourth defendants acting by the plaintiff, of the first part, under an order of the Chancery Division, dated Feb. 23, 1942, the plaintiff of the second part and one Henry Dagger of the third part, and by further charges dated respectively Mar. 23, 1943, Jan. 18, 1944, and Jan. 1, 1945, between the same parties on the same terms as the mortgage and under the authority of the High Court, each of the defendants borrowed sums for their maintenance amounting in the aggregate to £2,100 from the said Henry Dagger on the security of their then contingent reversionary interest in the trust fund. Under the terms of the charges, they could not be called in by the mortgagee during the life of the first defendant, but the interest on them amounted at the date of the summons to £1,139. On June 8, 1953, the plaintiff was called on to pay estate duty arising on the death of Mr. Forster in respect of the trust fund, amounting to some £504. The value of the fund at the date of the summons was some £7,750 invested in three mortgages at four per cent. to five per cent. interest.

The first defendant was willing to accept a capital sum of £2,000 out of the trust fund in consideration of the release and surrender of her life interest and all further rights under the settlement, such capital sum having been computed on the footing of the estimated cost of annuity to take the place of the life interest. It was estimated that after paying off the principal sums and interest under the mortgages and further charges and the estate duty and interest thereon there would remain a sum of about £2,000 for distribution among the second, third and fourth defendants. Accordingly, a draft agreement between the persons interested in the trust fund in such form that the contingent interest of the infant defendant was made absolute and that the trusts of the settlement were determined was now submitted to the court for its sanction.

R. R. D. Phillips for the plaintiff, the trustee.

Raymond Walton for the first, second and third defendants, the tenant for life and the two adult children.

E. M. Winterbotham for the fourth defendant, the infant. *Cur. adv. vult.*

Nov. 24. **HARMAN, J.**, read the following judgment: This was a settlement made, I am told, as a result of the compromise of certain proceedings in the Probate Court. By it £10,000 was brought into settlement and vested in trustees, of whom the plaintiff is the sole survivor, on protective trusts during the life of Eric Leigh Douglas Forster, with remainder to the first defendant, then his wife, for her life, with remainder to the issue of Mr. Forster by any marriage as he should appoint, with remainder to his children equally at twenty-one years or earlier marriage. The second, third and fourth defendants are children of Mr. Forster by his second wife. Mr. Forster died in 1941 without having

exercised his power of appointment, and the fund is accordingly held on trust for the first defendant for life with remainder to the second, third and fourth defendants equally, the fourth defendant's interest being contingent on his attaining the age of twenty-one years, which he will do if he lives until Oct. 9, 1956.

A During the war, the first defendant became an enemy within the meaning of the Trading with the Enemy Act, 1939, and the income of the fund was payable to the Custodian of Enemy Property. The second, third and fourth defendants were in urgent need of money for their maintenance, and under arrangements sanctioned by the court their contingent interests were mortgaged by charges made in 1942, 1943, 1944 and 1945 under which a capital sum of £2,100 has been raised and applied for the maintenance of one or other of them. Under the terms of these charges, they cannot be called in by the mortgagee during the life of the first defendant, but interest continues to run at five per cent. per annum and now amounts to some £1,100. The orders sanctioning the several charges were apparently made in exercise of the general jurisdiction of the court, presumably as a matter of salvage. The Trustee Act, 1925, was not invoked. The trustee has recently been called on to pay estate duty amounting to about £500 which arose on the death of Mr. Forster and was at the time overlooked. C The value of the fund is now about £7,750 invested on mortgages at four to five per cent. interest.

In these circumstances, it seemed desirable to the trustees not only to raise the money to pay the estate duty, but to pay off the charges on the defendants' interests in remainder in order to stop interest running. I understand, further, that the mortgagee has died and it is desirable from that point of view to wind-up his estate. D In the circumstances, a scheme was evolved under which the first defendant was willing to surrender her life estate to the trustee on receiving out of the settled fund a sum considerably less than the actuarial value of her interest, and it was proposed to put an end to the settlement by paying out the second and third defendants at once and by treating the fourth defendant as absolutely entitled and setting aside his share for him. A deed of family arrangement was entered into to carry this scheme into effect, and this originating summons was issued on May 4, 1954, to obtain the court's sanction to it on the infant's behalf. E

The originating summons recently came before me in chambers when I directed it to be adjourned into court for argument, for it seemed to me at first sight that to sanction the scheme was beyond the powers of the court having regard to the recent decision of the House of Lords in *Chapman v. Chapman* (1). When the case came on for argument, a difference of opinion appeared between counsel concerned to prevail on me to accede to the application. Counsel for the adult defendants appeared to agree that *Chapman's* case (1) was a bar to success under the general jurisdiction of the court, but argued that the transaction was one which it was open to the court to sanction under the Trustee Act, 1925, s. 57. F Counsel for the infant beneficiary, while disclaiming the possibility of bringing the application within s. 57, suggested that it might be effected under the general jurisdiction of the court and pointed out that it appeared to be exactly such a transaction as was referred to by LORD MORTON OF HENRYTON in *Chapman's* case (1) where, seeking to distinguish *Re Trenchard* (2) and holding, as LORD SIMONDS, L.C., had already done, that no compromise in the true sense was there involved, he suggested that the order might have been justified in these words ([1954] 1 All E.R. at p. 815): G H

"... this decision appears to me to be no more than the sanctioning by the court of a purchase by the trustees of the widow's rights."

I confess to being puzzled by these words, which seem to suggest that there is some general power in the court to sanction a re-arrangement of the beneficial interests, and this is the very thing which the House declined to allow except in what are called salvage cases. In my judgment I am not at liberty to sanction

such a transaction under the court's general jurisdiction unless it can be brought within the salvage principle as explained by ROMER, L.J., in *Re New, Re Leavers, Re Morley* (3) quoted by SIR RAYMOND EVERSHED, M.R., in *Re Downshire's Settled Estates* (4) ([1953] 1 All E.R. at p. 111). Is there such a situation here? In my judgment, there is not. True it is that £500 must be raised to meet the claim for estate duty. No doubt also it is desirable to put an end to the accumulation of interest on the mortgages sanctioned by the court during the war. But these transactions, having been so sanctioned, cannot be treated as improvident or improper, and I do not think that their existence raises such an emergency as will entitle the court to interfere. The infant defendant will attain his majority in less than two years and will be able then to consent to the winding-up of the trust if he is so minded. In these circumstances, I do not feel that the applicant has brought the case within the salvage principle, and, in its absence, I am of opinion, for the reasons given, that the court has no jurisdiction to interfere under its general jurisdiction.

It remains to consider whether the proposed transaction, or at least the first step in it, can be brought within the Trustee Act, 1925, s. 57. Counsel putting forward this view was content in the end to submit that there was jurisdiction under the section to sanction the purchase by the trustee of the life tenant's interest, this being, as he submitted, a purchase acquisition or other transaction expedient in the management or administration of the trusts of the settlement, but beyond the powers of the trustees. This kind of question is now not without authority. First WYNN-PARRY, J., in *Municipal & General Securities Co., Ltd. v. Lloyds Bank, Ltd.* (5), sounded a note of warning. The nature of the transaction is explained at the beginning of his judgment where he said ([1949] 2 All E.R. at p. 944):

"By the summons it is asked that there may be conferred on the trustee, so as to be exercisable at the request of the managers for the time being of the trust, put shortly, a power to sell the stocks issued under the three Acts in question, as to which I have held that on the terms of the trust deed as it stands there is no power to sell, and, further, that there may be a general power to sell all or any other stocks or securities, if any, which may from time to time hereafter be received, so as to form part of a unit, by the trustee pursuant to any statutory provisions for compensation. That is a power looking to the future and anticipating further schemes for nationalisation. It is further asked that power shall be given to re-invest, not only the net proceeds of the sale of any of the stocks coming within the purview of the power of sale to which I have referred, but also the whole or part of the net proceeds of any sale of investments or rights effected in accordance with the existing provisions of the trust deed and the supplemental trust deeds, in a manner set out in detail in the question, which, in effect, would involve investing the proceeds in buying further ordinary shares of the holding which, at the time of the proposed re-investment, was the smallest in value of the holdings of ordinary shares comprised in each unit, and so on upwards with a view to achieving, so far as possible, a perfect balance in the spread among the investments constituting the securities.

"The first point which I have to decide is whether there is jurisdiction in the court under the Trustee Act, 1925, s. 57 . . . to make any such order, either as regards authority to sell or as regards authority to re-invest. The section is couched in wide language, and there is little guidance in the reported cases, a circumstance which is explained by the fact that most applications under this section are dealt with in chambers. It appears to me that there must be some limit to the scope of this section. It cannot be construed as a section having such wide import as would allow a complete re-writing of a trust deed or a substitution of a completely different object from that to achieve which the trust was brought into being."

He then discussed the matter in detail and decided that the section has a very limited effect.

This aspect of the matter was emphasised by ROXBURGH, J., in his judgment in *Re B.'s Settlement* (6) ([1952] 2 All E.R. at p. 649). He was considering there the question whether a transaction afterwards known as the Downshire settlement could be effected under the Trustee Act, 1925, and he said that he was being asked to sanction the transaction under the general jurisdiction of the court or under the Trustee Act. He then turned to the statutory provisions and, having looked through them, he said that s. 57 of the Trustee Act, 1925, and s. 64 of the Settled Land Act, 1925, should be construed together. Although that view has been differed from in the Court of Appeal, I think that what he said about s. 57 stands. He said ([1952] 2 All E.R. at p. 649):

"It was argued that the legislature cannot have intended by these elaborate sentences to leave the rule in *Re New* (3) unchanged. It certainly has not done that. The jurisdiction is no longer 'extraordinary'. It extends to transactions which are neither urgent nor of an emergency character, but does it extend to a re-writing of the trusts of the settlement, to a re-arrangement of the beneficial interests thereunder for the advantage of the beneficiaries generally where there is no administrative problem? As I look at these two sub-sections together, it seems to me that they have been carefully framed so as to imply a negative answer. If it be asked why, in that case, the Act does not in its express terms supply the negative answer, I would reply that it could not do so without defining the boundary between administrative action and re-writing the trusts, and that is a boundary which is incapable of precise definition. It seems to me that neither section authorises a transaction which is not of an administrative character, and that the court cannot confer on tenant for life or trustees the power to execute a re-settlement or deal with the trust estate on the footing that a re-settlement has been executed. No language could be less apt than this for conferring such a novel and extensive power on the court. If I am wrong in this view, I would hold in the alternative that the legislature has by its language given clear indication that the court ought not to exercise its discretion in favour of a transaction or series of transactions which, in its opinion, are not of an administrative character, but involve a substantial re-writing of the trusts in order to re-arrange beneficial interests to greater advantage."

This part of the judgment was affirmed by the Court of Appeal in *Re Downshire* (4). SIR RAYMOND EVERSHED, M.R., giving the majority decision, said ([1953] 1 All E.R. at p. 118):

"In our opinion, the word 'administration' is not capable, in the context in which it appears, of bearing the meaning which the appellants seek to attach to it. It is clear, in our judgment, that the subject-matter both of 'management' and of 'administration' in s. 57 [of the Trustee Act, 1925] is trust property which is vested in trustees, and, in our opinion, 'trust property' cannot by any legitimate stretch of the language include the equitable interests which a settlor has created in that property. We think that the reason for the appearance of the word 'administration' as an alternative to 'management' in the section is that, although the words do largely overlap, it was thought possible that an unduly narrow interpretation might be adopted if only one word were to be used without the other. Be that as it may, we are satisfied that the application of both words is confined to the managerial supervision and control of trust property on behalf of beneficiaries. Such is the natural scope of both expressions, and to attribute to them, or either of them, an additional association with the beneficial interests themselves, would be to superimpose on their ordinary significance an interpretation that is both unnatural and unwarranted . . .

the object of s. 57 was to secure that trust property should be managed as advantageously as possible in the interests of the beneficiaries, and, with that object in view, to authorise specific dealings with the property which the court might have felt itself unable to sanction under the inherent jurisdiction, either because no actual 'emergency' had arisen or because of inability to show that the position which called for intervention was one which the creator of the trust could not reasonably have foreseen, but it was no part of the legislative aim to disturb the rule that the court will not re-write a trust or to add to such exceptions to that rule as had already found their way into the inherent jurisdiction."

This part of the judgment formed no part of the appeal to the House of Lords (see *Chapman v. Chapman* (1)) which disapproved the rest of the Court of Appeal's decision in that case.

With these warnings before me, I must consider what are the limits of "administrative" purposes. The courts have long come to the rescue in cases where tenants for life have so encumbered their interests that there is no money to support the family. In such a case the court authorises capital money to be expended in paying off the incumbrances on the life interest and provides for its replacement as a rule by a policy of insurance. *Re Salting* (7) was such a case, and it is to be observed that the order there was made under s. 57 of the Trustee Act, 1925, and no doubt has since been expressed of the court's jurisdiction, except for the point, not here material, about the discretionary trusts, which, was discussed by the Court of Appeal in *Re Downshire* (4). If then, it is argued, the court can authorise the use of capital to buy up the tenant for life's debts, why may it not sanction a similar expenditure of capital to purchase the life tenant's interest? One answer suggested is that this comes at least very near to altering the beneficial interests of the tenant for life.

I have the gravest doubt whether in an ordinary case this is a power which can be conferred on trustees under s. 57, but this is not an ordinary case. Here the court has already authorised four transactions, viz., the charges executed in 1942, 1943, 1944 and 1945, which have affected the beneficial interests of the remaindermen under the settlement. The result is that these interests are subjected to an annual wastage, and it seems clearly expedient to stop that wastage if possible. The trustees must also raise out of capital the money necessary to pay the estate duty on the death of Mr. Forster. At this juncture the tenant for life comes forward and offers to sell her life interest at an advantageous price. If the trustee may lay out money in accepting the offer that will free the rest of the fund and make it possible to pay off the charges and the estate duty at once, so preserving something for the remaindermen. In my judgment, this is a matter of management or administration in the circumstances, and it being, in my judgment, expedient, I propose to confer on the trustee the necessary power.

The summons must be amended by entitling it "In the matter of the Trustee Act, 1925", and making it non-inter-partes. The order I make will be to confer on the trustee power to purchase at a price not in excess of £2,000 the interest of the first defendant in the trust fund. The costs of all parties as between solicitor and client will be paid out of the corpus of the fund.

Order accordingly.

Solicitors: *Smith & Hudson*, agents for *Harold Michelmore & Co.*, Newton Abbot (for the plaintiff and the first, second and third defendants); *Kingsford, Dorman & Co.*, agents for *Baily, Strickland & Bryant*, St. Leonards-on-Sea (for the fourth defendant).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

WINDSOR RURAL DISTRICT COUNCIL v. OTTERWAY AND TRY, LTD.

[QUEEN'S BENCH DIVISION (Devlin, J.), November 25, 1954.]

Building Contract—Arbitration—Architect's final certificate—Jurisdiction of arbitrator to review and revise—R.I.B.A. Standard Form of Contract No. 6, Conditions, cl. 24 (f), cl. 27.

Arbitration—Special Case—Duties of arbitrator—Arbitration Act, 1950 (c. 27), s. 21 (1) (a).

On Mar. 21, 1949, the owners of a building site entered into an agreement with contractors for the erection of houses on the site. The agreement and schedule of conditions were in the Royal Institute of British Architects standard form of contract No. 6. Clause 24 (f) of the conditions provided that on the expiration of a certain period after the completion of the works the architect nominated on behalf of the owners should issue a final certificate of the value of the works, and that the final certificate, save in certain circumstances, should be conclusive evidence as to the sufficiency of the works. By cl. 27 of the conditions a dispute as to the construction of the contract or as to any matter arising thereunder or in connection therewith was to be referred to arbitration, and the arbitrator was empowered "to open up, review and revise any certificate . . . and to determine all matters in dispute . . . in the same manner as if no such certificate . . . had been given". On June 5, 1952, the architect issued the final certificate, and on June 15, 1952, the owners made their last payment to the contractor in respect of the works. As a result of the re-measurement of the works in September, 1953, the owners and the architect claimed that the contractors had been overpaid some £1,000 in the mistaken belief that that sum was due to them. The contractors relied on cl. 24 (f) of the conditions of contract and refused to re-pay the amount claimed by the owners. The matter having been referred to arbitration by the owners under cl. 27 of the conditions, the arbitrator, before determining the reference, stated a Special Case under s. 21 (1) (a) of the Arbitration Act, 1950, asking, among other questions, whether he had jurisdiction to review the final certificate.

HELD: clause 27 of the conditions of contract referred to all certificates, including final certificates, and the conclusiveness of a final certificate under cl. 24 (f) was subject to the arbitrator's right to review and revise the certificate under the express powers given to him by cl. 27; and, therefore, the arbitrator had power to make such an award in respect of the rights of the parties as he might think proper in the same manner as if no final certificate had been given.

Per DEVLIN, J.: where an arbitrator wishes to state any question of law arising in the course of the reference in the form of a Special Case for the decision of the court under s. 21 (1) (a) of the Arbitration Act, 1950, he should set out sufficient details to show what has arisen under the reference and what the contentions of the parties were, so as to enable the court to see how the question of law arose and to judge whether the question was material (see p. 723, letter D, post).

EDITORIAL NOTE. This case, which is of general interest as it is decided on conditions in common use in building contracts, may be compared with the decision in *Robins v. Goddard* ([1905] 1 K.B. 294), which was decided on an arbitration clause in somewhat similar terms and in which case also the certificate was held not to have finality.

AS TO HOW FAR A FINAL CERTIFICATE IS CONTROLLED BY AN ARBITRATION CLAUSE, see 3 HALSBURY'S LAWS (3rd Edn.) 522, para. 1039; and for CASES, see 7 DIGEST 359, 105 et seq.

Cases referred to:

- (1) *Clemence v. Clarke*, (1879), 2 Hudson's B.C. 4th Edn., 54; 7 Digest 358, 100.
- (2) *Lloyd Bros. v. Milward*, (1895), 2 Hudson's B.C. 4th Edn., 262; 7 Digest 359, 107.

SPECIAL CASE stated by an arbitrator.

The following facts were found or agreed. The claimants, Windsor Rural District Council, were the owners of a site known as West Site, Rise Road, Sunningdale, Berkshire. The respondents, Otterway and Try, Ltd., were building contractors. By an agreement in writing made on Mar. 21, 1949, between the claimants and respondents, it was agreed that the respondents would execute and complete at the site the works specified in the agreement, namely, the erection of a certain number of houses, on and subject to the conditions annexed to the agreement. The agreement and the schedule of conditions were in the form specially adapted for the use of local authorities and issued under the sanction of the Royal Institute of British Architects and the National Federation of Building Trades Employers (R.I.B.A. standard form of contract No. 6). Clause 24 (f) of the conditions provided that, on the expiration of the defects liability period (which was six months from the practical completion of the works), the architect nominated by the agreement on behalf of the claimants should issue a final certificate of the value of the works executed by the respondents, and the final certificate, save in cases of fraud, and save as regards all defects and insufficiencies in the works or materials which a reasonable examination would not have disclosed, should be conclusive evidence as to the sufficiency of the works and materials. The respondents completed the works and were paid by the claimants sums totalling £27,238 1s. 6d., the last of the payments having been made by cheque on June 15, 1952, pursuant to a final certificate issued by the architect on June 5, 1952. The claimants claimed that, in consequence of the re-measurement of the works on Sept. 24, 1953, in the presence and with the consent of a director of the respondents, the claimants and the architect discovered that the respondents had been overpaid by the sum of £1,056 5s. 5d., in the mistaken belief that that sum was due to them. The claimants did not complain of the quality of the works or materials executed or provided by the respondents. This claim related solely to overpayments made in consequence of errors in the calculation of the sums due to the respondents in respect of the foundations of the houses erected. The architect notified the respondents of the alleged overpayment and the claimants claimed repayment. The respondents having refused to admit the claim, the claimants referred the dispute to arbitration, in accordance with cl. 27 of the conditions of contract.

By their amended points of defence the respondents disputed the claim on the ground, inter alia, that, under cl. 24 (f) of the conditions of contract, the architect's final certificate was conclusive as to the sufficiency of the works and materials executed and provided by the respondents. By their reply the claimants said that they would contend that the dispute did not relate to the sufficiency of the works and materials within the meaning of cl. 24 (f) of the conditions, and, alternatively, that, inasmuch as the final certificate was not issued until after the completion of all the works, the dispute related, within the meaning of cl. 24 (f), to an insufficiency or insufficiencies which a reasonable examination would not have disclosed.

Before taking any further steps in determining the matters at issue, the arbitrator stated a Special Case asking the court to decide the following questions of law: (i) whether the complaint by the claimants as to an error in the calculations of the sums due to the respondents in respect of the foundations of the houses was a complaint as to the sufficiency of the works and materials within the meaning of cl. 24 (f); (ii) whether the "reasonable examination" referred to in cl. 24 (f) related to a reasonable examination at or about the date of the final

certificate or to a reasonable examination at some other and what date; (iii) whether the arbitrator had jurisdiction to review and revise the final certificate and or any other certificate given by the architect and/or to determine the matters submitted to him and the amount (if any) by which the respondents had been overpaid by the claimants in respect of the works and the rights of the parties in regard thereto and to make such an award as might be proper in the same manner as if no final certificate had been given.

A *J. G. K. Sheldon* for the claimants, the owners of the land.

K. J. P. Barracklough for the respondents, the contractors.

DEVLIN, J.: The Arbitration Act, 1950, s. 21 (1), provides:

B "An arbitrator or umpire may . . . state—(a) any question of law arising in the course of the reference . . . in the form of a Special Case for the decision of the High Court."

The arbitrator in this case has drawn up a Special Case and in para. 2 he says:

C "Having regard to the matters hereinbefore set out I am of the opinion that before any further steps are taken by me in investigating or determining the matters at issue between the parties, this court should decide the following questions which are questions of law."

The arbitrator then sets out three questions, and I find it necessary to deal only with the third.

D I have referred to the provision of the Act because I do not think that the form which the arbitrator adopted is the proper way in which these matters should be stated. He has power to state questions of law arising in the course of the reference, and I think that, to enable the court to determine whether the questions of law do or do not arise in the course of the reference, he ought to set out in his Case something which shows what has arisen under the reference, and what the contentions of the parties are, so as to show how the question of law has arisen. It is not a mere matter of words. The court is not at the beck and call of the arbitrator to answer whatever questions the arbitrator may want to put to it, and it is not here to indulge in legal exercises. It is here only to answer questions which it is satisfied do arise in the course of the reference and are material to be determined. I think, therefore, that it is important that arbitrators should, when they are stating their Case, state enough to make it plain how the questions of law arise so that the court can itself judge of their materiality. The point is not of importance in this case since I have been told now by counsel such circumstances as enable me to answer the only question which seems to me to be material, and I am not going to answer any others.

That question is:

G "Whether or not I have jurisdiction as arbitrator as aforesaid to review and/or to revise the said final certificate and/or any other certificate given by the said architects and/or to determine the matters submitted to me . . ."

H That is not a question which really goes to the arbitrator's jurisdiction; if it did, of course, it could not be dealt with by way of a Case Stated, because if the arbitrator had no jurisdiction to deal with the dispute he would have no jurisdiction to state a Case about it. What the arbitrator means is whether, on the true construction of the building contract between the parties, he has power to re-open the final certificate which has already been given by the architect. That comes about in this way. The work under the building contract was completed and the architect gave his final certificate. The claimants, the owners of the site, paid, and after they had done so they alleged that the architect had made a mistake. This was disputed by the respondents, the building contractors. The owners alleged that the architect agreed that he made a mistake, and that the result of the mistake was that the contractors had been overpaid by about

£1,000. The contractors rely on the certificate which was given and say that the matter cannot be re-opened.

There are two clauses in the conditions annexed to the contract which are material. The first is cl. 24, which provides for certificates and payments. Clause 24 (f) provides that upon the expiration of a certain period which is there stated,

"the architect shall issue a final certificate of the value of the works executed by the contractor and such final certificate . . . shall be conclusive evidence as to the sufficiency of the said works and materials."

A question might arise on that sub-clause whether the certificate was final and conclusive in any respect except in so far as it related to the sufficiency of the works and materials, and, if it has that limited effect, then, whether the matter which is raised in this case goes to the sufficiency of the works and materials. I do not propose to go into that question. I shall assume for the purpose of this case that cl. 24 (f), if taken by itself, provides that the architect's final certificate is to be conclusive for all purposes that are relevant.

Clause 27, which is the arbitration clause, reads as follows:

"Provided always that in case any dispute or difference shall arise between the employer or the architect on his behalf and the contractor, either during the progress or after the completion or abandonment of the works, as to the construction of this contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith . . . then either party shall forthwith give to the other notice in writing of such dispute or difference . . ."

The clause then provides that an arbitrator is to be appointed and ends with this sentence:

"Without prejudice to the generality of his powers the arbitrator shall have power to direct such measurements and/or valuations as may in his opinion be desirable in order to determine the rights of the parties and to ascertain and award any sum which ought to have been the subject of or included in any certificate . . ."

Then come the most significant words:

"and to open up, review and revise any certificate, opinion, decision, requisition or notice and to determine all matters in dispute which shall be submitted to him, and of which notice shall have been given as aforesaid, in the same manner as if no such certificate, opinion, decision, requisition or notice had been given."

That clause, in express terms, confers on the arbitrator a power to open up, review and revise any certificate and to determine all the matters in the dispute which are submitted to him as if such certificate had not been given.

In those circumstances, it appears to me quite plain that by the express words of cl. 27 the arbitrator is entitled to open up the final certificate given under cl. 24 (f). With great respect to counsel for the contractors, I do not feel that either *Clemence v. Clarke* (1) (2 Hudson's B.C. 4th Edn. 54) or *Lloyd Bros. v. Milward* (2) (2 Hudson's B.C. 4th Edn. 262), which were cited to me, and which dealt with the powers of the arbitrator where the contracts between the parties did not contain any such words as those contained in the last sentence of cl. 27, can help in the least. All these questions turn on the construction of a particular contract, and no case has been cited to me in which the court has had to construe the wide words at the end of cl. 27 of the conditions of contract in the present case.

The first point submitted by counsel for the contractors was that those words refer only to any interim certificate and not to any final certificate. The words are quite general—"any certificate"—and if they were to be construed as not meaning any final certificate, then it would follow, of course, that,

although the interim certificates could be re-opened, the final certificate could not be the subject of any re-opening at all. I see no justification for limiting the terms of the clause in that way.

A The second point submitted by counsel for the contractors was that, since the word "conclusive" was used in cl. 24 (f), some meaning which gave effect to that word must be put on cl. 27. The trouble is, what meaning? What meaning that does not destroy the effect of cl. 27? If cl. 27 itself is to be given any meaning at all, once one accepts, as I do, that it applies to final certificates, then there must be some conclusive certificates which the arbitrator can re-open and some that he cannot. I can find nothing in the contract which would lead me, or enable me, to draw any dividing line. One cannot invent one. One must get it from the words of the contract itself. It was suggested by counsel for the contractors that the arbitrator could re-open certificates which had not been B accepted and not certificates which had been accepted. I am afraid I do not understand clearly what counsel means by "acceptance". He said that a certificate was normally accepted by the contractor before it was issued, because the architect would consult with the contractor and obtain his agreement to it. I understood counsel also to say that the certificate was normally accepted by the C owner in the same way. If it is accepted by both parties, then it is always accepted before it comes into existence. If, on the other hand, counsel means that the making of the payment amounts to an acceptance of the certificate, I cannot find any words in the clause which would justify drawing the line, or anything in any part of the contract which suggests, that acceptance is in any way the test of anything which the arbitrator has to do. I, therefore, think that the only way in D which the contract can be construed is to say that the words "final" and "conclusive" in cl. 24 (f) must, in any case, be read subject to the express provisions of cl. 27, which provides that, in certain circumstances, the certificates are not to be final and conclusive for the arbitrator has power to re-open them. Clauses 24 (f) and 27 must be read as meaning simply that the certificates are final and conclusive subject to the arbitrator's powers under cl. 27. The arbitrator's powers under cl. 27 are as wide as they could possibly be. Any sort of E dispute and any certificate may be referred to him, and he has power to deal with the whole matter as if no such certificate had been given.

That is the conclusion at which I have arrived by looking at the contract as a whole. If, however, one is permitted to use one's experience, or even one's F common sense, in regard to how these contracts are built up, it is, I think, clear enough how the two clauses come to be there. The contract is not one which has been drafted as a whole and fully formed at one given moment: it is a contract which has been built up from time to time by clauses being added. It is plain enough from the authorities which have been cited to me that in earlier days G cl. 27 was much less wide than it is now. It is clear that at some time whoever was responsible for drafting this document decided that it would be desirable to give the arbitrator these very wide powers. He did that by putting some words on to the end of cl. 27 and it did not occur to him to go back and re-draft cl. 24 (f) in the light of what he had added to cl. 27. That is probably the explanation of any apparent discrepancy which there may be between the two clauses. Whether that is the true explanation or not, reading the two clauses together and reading them as both of equal authority, I think it is plain that cl. 24 (f) H must be read subject to cl. 27. I, therefore, answer the third question by saying that the arbitrator has power to make such an award in respect of the rights of the parties as he might think proper in the same manner as if no final certificate had been given.

Order accordingly.

Solicitors: *Bower, Cotton & Bower*, agents for *T. W. Stuchbery & Son*, Windsor (for the owners); *McNamara Ryan & Co.*, Chertsey, Surrey (for the contractors).

[*Reported by A. P. PRINGLE, ESQ., Barrister-at-Law.*]

BULLOCK v. LLOYDS BANK, LTD. AND ANOTHER.

[CHANCERY DIVISION (Vaisey, J.), November 17, 18, 30, 1954.]

Equity—Undue influence—Voluntary settlement—By unmarried girl shortly after coming of age—Parental influence—No independent advice—Laches. Settlement—Voluntary settlement—Validity—Undue influence—Settlement by unmarried girl shortly after coming of age—No independent advice—Laches—Costs of trustee.

On June 11, 1940, the settlor attained the age of twenty-one and thereupon became absolutely entitled, under the will of her deceased mother, to funds amounting to about £12,000. At that time the settlor was unmarried and was living with her father. At the father's suggestion, and acting on the advice of the father's solicitor without consulting a solicitor independent of her father, the settlor settled the funds by a deed of settlement, dated July 12, 1940, and made between herself, of the one part, and a bank, as trustee, of the other part. By the terms of the settlement the bank was to hold the trust fund on the statutory protective trusts for the settlor for life, and after her death (subject to any interest appointed by her to a surviving husband) on trust for her issue, and in default of issue on certain trusts for her father and brother and the brother's issue. In the event of the failure or determination of all these trusts, the fund was to be held on trust for the testamentary appointees of the settlor or for the settlor. The settlement conferred on the settlor the power to appoint the fund among her issue by will or codicil, but not by deed, and the settlor was empowered to revoke or vary all or any of the trusts contained in the settlement, but only with the consent in writing of the bank, which consent should only be given in what the bank deemed to be the best interests of the settlor, and the bank had an absolute discretion to give or withhold the consent as it thought proper without incurring any responsibility in that behalf. The settlement contained no general power of appointment to override the trusts in favour of the settlor's father and brother. At the time when the settlement was executed, the settlor's father was in financial difficulties, but there was no selfish or fraudulent motive on his part in regard to the execution of the settlement. The settlor understood to a certain extent what she was doing, but she was never told that she was not obliged to make the settlement or that it was only one of many alternative arrangements which it was open to her to make. She was under the impression that the bank would look after the money for her and did not understand that the money was to be placed irrevocably beyond her own unfettered control. In 1949 she became aware of objections to the validity of the settlement and during the following years she endeavoured to persuade the bank to consent to the revocation of the trusts and to allow her to receive the fund for herself. On Feb. 27, 1953, the settlor commenced an action for a declaration that the deed of settlement was void.

HELD: (i) a settlement of this character, viz., by a young unmarried woman of the whole of a considerable fortune upon trusts which placed that irrevocably beyond her unfettered control, can only stand if executed after receiving legal advice which is careful, deliberate and wholly independent; on the facts, the settlor's understanding of the settlement at the time of its execution was imperfect, insufficient time had been given to her consideration of it and of possible alternatives and she had not had wholly separate independent advice, and accordingly, though her adviser and her father had acted with integrity, the settlement should be set aside.

(ii) the delay in bringing the action did not, in the circumstances, disentitle the settlor to the relief sought, and the settlement was set aside.

Allcard v. Skinner (1887) (36 Ch.D. 145), considered.

(iii) in the circumstances, the bank was entitled to its full taxed costs and expenses as though there had been an unexceptionable trust.

Dutton v. Thompson (1883) (23 Ch.D. 278), considered.

Per VAISEY, J. : (a) "The expression 'undue influence' . . . is not confined to those cases in which the influence is exerted to secure a benefit for the person exerting it, but extends also to cases in which a person of imperfect judgment is placed or places himself under the direction of one possessing not only greater experience but also such force as that which is inherent in such a relation as that between a father and his own child" (see p. 729, letter C, post).

Lancashire Loans, Ltd. v. Black ([1934] 1 K.B. 380), applied.

(b) ". . . any trustee, corporate or other, when taking over the property of a young girl just of age, would be well advised to make quite sure that the trusts have been constituted in circumstances which leave no doubt as to their full validity" (see p. 731, letter A, post).

AS TO UNDUE INFLUENCE, see 13 HALSBURY'S LAWS (2nd Edn.) 21, para. 17; and FOR CASES, see 12 DIGEST (Repl.) 111-116, 657-683.

AS TO LACHES, see 13 HALSBURY'S LAWS (2nd Edn.) 212, para. 205, 218, para. 209 text and notes (g) (h); and FOR CASES, see 20 DIGEST 527, 2509 et seq.

AS TO TRUSTEE'S COSTS OF LEGAL PROCEEDINGS WHERE VOLUNTARY SETTLEMENT IS SET ASIDE, see 33 HALSBURY'S LAWS (2nd Edn.) 273, para. 484; and FOR CASES, see 43 DIGEST 825, 2688-2698.

Cases referred to:

(1) *Lancashire Loans, Ltd. v. Black*, [1934] 1 K.B. 380; 103 L.J.K.B. 129; 150 L.T. 304; 12 Digest (Repl.) 115, 679.

(2) *Everitt v. Everitt*, (1870), L.R. 10 Eq. 405; 39 L.J.Ch. 777; 23 L.T. 136; 40 Digest 554, 957.

(3) *Dutton v. Thompson*, (1883), 23 Ch.D. 278; 52 L.J.Ch. 661; 49 L.T. 109; 40 Digest 555, 970.

(4) *James v. Couchman*, (1885), 29 Ch.D. 212; 54 L.J.Ch. 838; 52 L.T. 344; 40 Digest 543, 855.

(5) *Powell v. Powell*, [1900] 1 Ch. 243; 69 L.J.Ch. 164; 82 L.T. 84; 12 Digest (Repl.) 115, 676.

(6) *Inche Noriah v. Shaik Allie Bin Omar*, [1929] A.C. 127; 98 L.J.P.C. 1; 140 L.T. 121; Digest Supp.

(7) *Allcard v. Skinner*, (1887), 36 Ch.D. 145; 56 L.J.Ch. 1052; 57 L.T. 61; 12 Digest (Repl.) 111, 659.

ACTION for (i) a declaration that a deed of settlement executed by the plaintiff on July 12, 1940, was void, and (ii) an order that the defendant, Lloyds Bank, Ltd., the trustee of the settlement, should deliver up the deed to the plaintiff for cancellation. By its defence the defendant bank raised the question whether the laches, acquiescence and delay of the plaintiff in seeking the relief claimed disentitled her to the relief. The facts and the provisions of the settlement are set out in the judgment of VAISEY, J.

C. F. Fletcher-Cooke for the plaintiff, the settlor.

E. B. Stamp for the defendant bank, the trustee.

Cur. adv. vult.

Nov. 30. VAISEY, J., read the following judgment: The plaintiff in this action, Mrs. Hazel Isobel Bullock, is the wife of Dr. Ernest Edgar Bullock. The first defendant, Lloyds Bank, Ltd., is sued as the trustee of a deed of settlement dated July 12, 1940, and expressed to be made between the plaintiff, of the one part, and Lloyds Bank, Ltd., of the other part. The second defendant, Verling Harris, was the plaintiff's brother. He takes no part in these proceedings. The plaintiff seeks a declaration that the said deed is void, and asks that it be delivered up for cancellation.

The facts are simple and not really in dispute. The plaintiff attained the age of twenty-one years on June 11, 1940. She thereupon became absolutely entitled under the will of her deceased mother to certain funds amounting to some £12,000 in value. She was then an unmarried girl and her name was Hazel Isobel Macnaughton-Jones. She was living at home with her father, the late Dr. Henry Macnaughton Macnaughton-Jones, and her stepmother, his second wife. She was embarking on a stage career, that being, she told me, her chief interest in life. Her father was then, and had for some time been, pecuniarily embarrassed, or, as she put it to me, "in terrific financial difficulties". Let me say at once that he dealt with the situation in a perfectly proper manner so far as the execution of this settlement is concerned, and I entirely acquit him of any selfish or self-seeking conduct in the matter. It must be remembered that the month which elapsed between the plaintiff's attainment of her majority and the execution of the settlement in question was one of grave national peril and consequent alarm. There can seldom have been a time so ill-suited for the arrangement of matters requiring calm consideration and balanced judgments.

The settlement executed under the conditions which I have indicated provided as follows. By cl. 1 the bank was either to permit the trust fund or any part thereof to remain in its then state of investment so long as the bank should think fit or to sell and convert into money the same or any part thereof and invest the proceeds in any of the investments thereby authorised, but so that during the life of the plaintiff no sale, conversion, investment or reinvestment was to be made without her consent in writing. By cl. 2 a very wide investment range is provided for and all transactions were to be subject to the plaintiff's consent in writing. By cl. 3 the bank was to hold the income of the trust fund on the statutory protective trusts for the benefit of the plaintiff during her life. By cl. 4 after the death of the plaintiff the bank was to hold the fund in trust for her children or remoter issue as she should appoint, but by will or codicil only and not by deed, and in default of and subject to such appointment in trust for all her children attaining twenty-one, or being female attaining that age or marrying, in equal shares if more than one, with the substitution of the children or child of a deceased child predeceasing the plaintiff. I observe that the terms of this clause make it a little doubtful whether it was necessary for a child of the plaintiff to survive her in order to attain a vested interest. Clause 5 is a hotchpot provision. By cl. 6 the plaintiff was empowered to appoint a life interest in favour of a surviving husband. Clause 7 provides that subject to the foregoing trusts the income of one half of the trust fund was to be held on protective trusts for the benefit of the plaintiff's father during his life and, subject thereto, the whole of the income was to be held on protective trusts for the benefit of the plaintiff's brother. There is an ultimate trust for the issue of the testator's brother or in default of such issue for the plaintiff's father on the statutory trusts during his life. Clause 8 empowers the brother to appoint a life estate to a widow, and there are, finally [in cl. 9], ultimate trusts for the testamentary appointees of the plaintiff and in default for the plaintiff herself.

The settlement contained [in cl. 11] an overriding power for the plaintiff, with the consent in writing of the bank (which should only be given in what the bank deemed to be the best interests of the plaintiff and which the bank should have an absolute discretion to give or withhold as it thought proper without incurring any responsibility in that behalf), by deed to revoke or vary all or any of the trusts and provisions therein contained concerning the whole or any part of the trust fund, and to declare any new or other trusts or provisions concerning the trust fund or any part thereof either in the plaintiff's own favour or in favour of any other person or persons. Under the last-mentioned power certain moneys have been raised out of the trust fund for the plaintiff, and what remains of it is now of the value of about £9,240.

In 1945 the plaintiff had married one Vernon Edward Kelso, but her marriage

was annulled in 1949. Her marriage to her present husband took place on Feb. 13, 1950. She has never had any issue. Her father died in 1949.

A The settlement was executed by the plaintiff under no advice except that of her father and of her father's solicitor, the late Mr. Pepper. As a piece of draftsmanship it is not, in my judgment, altogether commendable, and the most serious defect in it is the absence of any general power of appointment to override the ultimate trusts other than those in favour of the plaintiff's own issue and surviving husband. Various alternative trusts and provisions ought also, I think, to have been suggested to the plaintiff and would have been suggested to her if she had been more efficiently and not only separately but quite independently advised. I cannot believe, for instance, that she deliberately excluded the usual power to appoint the fund to a child inter vivos (for example, on marriage); and whether she really meant that no child of hers should participate in the fund unless that child survived her it is impossible to say because of an ambiguity in the clause itself.

B I acquit the solicitor of anything more than a certain measure of carelessness in the preparation of the draft, but I think that he was handicapped by the fact that he was the father's solicitor and so, as I think, incapable of approaching the matter in a wholly dispassionate spirit. The expression "undue influence" is, to my mind, one of ambiguous purport. It is not confined to those cases in which the influence is exerted to secure a benefit for the person exerting it, but extends also to cases in which a person of imperfect judgment is placed or places himself under the direction of one possessing not only greater experience but also such force as that which is inherent in such a relation as that between a father and his own child: see *Lancashire Loans, Ltd. v. Black* (1). If this matter had been considered by someone who was not thinking of the father's embarrassments or of any of the family difficulties except in regard to their effect on the plaintiff herself, I think that a better document might well have been produced. It seems to me that the influence of the father exercised by him and through his solicitor was "undue" in the sense that its exercise had a necessarily constraining effect on the mind of the plaintiff, who ought to have been placed in the hands of somebody who had been concerned to secure her interests and hers alone. I doubt very much whether she realised that neither her father nor her brother had any right to accept benefits from her, and that her wishes in regard to provision being made for them were essentially subject to change in the future. The settlement was obviously one dictated by the father, not with any sinister desire of benefiting himself, but without a sufficiently single-eyed concentration on his daughter's interests, present and future, apart from the interests of anyone else in the world. A fortune of £12,000 is, after all, a substantial fortune, and ought to have been tied up, if at all, only after the most careful consideration and with certainty that the plaintiff not only understood what she was doing but also understood the large field of choice which was open to her in the matter. The very fact that the general power of appointment was omitted seems to me to indicate that she can have had no such understanding. I have considered (among others) the following cases cited to me: *Everitt v. Everitt* (2), *Dutton v. Thompson* (3), *James v. Couchman* (4), *Powell v. Powell* (5), *Inche Noriah v. Shaik Allie Bin Omar* (6) and *Lancashire Loans, Ltd. v. Black* (1).

G I had the advantage of hearing the plaintiff's evidence in the box, and I have been supplied with a transcript of the shorthand note of that evidence. Did she understand what she was doing? That is a very difficult question to answer. I am sure that Mr. Pepper explained to her the effect of the document and that she took in what he said so far as her intelligence and understanding allowed. But the whole thing was, I think, done much too quickly. In the special circumstances of the time, much more prolonged consideration should surely have been given to the matter. Even if the plaintiff understood what she was doing when she executed the settlement, I cannot believe that she was really impressed as

she should have been with the fact that it was not obligatory on her to make any settlement at all. She told me that her idea when she went to see Mr. Pepper was that some arrangement was to be made whereby her father "was sort of got out of his troubles". That, of course, was entirely beside the point. I am not convinced that her mind was ever brought to the real point, and, accepting Mr. Pepper's entries as a true record (as I do), I think that what was omitted was that the plaintiff was never told that the settlement was one which she was not obliged to make at all, and gave effect to only one of many alternative arrangements which were open to her to make. Mr. Pepper was only known to her as her father's solicitor, and she had, in fact, never met him before. She tells me:

"I thought it was sort of making a trust which would look after my stocks and shares and things until I knew more about it. I thought that that was quite a good idea."

In further answer to me, she said:

"I thought Lloyds Bank would really be sort of acting for me to advise me. I am afraid I did not understand."

At the interview which she had with Mr. Pepper alone the plaintiff appears to have frankly told Mr. Pepper, according to her recollection, that she had not thought at all about who was to have her money if anything happened to her. A cut and dried scheme was put before her which was not altogether bad, although, if I may say so, rather crude. I do not believe that she ever understood clearly that she would never be able of her own free volition to, as she says, "touch" her money, and that, whatever were the exigencies of her intended theatrical career or otherwise, her money was to be placed irrevocably beyond her own unfettered control. She must, no doubt, have heard the word "protected", but I do not believe that she was ever told against whom or what she was to be protected or how such protection was intended to be secured.

Such a settlement as this is can, in my judgment, only be justified after prolonged consideration being made, as it was, by a young girl only just of age, and can only stand if executed under the advice of a competent adviser capable of surveying the whole field with an absolutely independent outlook and who explains to the intending settlor, first, that she could do exactly as she pleased, and, secondly, that the scheme put before her was not one to be accepted or rejected out of hand but to be discussed, point by point, with a full understanding of the various alternative possibilities. I accept Mr. Pepper's entries as a correct record, but I think that the matter was rushed. I think Mr. Pepper did his best, and I think that the plaintiff's father did his best, but the plaintiff was entirely in the hands of the two of them, and she ought to have been advised carefully, deliberately, separately and independently, which she was not. In my judgment the plaintiff did understand what she was doing up to a point, but her evidence convinced me that her understanding was so imperfect and incomplete that this settlement ought not, in my judgment, to stand.

The more difficult question is that of laches. The writ in this action was issued on Feb. 27, 1953, and there is no doubt that the plaintiff had been aware of the objections to the validity of the settlement since 1949. I have been referred to *Allcard v. Skinner* (7), in which a majority of the Court of Appeal held that acquiescence had in that case operated as a bar to the plaintiff's right. I have felt a great deal of difficulty about this. No doubt the plaintiff tried to be relieved from the embarrassments of the settlement by means of the power contained in the settlement itself, and for some four years she tried to secure the end which she seeks in this action by endeavouring to induce the defendant bank to allow her to revoke the trusts and to receive the funds for herself. That seems to me to involve an inconsistency of attitude on the plaintiff's part which has little real substance, and on the whole, though with hesitation, I think that the

action should succeed and the plaintiff should be granted the relief which she seeks.

The criticisms which I have thought it right to make about the conduct of the plaintiff's father and his solicitor do not reflect at all on the honesty and integrity of either of them, and I think, as I have said, that each was trying to do his best in very difficult circumstances. Still less do I desire to condemn in any way Lloyds Bank, Ltd., or any of its officials; but I do think that any trustee, corporate or other, when taking over the property of a young girl just of age, would be well advised to make quite sure that the trusts have been constituted in circumstances which leave no doubt as to their full validity.

As the settlement is being set aside the defendant bank has no contractual right to its costs (see *Dutton v. Thompson* (3)); but I think that the bank in the present case certainly ought to have its full taxed costs and expenses in exactly the same way as though there were here an unexceptionable trust. Subject to the retention of such costs and expenses the funds must be transferred to the plaintiff or as she may direct, and with regard to any taxation of her own costs an order for that purpose will be made if she asks for it.

Judgment for the plaintiff.

Solicitors: *Hall, Brydon, Egerton & Nicholas* (for the settlor); *Lithgow, Pepper & Eldridge* (for the trustee).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

ORMAN BROTHERS, LTD. v. GREENBAUM.

[QUEEN'S BENCH DIVISION (Devlin, J.), December 3, 1954.]

Landlord and Tenant—Notice to quit—Business premises—Notice given before operation of Landlord and Tenant Act, 1954—Notice expiring after Act in operation—Form of notice not that prescribed by Act—Validity of notice—Landlord and Tenant Act, 1954 (c. 56), s. 24 (1), (3).

The Landlord and Tenant Act, 1954 (which was passed on July 30, 1954, and came into operation on Oct. 1, 1954) provides by s. 24: “(1) A tenancy to which this part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this part of this Act . . . (3) Notwithstanding anything in sub-s. (1) of this section . . . (b) where, at a time when a tenancy is not one to which this part of this Act applies, the landlord gives notice to quit, the operation of the notice shall not be affected by reason that the tenancy becomes one to which this part of this Act applies after the giving of the notice”.

The tenant of business premises under a lease which expired on Mar. 9, 1954, was permitted to hold over, but on Aug. 31, 1954, the landlords gave him notice to quit on Oct. 4, 1954. The tenancy was one to which the Act of 1954 applied but the notice to quit was not in the form prescribed by the Act.

Held: notwithstanding that the notice to quit was given before the Act of 1954 was passed and operated, s. 24 (1) applied to render the notice ineffective, because that sub-section literally meant that a tenancy should not come to an end unless notice to quit had been given in accordance with the Act, and it was clear from para. 1 of sched. IX to the Act that Parliament intended the literal meaning to be applied; and, further, s. 24 (3) did not apply to protect the notice from the operation of s. 24 (1), because sub-s. (3) was applicable only on the assumption that the Act was already in force, which it was not at the date of the notice.

ACTION for possession of business premises and for mesne profits.
The facts are set out in the judgment.

M. D. Sherrard for the landlords.

C. Lawson for the tenant.

DEVLIN, J.: The Landlord and Tenant Act, 1954, came into force just two months ago, so that very little time has been lost in the discovering of difficulties about its interpretation and application. It is an Act which is intended so far as Part II is concerned, which is the only part that I have to deal with, to make certain provisions for security of tenure for business, professional and other tenants.

The defendant in this case was a business tenant. He was granted a lease of the premises which are the subject-matter of this case: the lease was for business purposes and was to operate from Mar. 9, 1953, at a rent of £20 a week. His tenancy, therefore, expired on Mar. 9, 1954, but he was allowed to hold over on the same terms until the landlords, the plaintiffs in this case, decided on Aug. 31, 1954, to give him a notice to quit which was to expire within four weeks from its service, and which did, therefore, in accordance with its terms, expire on Oct. 4 of this year. Meanwhile, the Landlord and Tenant Act, 1954, had come into force. It was an Act which was passed by Parliament on July 30, 1954, and the date is important, but by s. 70 (2) the Act came into operation on Oct. 1, 1954.

It is common ground in this case that this was a tenancy of a class to which the Act applies. One of the provisions of the Act is with regard to the giving of notices to quit, and certain forms of notice to quit are prescribed. It is common ground that the notice which was given on Aug. 31, 1954, did not comply with that requirement. The question, therefore, which I have to determine, is whether the notice to quit was a good one or not.

One naturally looks to see what provision, if any, has been made for the situation which was obviously bound to arise, that at the time when the Act came into force there might be notices to quit which had been served, but which had not yet taken effect. Here was a notice to quit served on Aug. 31, 1954, to take effect on Oct. 4, 1954, and on Oct. 1, 1954, the Act comes into force. The notice does not comply with the requirements of the Act. What is the effect of the Act on such a notice?

One first looks to see what the Act says about notices that are not in accordance with its provisions. That is to be found in s. 24 (1) which provides:

"A tenancy to which this part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this part of this Act . . ."

Counsel for the landlords argues that "terminated" means "giving a notice to quit"; in other words, when the Act uses the word "terminated", it is referring to the instrument or to the act which is the terminating factor and not to the effluxion of time. Counsel for the tenant disputes that, but I think that the first interpretation is the better one, and I shall assume it to be right. The wording of the section which I have read appears to draw a distinction between a tenancy coming to an end and a tenancy being terminated. Accordingly, for "terminated" I shall read "give notice to quit". On that basis, the operative part of the section reads in this way: "A tenancy to which this part of this Act applies shall not come to an end unless notice to quit has been given in accordance with the provisions of this part of this Act . . ."

If one applies that literally, the position is this: One has to ask oneself whether, on Oct. 4, 1954, this tenancy came to an end. The Act is then unquestionably in force. It is then a tenancy to which this part of the Act applies, because it is a business tenancy. Has it come to an end? It does not come to an end unless notice to quit has been given in accordance with the provisions of the Act and

notice to quit has not been given in accordance with the provisions of the Act and, therefore, the tenancy does not come to an end. That is the literal interpretation of the section.

Counsel for the landlords argues, with a good deal of force, that that literal interpretation ought not to be given to the section; it ought not to be assumed that Parliament is in effect, though not in form, legislating retrospectively as to the contents of a notice to quit. Suppose, he says, a tenancy required a year's notice to quit and a notice is given which is in the usual form, and then an Act of Parliament is passed which requires it to be in some special form. The consequence is that when it would normally have taken effect a few days later it does not take effect at all. The parties may have made their arrangements on the basis that it was going to take effect; the premises may have been re-let; and it would be quite unreasonable, counsel argues, to give a meaning to this section which would put a landlord, who could not possibly have known what particular form Parliament was going to require, into such a position as that. That is always an argument that has to be taken into consideration in the construction of the section, and it may sometimes be a good reason for not giving the words of the section the meaning that they literally bear, but it is not a conclusive reason, because, of course, Parliament can do what it likes. One has to look at other provisions of the Act to see whether Parliament has indicated one way or the other how it proposed to deal with such a situation.

I have been referred to the provisions of para. 1 of sched. IX to the Act as throwing some light on Parliament's intention with regard to notices to quit that were served before the coming into force of the Act. Before I refer to that schedule, I must, so as to make it comprehensible, refer to s. 66 of the Act itself, which, by sub-s. (1), says this:

"Any form of notice required by this Act to be prescribed shall be prescribed by regulations made by the Lord Chancellor by statutory instrument."

What appears to be at first sight surprising, and is, indeed, surprising until one looks at the terms of sched. IX, is that although the Act did not come into force until Oct. 1, 1954, regulations were made on Aug. 19, 1954, which purported to come into operation on Aug. 27, 1954, over a month before the Act itself came into force. All that I need say about those regulations is that they contain a large number of notices and are clearly the sort of regulations that are contemplated by s. 66 (1), where the Lord Chancellor is given power to prescribe the form of notice.

If one looks at sched. IX, para. 1, one sees why the regulations were made on that date. Paragraph 1 reads as follows:

"The power under s. 66 of this Act to make regulations prescribing forms of notices for the purposes of this Act may be exercised at any time after the passing and before the commencement of this Act so as to bring the regulations into operation at any time after they are made; and where the date, or the end of a period, specified by a notice which is given in a form so prescribed falls after the time at which this Act comes into operation the notice shall not be invalid by reason only that it was served before that time."

It is a novel Parliamentary device to make the regulations made under the Act part of the law of the land before the Act itself becomes part of the law of the land. I am not, however, in the circumstances of this case, called on to consider any large question of that sort. The effect of this may be one of two things: it may be that the Act becomes part of the law of the land for certain purposes, and for the purpose of making regulations in particular, on July 30, the date on which the Act was passed, and that the provision that it does not come into operation until Oct. 1 must be construed accordingly. In that event, the regulations become part of the law of the land on the date when they are made, or,

rather, by their terms, brought into operation, i.e., Aug. 27. The alternative view is that that is not a possible construction of the Act and that if the Act itself does not come into operation until Oct. 1, neither can the regulations. On that view, however, it seems to me to be plain from para. 1 that if they do not become part of the law of the land until Oct. 1, on Oct. 1 they become, by virtue of para. 1, retrospectively law from Aug. 27. That would mean that as between Aug. 27 and Oct. 1 they are not part of the law of the land, but on Oct. 1 they become part of the law of the land retrospectively.

Those are both possibilities which, as I say, I am not called on to determine. All that I have to consider is what light this paragraph throws on the construction of s. 24 (1). Does it help to show what Parliament's intentions were with regard to notices to quit served before the Act came into operation? Clearly it does. Clearly whichever of the two alternative views which I have mentioned be the right one, Parliament intended that from and after Aug. 27, notices to quit should comply with the forms that were set out in the regulations of that date; otherwise, there would have been no point whatever in prescribing such forms.

Counsel for the landlords has argued that that is not the true effect of para. 1 of sched. IX to the Act. He says para. 1 and the regulations that were made were intended to set out these notices before the Act itself came into operation so that landlords who desired to follow them could follow them, but there is nothing in them to make a landlord who chooses not to follow them in any way not in compliance with the Act. I think that the difficulty in that argument is the use of the word "only" in the last part of the paragraph. The paragraph reads:

" . . . where the date, or the end of a period, specified by a notice which is given in a form so prescribed falls after the time at which this Act comes into operation the notice shall not be invalid by reason only that it was served before that time . . . "

That appears to me to carry with it the clear implication that it will be invalid if, for some other reason, it does not comply with the Act.

However, I have not to consider para. 1 as if I were construing a paragraph which invalidated a notice which would otherwise be good; I have to consider it simply for the light which it throws on the construction of the Act itself, and it there, I think, makes it quite plain that Parliament did intend that the literal meaning should be given to those words. It did intend that when the tenancy came to an end one should inquire "Has it been terminated?"—i.e., "Has a notice to quit been given in accordance with the provisions of this Act?"—and it made such provision as it thought was necessary for giving landlords advance information of what notices they ought to use, so that they could bring themselves into conformity with the Act.

I therefore hold that s. 24 (1) applies in this case and that the tenancy has not come to an end because notice to quit has not been given in accordance with the provisions of the Act. That is subject to the alternative argument of counsel for the landlords, which is that if he is caught by s. 24 (1), then he is taken out of it by s. 24 (3). Sub-section (3), so far as it is material, provides:

"Notwithstanding anything in sub-s. (1) of this section . . . (b) where, at a time when a tenancy is not one to which this part of this Act applies, the landlord gives notice to quit, the operation of the notice shall not be affected by reason that the tenancy becomes one to which this part of this Act applies after the giving of the notice."

I think the object of that sub-section is clear enough. It is not intended merely as a transitional provision to cover notices to quit that are served before the coming into force of the Act; it is intended as a permanent provision of the Act and its object is to deal with the situation in which there is a change of user between the serving of the notice and its taking effect, a change of user which might bring the tenancy within the Act. Thus, if instead of reading "tenancy is

not one to which this part of this Act applies " I call it, not precisely but no doubt for general purposes sufficiently accurately, a "business tenancy", then the sub-section would read in this way: "where, at a time when a tenancy is not a business tenancy, the landlord gives notice to quit, the operation of the notice shall not be affected by reason that the tenancy becomes a business tenancy after the giving of the notice ". That is a plain, simple and, no doubt, necessary provision.

A Counsel for the landlords argues that whatever the object of the sub-section may be, the language is wide enough for his purposes and he can use it as, so to speak, a transitional provision. He seeks to apply it in this way: Sub-section (3) (b) begins "where, at a time when a tenancy is not one to which this part of this Act applies, the landlord gives notice to quit ". He says the landlord gave notice to quit on Aug. 31, 1954, and the tenancy, although a business tenancy, was not then one to which this part of the Act applied, because the Act did not apply to any tenancy at all, not having come into force until Oct. 1, 1954. Accordingly, he comes within that sub-section, and he then says: "The operation of the notice shall not be affected by reason that the tenancy becomes one to which this part of the Act applies after the giving of the notice ", the "becoming" being in his case coincident with the coming into force of the Act which affects the tenancy.

C In my judgment, that is not a construction which it is reasonable to give to this sub-section. I do not think that, if what had been meant was that notices to quit which were given before the coming into force of the Act were not intended to be affected, Parliament would have dealt with it in a way like that. The words "at a time when a tenancy is not one to which this part of this Act applies" clearly to my mind carry with them the implication that at the time when one is considering the matter the Act is in force. It is perfectly true, of course, that the Act does not apply to any tenancies before Oct. 1, 1954, or, at any rate, before July 30, 1954, but that division in time is not what is intended by this sub-section. The sub-section intends a division in character, and I think counsel for the tenant is right in his argument when he says that when one is applying that sub-section at a time when a tenancy is not one to which this part of this Act applies, one has to assume that the Act itself is already in force and applying, and then consider whether in its terms it does or does not cover that particular class of tenancy. Accordingly, the argument based on s. 24 (3) fails and, therefore, I hold that, by virtue of s. 24 (1) and notwithstanding the notice to quit, the tenancy has not come to an end.

Judgment for the tenant.

Solicitors: *E. Kleinman* (for the landlords); *Tringhams* (for the tenant).

[*Reported by A. P. PRINGLE, Esq., Barrister-at-Law.*]

S. v. S. (otherwise C.).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), July 19, 20, November 15, 16, 17, 26, 1954.]

Nullity—Incapacity of wife—Practical impossibility of consummation—Date for ascertaining—Remediable by minor operation without danger.

Nullity—Wilful refusal to consummate marriage—Indecision not refusal—Refusal distinguished from neglect.

On Jan. 19, 1949, the parties went through a ceremony of marriage. Both parties made genuine but unsuccessful attempts to consummate the marriage. Towards the end of 1949 the husband suggested that the wife should consult a doctor; he repeated the suggestion twice during 1950 and twice during 1951, but in fact the wife did not do so. At no time did the husband offer to take the wife to a doctor, nor did he ever see a doctor himself. On Sept. 11, 1952, the wife left the husband and they never resumed cohabitation. In the autumn of 1952, the husband admittedly began an adulterous association which had continued.

By a petition dated Apr. 8, 1953, the husband sought a decree of nullity alleging that the wife was at the time of the marriage and had ever since been incapable of consummating the marriage, alternatively that she had wilfully refused to consummate the marriage. On Apr. 22, 1953, the wife consulted a doctor who found her to be abnormal only in the thickness of her hymen which in his view could be corrected by a minor surgical operation. By her answer dated Nov. 6, 1953, the wife denied the allegations of the petition and alleged that she was not subject to any physical or mental abnormality save a hymeneal stenosis with a thickened hymen, removable by a simple surgical operation which she "is and was at all material times ready and willing to undergo". By way of cross-petition the wife sought a divorce on the ground of the husband's adultery. On Dec. 14, 1953, the wife was examined by the medical officer appointed by the court who found that the hymen was of such an unusually thick and resistant nature that it constituted an effective barrier to penetration, but that the operation would cause no danger to her life or health.

In July, 1954, the suit was heard and adjourned for argument by the Queen's Proctor. At that hearing the wife stated in evidence that she was willing to undergo the operation. In October, 1954, the operation of hymenectomy was successfully performed on the wife. In November, 1954, the case came on for further argument, and one of the submissions for the husband was that the wife's incapacity should be determined as at the date of presentation of the petition.

HELD: (i) where both incapacity and wilful refusal were alleged, it was still necessary for the court to ascertain the cause of non-consummation and the questions of incapacity and wilful refusal would be considered separately: observations of DENNING, L.J., in *Morgan v. Morgan* ([1949] W.N. at p. 250), not applied.

(ii) the true test of incapacity was the practical impossibility of consummation, and a spouse must be regarded as incurable if the condition could be remedied by an operation attended by danger or if the spouse at fault refused to submit to an operation (observations of LORD PENZANCE in *G— v. G—* (1871) (L.R. 2 P. & D. at p. 291), applied): in deciding whether a state of impotency at the date of the marriage and continuing to the date of the action was remediable the court must take into consideration future medical or surgical treatment which might remove the cause of the disability (*W.Y. v.*

A.Y. (1946 S.C. 27), applied); accordingly, the test whether there was practical impossibility of consummation must be applied in the present case at the date of the hearing of the suit in July, 1954, and, as at that date the wife was willing to undergo and subsequently underwent an operation which remedied the impediment, the husband failed to prove that the marriage had not been consummated owing to the wife's incapacity.

A (iii) wilful refusal to consummate a marriage implies a conscious act of volition, which is to be distinguished from neglect that may be no more than a failure or an omission to do what has been suggested; in the present case the wife had not come to a settled and definite decision and the husband had failed to prove that she had wilfully refused to consummate the marriage (observations of LORD JOWITT, L.C., in *Horton v. Horton* ([1947] 2 All E.R. at p. 874), applied).

B (iv) accordingly the husband's petition must be dismissed and the wife would be granted a divorce on the ground of the husband's adultery.

C Per curiam: it was accepted by counsel, and I agree, that wilful refusal to consummate a marriage, if it is to be a ground for rendering a marriage voidable under s. 8 (1) (a) of the Matrimonial Causes Act, 1950, must have persisted up to the date of the presentation of the petition (see p. 743, letter D, post).

AS TO WHAT CONSTITUTES IMPOTENCE, see 10 HALSBURY'S LAWS (2nd Edn.) p. 641, para. 938; and FOR CASES, see 27 DIGEST (Repl.) 272-275, 2183-2202.

D FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 8 (1) (a), see 29 HALSBURY'S STATUTES (2nd Edn.) 397; and FOR CASES, see 27 DIGEST (Repl.) 280, 281, 2252-2259.

Cases referred to:

- (1) *Morgan v. Morgan*, [1949] W.N. 250; 93 Sol. Jo. 450; 27 Digest (Repl.) 276, 2213.
- E (2) *Baxter v. Baxter*, [1947] 2 All E.R. 886; [1948] A.C. 274; [1948] L.J.R. 479; 27 Digest (Repl.) 280, 2253.
- (3) *G—— v. G——*, (1871), L.R. 2 P. & D. 287; 40 L.J.P. & M. 83; 25 L.T. 510; 27 Digest (Repl.) 270, 2162.
- (4) *H. v. H.*, (Mar. 31, 1954), unreported.
- (5) *D——e v. A——g* (*falsely calling herself D——e*), (1845), 1 Rob. Eccl. 279; 163 E.R. 1039; 27 Digest (Repl.) 273, 2187.
- F (6) *L. v. L.* (*falsely called W.*), (1882), 7 P.D. 16; sub nom. *L. v. W.* (*falsely called L.*), 51 L.J.P. 23; 47 L.T. 132; 27 Digest (Repl.) 274, 2194.
- (7) *W.Y. v. A.Y.*, 1946 S.C. 27; 27 Digest (Repl.) 271, 980.
- (8) *Harthan v. Harthan*, [1948] 2 All E.R. 639; [1949] P. 115; [1949] L.J.R. 115; 27 Digest (Repl.) 272, 2178.
- G (9) *F. v. F.*, 1945 S.C. 202; 27 Digest (Repl.) 272, 985.
- (10) *G. v. G.* (*falsely called K.*), (1908), 25 T.L.R. 328; 27 Digest (Repl.) 274, 2200.
- (11) *Horton v. Horton*, [1947] 2 All E.R. 871; [1948] L.J.R. 396; 27 Digest (Repl.) 281, 2256.
- (12) *Dickinson v. Dickinson* (*otherwise Phillips*), [1913] P. 198; sub nom. *D. v. D.* (*otherwise P.*), 82 L.J.P. 121; 27 Digest (Repl.) 276, 2209.
- H (13) *Napier v. Napier*, [1915] P. 184; 84 L.J.P. 177; 113 L.T. 764; 27 Digest (Repl.) 276, 2210.
- (14) *Re Quintin Dick*, [1926] Ch. 992; 35 Digest 706, 64.

PETITION for nullity.

On Apr. 8, 1953, the husband petitioned that the marriage celebrated between him and the respondent be declared null and void on the ground of her incapacity

to consummate the marriage or of her wilful refusal to consummate it. By her answer the wife denied incapacity and wilful refusal and prayed a declaration of nullity of marriage on the ground of the petitioner's incapacity or wilful refusal to consummate the marriage, and by cross-petition prayed a dissolution of the marriage on the ground of the husband's adultery.

The facts appear in the judgment.

J. E. S. Simon, Q.C., and P. J. Cox for the husband.

G. C. Tyndale, Q.C., and C. A. Beaumont for the wife.

Colin Duncan for the Queen's Proctor.-

Cur. adv. vult.

Nov. 26. **KARMINSKI, J.**, read the following judgment: On Jan. 19, 1949, the husband and the wife went through a ceremony of marriage at Birmingham. By his petition, filed on Apr. 9, 1953, the husband alleges that the marriage was never consummated by reason of the incapacity of the wife. The husband alleges in the alternative that the wife has wilfully refused to consummate the marriage. By her answer, filed on Nov. 10, 1953 (an earlier answer had been struck out by reason only of a technical defect) the wife did not admit non-consummation and asserted that her only physical abnormality was a hymeneal stenosis with a thickened hymen. She further said that if such abnormality was an impediment to consummation it is and was at all material times removable by a simple surgical operation which she is and was at all material times ready to undergo. The wife by her answer also alleged that the husband was not entitled to relief by reason of insincerity, and because he had approbated the marriage; during the course of the hearing the defences of insincerity and approbation were dropped. The wife further asserted that if the marriage had not been consummated it was due to the incapacity or wilful refusal of the husband, and she claimed a decree of nullity on these alternative grounds; but again, as the evidence was heard, it became apparent that these cross-charges could not be sustained and they, too, were abandoned. By her cross-petition the wife alleged adultery by the husband with a Mrs. N. from about September, 1952, until the date of the answer, and prayed for a decree of dissolution on the grounds of such adultery. The husband by his reply joined issue on the allegations contained in the answer and denied the allegation contained in the cross-petition. In the course of his evidence, however, he expressly admitted that he had committed adultery with Mrs. N.; that she had borne him a child as the result of the adulterous intercourse, and that he was, in fact, still living with her at the time when he gave evidence in July, 1954.

The facts of the present case are within a narrow compass and are not difficult to ascertain. The area of dispute between the parties was comparatively small, but where differences existed I desire to make it clear at the outset that I preferred in general the evidence of the husband, whom I thought to be a more reliable and convincing witness. At the time of the ceremony of marriage in 1949 the husband was aged twenty-three and the wife thirty. They had been courting for some time prior to the marriage, but both were without sexual experience. When the medical inspector of the court examined the wife in December, 1953, she was, in his view, without any doubt, a virgin. There can be no doubt, in my mind, that up to the time the parties separated in September, 1952, the marriage had never been consummated. At the time of the marriage the husband was a student nurse; later he qualified as a state registered nurse, and later still obtained a special diploma in mental nursing. The wife, whose mother had died when she was about eight years of age, had thereafter lived with and been brought up by some maiden aunts in Birmingham, though she maintained contact with her father, who had re-married. Immediately after the marriage

the husband attempted to consummate the marriage; the wife was, in my view, not only anxious to consummate the marriage, but to bear children. After hearing the medical evidence, to which I shall refer in more detail hereafter, it became clear that, in spite of genuine efforts on both sides, all attempts at consummation failed. I find that the husband was perfectly capable, but the cause of the failure to consummate was due to the structure of the wife's parts.

A At some time in the latter part of 1949 the husband first suggested to the wife that she should see a doctor and obtain medical advice. According to the husband's evidence, which I accept, the wife did nothing, saying that the husband was effecting penetration. The wife denies that the husband told her about this time to consult a doctor, but I prefer the husband's version of this part of the case. Attempts to consummate the marriage continued, but with equal lack of

B success, during 1950. The husband says, and I again accept his evidence, that he twice during that year asked the wife to see a doctor. At that time he thought that either his wife was too small or that his own person was too large. The husband's suggestion that the wife should see a doctor did not appear to be communicated in any very definite manner. He himself expresses it as being offered in a roundabout way, pointing out that unless something was done the

C marriage was never going to be consummated. In 1951 the situation continued much as before. Attempts at consummation, though perhaps less frequent, were certainly wholly unsuccessful. Again the husband says, and again I accept his evidence, that on two occasions he asked his wife to see a doctor. The husband did not offer to take the wife to see a doctor, or to go to a doctor himself, or to see her own doctor. In fact, the wife had been under the care of her family

D doctor, Dr. L., for twenty-five years. Though it is perhaps easy to be wise after the event, I cannot help feeling that the unhappiness inherent in the present case might well have been avoided if the wife, or better still, the husband and the wife together, had at an early stage in the marriage consulted Dr. L. about their sexual difficulties. In fact, the husband never saw a doctor at all; the wife, though she consulted Dr. L. from time to time on other matters, did not, in fact,

E consult him about her sexual difficulties until* Apr. 22, 1953, soon after the present petition had been served on her.

In 1952 the general position between the parties rapidly deteriorated. The frustration which was caused by the attempts and by the failures at sexual intercourse set up a mutual irritation which became more acute as the year went

F on. In June, 1952, the wife consulted her doctor about some menstrual difficulties which led her to suspect that she might possibly be pregnant. Her suspicion of pregnancy was found to be mistaken, but it does not appear that on that occasion she was examined as to her sexual parts. On Sept. 11, 1952, the wife left the husband and has never returned to cohabitation with him. On Nov. 7, 1952, she obtained from the Birmingham justices an order for her main-

G tenance on the ground that the husband had deserted her. In the autumn of 1952 the husband commenced an adulterous association with Mrs. N. which resulted in her child being born in May, 1953. The husband and Mrs. N. have lived together as husband and wife since April, 1953. As I have already indicated, on being served with the petition the wife at last consulted Dr. L. He examined

H her and found her to be a perfectly healthy woman, who was co-operative on examination and showed no signs at all of frigidity or hysteria during his examination of her sexual parts. Dr. L. found her, however, to be abnormal only in the thickness of her hymen, which, in his view, could be corrected by a minor surgical operation. Dr. L. was unfortunately himself ill at the time of the hearing and was unable to appear in court, but I accepted an affidavit sworn by him setting out the above facts. Dr. L. further expressed the opinion that if the husband had in the early days been more persistent in his efforts to consummate there was

a bare possibility that by intercourse he could have penetrated the wife's hymen. I would say that, in my view, the possibility was too uncertain to be considered by me as practical. The evidence of Dr. L. was in accordance with that given by Mr. P., the medical inspector appointed by the court, who had examined the husband and the wife on Dec. 14, 1953. Mr. P. found the husband apparently capable, but that the wife had a hymen of such an unusually thick and resistant nature that it constituted an effective barrier to penetration. Mr. P., like Dr. L., found no sign of hysteria or frigidity in the wife, and took the view that the hymen could be dealt with by a simple surgical operation, with no danger to her life or health. The views of Mr. P. and Dr. L. were reinforced at the hearing by that of Mr. T., a gynaecological surgeon at the Birmingham United Hospital. He examined the wife on July 17, 1954, and expressed the view that there was no reason why, if the operation of hymenectomy was performed on the wife she should not thereafter become perfectly normal and able to consummate the marriage. When she gave evidence before me in July, 1954, the wife said that she was perfectly willing to undergo the operation indicated by the medical evidence, but that she had been advised by her solicitors that it was not desirable for her to submit to such an operation pending the hearing of the suit. Having heard the evidence and some of the argument at assizes, I formed the view that the case was unusual and by no means free of difficulty, and I therefore adjourned the matter for subsequent argument in London and invited the assistance of the Queen's Proctor under the Matrimonial Causes Act, 1950, s. 10 (1). While the case was awaiting argument the wife submitted herself on Oct. 15, 1954, to the operation of hymenectomy. This was successfully performed by Mr. T., who swore an affidavit on Oct. 22, saying that, in his view, there is now no impediment on the wife's part to a full consummation of the marriage. I accept the expression of opinion given by Mr. T. in his affidavit without any reservation or hesitation. The case came before me for further argument on Nov. 15, 1954, and I had the advantage of very full and helpful arguments from counsel, from Mr. Simon for the husband, from Mr. Tyndale for the wife, and from Mr. Colin Duncan for the Queen's Proctor, and I desire to express my gratitude to all three counsel for the assistance given by them to me.

On these facts I have to decide whether or not a failure to consummate the marriage was due to the incapacity of, or the wilful refusal by, the wife. Counsel for the husband argued that incapacity and wilful refusal can be concurrent causes of a failure to consummate, and founded his argument on this matter on some observations of DENNING, L.J., as reported in *Morgan v. Morgan* (1). Counsel for the husband agreed that these observations were unnecessary to the decision of the case and, therefore, obiter. DENNING, L.J., is reported to have said ([1949] W.N. at p. 250):

"... the wilful refusal of the wife to consummate the marriage was a cause—one of the causes—of the marriage not having been consummated. It was not necessary that it should be the sole cause. It might be that there was another cause, viz. the impotence of the husband; but that did not matter."

BUCKNILL and ASQUITH, L.J.J., appear to have been silent on this point, and I do not consider myself to be bound by the observations of DENNING, L.J. In my view, it is necessary for the court to ascertain the cause of non-consummation, though I accept that the cause may be wilful refusal even where the spouse in fault is incapable. Thus an impotent spouse may effectively prevent consummation by a steadfast refusal to allow even an attempt to consummate the marriage. But it must be remembered that the common area covered by suits for nullity on the grounds respectively of incapacity and wilful refusal is very small: *Baxter v. Baxter* (2) ([1947] 2 All E.R. at p. 890).

I propose, therefore, to deal separately with the questions of incapacity and wilful refusal. The true test of incapacity is the practical impossibility of consummation. In *G—— v. G——* (3) LORD PENZANCE stated (L.R. 2 P. & D. at p. 291) the proposition as follows:

A “The invalidity of the marriage, if it cannot be consummated on account of some structural difficulty, is undoubted; but the basis of the interference of the court is not the structural defect, but the impracticability of consummation. If, therefore, a case presents itself involving the impracticability (although it may not arise from a structural defect) the reason for the interference of the court arises. The impossibility must be practical. It cannot be necessary to show that the woman is so formed that connection is physically impossible if it can be shown that it is possible only under conditions to which the husband would not be justified in resorting. The absence of a physical structural defect cannot be sufficient to render a marriage valid if it be shown that connection is practically impossible, or even if it be shown that it is only practicable after a remedy has been applied which the husband cannot enforce, and which the wife, whether wilfully or acting under the influence of hysteria, is determined not to submit to.”

B
C In *H. v. H.* (4), the Court of Appeal followed and applied this test. SINGLETON, L.J., stated the proposition as follows:

D “That shows the necessity of proving that which I stated a moment ago, that the disability alleged is incurable or such as to make consummation practically impossible.”

E A spouse must be regarded as incurable either if the condition can be remedied by an operation attended by danger, or if the spouse at fault refused to submit to an operation. In *D——e v. A——g* (*falsely calling herself D——e*) (5) there was evidence that a further operation on a wife could not be performed without danger to her life, and DR. LUSHINGTON found that she was practically incapable of consummating the marriage. In *L. v. L.* (*falsely called W.*) (6) SIR JAMES HANNEN, P., found that the marriage had not been consummated through the incapacity of the wife. He added these words (7 P.D. at p. 17):

F “The difficulty might perhaps be overcome if the lady would undergo an operation, which would probably be successful. But the court cannot compel her to submit, and the man can only be expected to take all reasonable means to persuade her. This he has done, and she has distinctly refused. I therefore make a decree nisi for nullity of the marriage.”

G In the present case the wife is no longer incapable of consummation since the operation recently performed on her has now rendered her physically capable of consummation. Nor can it now be said that she has refused to submit to an operation, since she has, in fact, though belatedly, submitted to it. But counsel for the husband has argued that the wife submitted to the operation too late, describing her submission as a tactical move and one not undergone bona fide with the object of achieving a consummation of her marriage with the husband. H He submitted that if the wife is to be regarded as curable she must, in fact, be curable at the date of the presentation of the petition; in the present case he said the wife was not so curable, because she had refused to see a doctor or to undergo treatment prior to the presentation of the petition. I do not think that this argument is supported by authority. In *D——e v. A——g* (*falsely calling herself D——e*) (5) DR. LUSHINGTON adjourned the hearing for further medical evidence to ascertain whether the wife's defects were incapable of cure. At the resumed hearing evidence was given that any further operation might be dangerous and

would probably be unsuccessful. The reasons for the further inquiry were set out by DR. LUSHINGTON (1 Rob. Eccl. at pp. 298, 299) in the following terms:

"There is, I think, some ambiguity in the evidence. The two witnesses are both agreed as to the connection being imperfect; but I am not satisfied as to the true meaning of their evidence as to incurability. In one sense of the term, there can be no doubt, namely, that as relates to conception, the malformation is incurable; but it is to me doubtful whether they mean that it is incurable as to the mere coitus. In this difference, I think, lies the true distinction. If there be a reasonable probability that the lady can be made capable of a vera copula—of the natural sort of coitus, though without power of conception—I cannot pronounce this marriage void."

This passage was quoted with apparent approval in the opinion of LORD JOWITT, L.C., in *Baxter v. Baxter* (2) ([1947] 2 All E.R. at p. 889).

The nearest decision on the facts to the present case is *W.Y. v. A.Y.* (7). In that case the Lord Ordinary (LORD SORNS) adjourned a suit for nullity on the ground of incapacity after hearing evidence from a doctor that the wife might have her condition remedied by treatment and on the wife's own evidence that she was willing to undergo treatment. In that case the wife had up to the date of the hearing refused or neglected to submit to treatment. The husband appealed to the Inner House against the course directed by the Lord Ordinary. The Inner House upheld the decision of the Lord Ordinary, the Lord President (LORD NORMAND) stating that when the question has arisen whether a state of impotency existing at the date of the marriage and continuing to the date of the action, is remediable, the court has not dealt with it without consideration of future medical or surgical treatment which might remove the cause of the disability. LORD MONCRIEFF, in concurring, said (1946 S.C. at p. 31):

"If incapacity is only temporary and is subject to cure after appropriate treatment, then there is no reason for annulling a marriage."

With these views LORD CARMONT and LORD RUSSELL agreed. Counsel for the husband in the present case contended that authorities dealing with questions of incapacity under Scots law are not even of persuasive authority in England, by reason of the fundamental differences between the two systems and their historical divergencies. In *Harthan v. Harthan* (8) a similar argument appears to have been addressed to the court by counsel for the King's Proctor. LORD MERRIMAN, P., dealt with his submission in these terms ([1948] 2 All E.R. at p. 652):

"Conversely, it was argued by counsel for the King's Proctor that no attention should be paid to this decision [*F. v. F.* (9)] because of the greater authority of the canon law in Scotland. It is indisputable that there are divergencies between the laws of the two countries in relation to divorce. The case of desertion is the clearest example, and others are to be found in connection with condonation, collusion and connivance, but counsel was unable to point to any essential difference in the law of the two countries as regards nullity, and, as has already been seen, it is well settled in both countries that impotence merely renders a marriage voidable and not void."

I think that these observations were material to the decision in *Harthan v. Harthan* (8) and are, therefore, binding on me. But in any event I would express my entire and respectful agreement with them.

Counsel for the husband further argued that the Scots cases, of which I have only referred to *W.Y. v. A.Y.* (7), are inconsistent with the decision of the English Court of Appeal in *G. v. G.* (*falsely called K.*) (10). That case, which is

somewhat briefly reported, decided that a wife might obtain a decree of nullity on the ground of her husband's incapacity though she herself was too small in relation to the husband who was himself unusually large and even though she refused to undergo a minor operation to make herself apta to her husband. The Court of Appeal decided that it would not be right to insist on the wife undergoing the operation suggested, perhaps because the medical evidence showed her to be apta to a man of ordinary size. In my view, *G. v. G. (falsely called K.)* (10) was decided on the facts peculiar to that particular case, and the decision of the Court of Appeal conflicted neither with *W.Y. v. A.Y.* (7) nor with the earlier English authorities to which I have referred, namely, *D——e v. A——g (falsely calling herself D——e)* (5) and *L. v. L. (falsely called W.)* (6).

Applying the principles discussed above, I have asked myself this question: Was the consummation of the marriage between the husband and the wife practically impossible at the date of the hearing of this suit in July, 1954? The answer to that question must be no. At that hearing the wife said that she was willing to undergo an operation, and she did, in fact, subsequently undergo it. It is true that consummation is now improbable, but that is at least due in part to the fact that the husband is living with another woman; but the impractical and the improbable must not be confused, since I have no reason to believe that the wife would refuse an attempt to consummate the marriage if the husband left the woman named and offered to start married life afresh with the wife. I find, therefore, that the husband has failed to satisfy me that the marriage has not been consummated owing to the incapacity of the wife.

I turn now to the issue of wilful refusal. Section 8 (1) (a) of the Matrimonial Causes Act, 1950, says that a marriage shall be voidable on the ground

“that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage.”

It was accepted by counsel, and I agree, that the wilful refusal must have persisted up to the date of the presentation of the petition. In *Horton v. Horton* (11) LORD JOWITT, L.C., expressed the view ([1947] 2 All E.R. at p. 874) that it was not desirable to attempt any definition of the phrase “wilful refusal to consummate the marriage”. He added, however, these words (*ibid.*):

“The words connote, I think, a settled and definite decision come to without just excuse, and, in determining whether there has been such a refusal, the judge should have regard to the whole history of the marriage.”

In *Dickinson v. Dickinson (otherwise Phillips)* (12) SIR SAMUEL EVANS, P., found that wilful and persistent refusal to allow any marital intercourse is a sufficient ground for a decree of nullity of marriage. This decision, which anticipated the passing of the Matrimonial Causes Act, 1937, by over twenty years, was subsequently overruled by the Court of Appeal in *Napier v. Napier* (13) but the judgment of SIR SAMUEL EVANS remains of great interest. He said this of wilful refusal ([1913] P. at p. 204):

“By wilful refusal I do not mean a mere temporary unwillingness due to a passing phase, or the result of coyness, a feeling of delicacy, affected or real, or a nervous ignorance which might be got rid of or cured by patient forbearance, care and kindness; but a wilful, determined, and steadfast refusal to perform the obligations and to carry out the duties which the matrimonial contract involves.”

Counsel for the husband argued that if the wife refuses to have treatment, such refusal should be treated as wilful refusal. Counsel for the Queen's Proctor conceded that if a wife refused all attempts to get her to have treatment it could be treated as wilful refusal. Whether or not a refusal to have treatment could amount to wilful refusal must, I think, depend on the particular facts and history

of each case, and in this case I must consider the history of the marriage as a whole.

The pleadings in the present suit themselves show that at the time when they were filed the parties and their advisers were in some considerable doubt as to the real nature and effect of the disabilities which had hitherto impeded consummation. It was unfortunate that the wife did not see a doctor before April, 1953, and, indeed, I think that she was unwise in that respect. It was equally unfortunate that the husband failed to take more positive steps to persuade her to see a doctor or to see one himself. But the failure of the wife to see a doctor or to subject herself to treatment is, in my view, more consistent with a state of indecision than with a settled or definite decision. Mere neglect to comply with a request is not necessarily the same as a refusal. A refusal implies a conscious act of volition; neglect may be no more than a failure or an omission to do that which has been suggested: see *Re Quintin Dick* (14). In petitions based on wilful refusal a petitioner must prove that the marriage has not been consummated owing to the wilful refusal of the respondent. If the petitioner fails to prove this, he has failed to do what the sub-section requires: see *Horton v. Horton* (11) ([1947] 2 All E.R. at p. 874). In the present case the husband has failed so to satisfy me, and I find against him on the issue of wilful refusal. In the result, I must reject both the prayer in the petition and the prayer in the answer. There remains the wife's cross-petition on the grounds of the husband's adultery. I am satisfied that the husband's adultery has been proved as alleged in the cross-petition, and I pronounce a decree nisi of dissolution on the grounds of adultery.

Husband's petition dismissed. Decree nisi in favour of wife.

Solicitors: *Dennes & Co.*, agents for *Harvey, Mabey & Walker*, Birmingham (for the husband); *Shelton, Cobb & Co.*, agents for *Michael L. Prior*, Birmingham (for the wife); *Treasury Solicitor*.

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

LADD v. MARSHALL.

[COURT OF APPEAL (Denning, Hodson and Parker, L.J.J.), November 23, 24, 25, 1954.]

Court of Appeal—Further evidence—Principle on which received—Evidence proffered by witness that her evidence at trial was not the truth—Whether fresh evidence presumably to be believed.

A In an action by the plaintiff for money alleged to have been paid by him to the defendant on a consideration which wholly failed, the plaintiff called, among other witnesses, the defendant's wife as a witness to the payment, which was alleged to have been made on Apr. 2, 1952. She was a reluctant witness and, on being questioned at the hearing on Mar. 12, 1954, stated on oath that she did not remember. Judgment was given for the defendant whose evidence B the judge accepted in preference to that of the plaintiff and the plaintiff's witnesses. On May 6, 1954, the defendant's wife obtained a decree nisi of divorce. Subsequently she informed the plaintiff's solicitors that she did remember the occasion on Apr. 2, 1952, and that the money was paid by the plaintiff to the defendant in her presence. The plaintiff appealed, applying C alternatively for a new trial, and sought to adduce on the appeal further evidence from the defendant's former wife.

HELD: for the court to allow further evidence to be adduced in support of an appeal against a decision of fact the evidence must be such as is presumably to be believed, and, as the evidence sought to be adduced was not of that description, it would not be admitted; and in the circumstances the appeal and motion for a new trial would be dismissed.

D *Brown v. Dean* ([1910] A.C. 373), applied, and principle stated by LORD LOREBURN, L.C. (*ibid.*, at p. 374), considered.

Per DENNING, L.J.: if it were proved that a witness had been bribed or coerced into telling a lie at the trial and was now anxious to tell the truth, that would be a ground for a new trial (see p. 748, letter C, post, and cf. per PARKER, L.J., p. 752, letter B, post); or if it were proved that a witness E made a mistake on a most important matter and wished to correct it, and the circumstances were so well explained that the witness' fresh evidence was presumably to be believed, there would be ground for a new trial (see p. 748, letter D, post).

Appeal dismissed.

F AS TO POWER OF COURT OF APPEAL TO RECEIVE FURTHER EVIDENCE, see 26 HALSBURY'S LAWS (2nd Edn.) 121, text and note (h); and FOR CASES, see DIGEST, Practice, 775-778, 3396-3420.

Cases referred to:

- (1) *Richardson v. Fisher*, (1823), 1 Bing. 145; 130 E.R. 59; Digest, Practice, 603, 2443.
- G (2) *Braddock v. Tillotsons Newspapers, Ltd.*, [1949] 2 All E.R. 306; [1950] 1 K.B. 47; 2nd Digest Supp.
- (3) *Brown v. Dean*, [1910] A.C. 373; 79 L.J.K.B. 690; 102 L.T. 661; Digest, Practice, 602, 2431.

APPEAL.

H The plaintiff appealed by notice of motion, dated June 3, 1954, asking alternatively for a new trial, pursuant to leave granted by the Court of Appeal on May 31, 1954, from a judgment of GLYN-JONES, J., given on Mar. 12, 1954, in favour of the defendant. The plaintiff sought to adduce on the appeal further evidence of the defendant's wife who had been called by the plaintiff as a witness at the trial.

The facts appear in the judgment of DENNING, L.J.

F. W. Beney, Q.C., and *T. M. Eastham* for the plaintiff.

Ewen Montagu, Q.C., and *H. W. Sabin* for the defendant.

DENNING, L.J.: In 1952, Mr. Marshall, the defendant, owned a bungalow in Ashgrove Road, Ashford, Middlesex, with a large holding attached to it. It was a new bungalow built under licence and the local authority had included a condition in the licence that if it were re-sold the limit of price was to be some £1,500. The defendant, wishing to sell the bungalow and land, put it into the hands of agents, who issued particulars offering it for sale with vacant possession at the figure of £3,600 freehold. The plaintiff, Mr. James William Ladd, became interested in this property and negotiated with the defendant for its purchase. In the course of the negotiations the defendant told the plaintiff that he, the defendant, would sell the bungalow with the addition of two plots of ground. He also told the plaintiff that the price was controlled at £2,500. The defendant's solicitor had told him so. I suppose that was because the licence restricted the sale price of the bungalow to £1,500 and it was thought that by including the two additional plots the price might be increased to £2,500, but no more. On Apr. 2, 1952, a document was drawn up and signed by the parties in which the property (i.e., the bungalow and two plots of ground) was stated to be sold for £2,500 freehold and £50 deposit to have been paid. A twopenny stamp was put on it and it was signed by the defendant. The document was drawn up by Mrs. Ladd, the plaintiff's wife, and was copied by Mrs. Marshall, the defendant's wife, at a meeting in the Marshalls' bungalow. On June 11, 1952, the defendant's solicitors wrote to the plaintiff's solicitors:

"We have to advise you that our client has instructed us that he does not wish to proceed with the sale of the above business to your client."

About a month later the plaintiff went to the police and told them that he had paid £1,000 to the defendant as part of the transaction, that he wanted the £1,000 to be returned and that the defendant would not give it back to him. He has now brought an action for the return of the £1,000. He alleged that at the meeting on Apr. 2, 1952, when the document of sale was signed, he paid the defendant, in addition to the £50 deposit, a sum of £1,000 in notes without anything being put into writing about it. It was paid "under the table" or "under the counter", as the saying is. The reason was that although the controlled price was £2,500, the defendant wished to sell at the price of £3,600 which he had originally asked.

At the hearing of the action on Mar. 12, 1954, the plaintiff gave evidence that he had accumulated £1,000 in notes which he kept in a tin box under his bed. He said that on Apr. 2, 1952, he went first to a Mr. Warren, a friend and former partner of his, and that together they counted out the £1,000 in Mr. Warren's house. A Miss Andrews, who was Mr. Warren's secretary, was there and she helped to count. The notes were done up in bundles of £100 each, then tied in two lots of £500 each, and put into a brown paper parcel and taken in a van by the plaintiff and Mr. Warren to the defendant's house. On arrival there the notes were counted. The £50 deposit was counted on the table, but this £1,000 was counted on the carpet and was paid over then and there. The plaintiff said that he asked for a receipt for the £1,000, but that the defendant would not give one. The defendant's reason was that as the controlled price was £2,500, if he gave a receipt for the extra £1,000, the plaintiff could get it back from him afterwards. The plaintiff said that he had already prepared a receipt, but that the defendant would not sign it. He said: "My word is my bond". The plaintiff's evidence was supported by two witnesses. Mr. Warren gave evidence to the same effect as the plaintiff, and Miss Andrews gave evidence that she was present when the money was counted out in Mr. Warren's house. Moreover, they all gave evidence of an earlier occasion in the course of the negotiations when the defendant first asked for the £1,000. Those three witnesses were cross-examined and the judge seems not to have gained a good impression of them.

Counsel for the plaintiff then called into the witness-box Mrs. Marshall, the wife of the defendant. On the day before the hearing Mrs. Marshall had filed a petition for divorce against her husband on the ground of his adultery. When called into the witness-box she said: "Excuse me, my Lord, I do not wish to give evidence for or against my husband". It was pointed out that in a civil case a wife can be compelled to give evidence against her husband. Accordingly, she was sworn and told she had to give evidence. She was asked about the occasion on Apr. 2, 1952, when she took part in the preparation of the document. She said:

"I was called into the room . . . Q.—At that time was there a parcel in the room? A.—I cannot remember. Q.—Did you see any money pass on that occasion? Was £1,000 counted out? A.—I do not remember.

Q.—You must remember, [and the judge said:] You cannot cross-examine your own witness. You are not to say, 'You must remember' ",

and the judge did not allow any cross-examination. So she did not help the case at all. The only witness called for the defence was the defendant who denied that he had received the £1,000 at all.

The judge then gave a very short judgment in these words:

"I strongly suspect that taking advantage of the difference between the £3,600 in the first set of particulars, and £2,500, at which the contract was actually entered into, the plaintiff and Mr. Warren endeavoured to get £1,100 or £1,000 out of the defendant, but I am not bound to pronounce any findings about that. This is a pure question of fact, and the decision of the case rests on whether or not the plaintiff and the witnesses whom he has called have persuaded me that it is true that £1,000 was paid to the defendant. I am not so persuaded. I prefer on every point where the evidence is in conflict the evidence of the defendant to the evidence of the plaintiff and his witnesses. There will, therefore, be judgment for the defendant with costs."

Inasmuch as the first sentence in that judgment was not altogether clear we were invited by counsel on both sides to see the judge and ask him what exactly he meant. He told us that what he meant was that he suspected that, after the defendant refused to go on with the sale on June 11, 1952, the plaintiff and Mr. Warren put their heads together to try to obtain £1,000 or £1,100 from the defendant and that Miss Andrews, the secretary, was implicated. This makes the case a very serious one for all these persons.

No appeal was entered by the plaintiff within the six weeks allowed for doing so. Then on May 6, 1954, Mrs. Marshall obtained a decree nisi of divorce from the defendant. Thereupon she apparently felt free of him and she made a statement to her solicitors (who were also the plaintiff's solicitors) in which she said that the evidence she had given at the hearing before GLYN-JONES, J. was false. She said that she did remember what happened at the meeting of Apr. 2, 1952; that she was there when the money was counted; and that the £1,000 was counted and handed over by the plaintiff to the defendant. In those circumstances, an application was made on the plaintiff's behalf to this court asking for the time for appeal to be extended. It was extended: this appeal was accordingly entered. The plaintiff has also applied for leave to adduce further evidence by Mrs. Marshall so that she can say what she now says is the truth, namely, that she was present when the £1,000 was handed over. She has made an affidavit in which she says that at the trial she was afraid of telling the truth because she was still living in her husband's house. She says he would almost certainly have resorted to physical violence and that she was in fear not only of him but also of other members of the family and it was for that reason that she did not tell the truth. There was an affidavit by a police sergeant as to another interview and

by a partner in the plaintiff's firm of solicitors, saying that he could not have got this evidence before.

Counsel for the plaintiff has put the case on two grounds. First, he says the fresh evidence given by Mrs. Marshall is so important that either it should be received by this court or that there should be a new trial so that the matter can be fully investigated. Secondly, he says that in all the circumstances the trial was unsatisfactory.

It is very rare that application is made to this court for a new trial on the ground that a witness has told a lie. The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible. We have to apply those principles to the case where a witness comes and says: "I told a lie but nevertheless I now want to tell the truth". It seems to me that the fresh evidence of such a witness will not as a rule satisfy the third condition. A confessed liar cannot usually be accepted as credible. To justify the reception of the fresh evidence, some good reason must be shown why a lie was told in the first instance, and good ground given for thinking the witness will tell the truth on the second occasion. If it were proved that the witness had been bribed or coerced into telling a lie at the trial, and was now anxious to tell the truth, that would, I think, be a ground for a new trial, and it would not be necessary to resort to an action to set aside the judgment on the ground of fraud. Again, if it were proved that the witness made a mistake on a most important matter and wished to correct it, and the circumstances were so well explained that his fresh evidence was presumably to be believed, then again there would be ground for a new trial: see *Richardson v. Fisher* (1). This, however, is not a case of bribery or coercion, nor of a mistake. It seems to me that Mrs. Marshall is not a person who in the new situation is presumably to be believed. She endeavoured to show that she was coerced by her husband, but on reading the affidavits on both sides, it seems to me that the suggestion of coercion comes to nothing. She does not seem to have been in fear of her husband at all. I am afraid it is simply a case of a witness who has told a lie at the first hearing now wishing to say something different. It would be contrary to all principles for that to be the ground for a new trial.

Next, it is said that the trial was unsatisfactory. Counsel for the plaintiff pointed out that Miss Andrews was not cross-examined as to credit. All that was said concerning her was that she was secretary to Mr. Warren and that she lived in Mr. Warren's house. Nevertheless the judge might disbelieve her because of the bad impression she made on him. Next, it was said that the judge should have allowed Mrs. Marshall to have been cross-examined as a hostile witness. That, however, was a matter for the judge's discretion. If counsel had material tending to show she was hostile, he could have put it before the judge and asked to be allowed to cross-examine her. He did not make this application, probably because he had no such material. Finally, it was said that the judge gave a very short judgment. That, however, is not a serious defect; no doubt he thought there was nothing more that needed to be said.

The plaintiff admitted that he paid this £1,000 "under the counter" in order to evade the law which controlled the price of the premises. He paid the £1,000, not out of any banking account, but in notes which cannot be traced, and he paid it without obtaining a receipt. I cannot think of anything more foolish. It is for him to satisfy the trial judge that the £1,000 was paid: and, if he and his witnesses do not convince the judge that it was paid, then he has only himself

to blame, for he obviously ought to have got a receipt. I do not mean to suggest that there was any wicked conspiracy between him and his witnesses. All I say is that he did not prove his case to the satisfaction of the trial judge, and that that is the end of the matter. In my judgment this appeal and motion alternatively for a new trial should be dismissed.

A **HODSON, L.J.**, stated the facts and continued: Counsel for the plaintiff in opening the appeal admitted that the question in the case being one of fact depending not on documents but on the oral evidence of witnesses, the conclusion of the judge who had seen those witnesses, was virtually unassailable, and counsel recognised that unless he could succeed in his application to call further evidence he must fail. That position was slightly altered during the course of the hearing in circumstances to which I shall return, but I think it was a well justified way of putting the case when one has regard to the following passage in the judge's judgment:

C "This is a pure question of fact, and the decision of the case rests on whether or not the plaintiff and the witnesses whom he has called have persuaded me that it is true that £1,000 was paid to the defendant. I am not so persuaded. I prefer on every point where the evidence is in conflict the evidence of the defendant to the evidence of the plaintiff and his witnesses. There will, therefore, be judgment for the defendant with costs."

D That passage was the effective passage of the learned judge's judgment. Whether the £1,000 was paid was the only issue of fact in the case. The day now fixed for the alleged payment is Apr. 2, 1952, when the money is alleged to have been paid over in notes by the plaintiff at the defendant's house.

E The plaintiff gave evidence himself and called as a corroborative witness present at the time a Mr. Warren, who said that he saw the payment of £1,000 made in notes; the plaintiff also called as a witness a young woman, Miss Andrews, who, although not actually present when the money was paid over, was present when the money was said to have been counted in Mr. Warren's house. Finally, the plaintiff called as a witness the then wife of the defendant, who, as my Lord has mentioned, was a very reluctant witness. It was clear from what she did say that she was present on the material occasion when this money is alleged to have been paid over, but when she was asked the specific question by counsel examining her in chief, "Did you see any money pass on that occasion or £1,000 counted out?", she answered "I do not remember". **F** That answer, I suppose, in so far as any answer can be so described, was manifestly untrue. The judge would not allow her to be cross-examined. Counsel did not follow up the judge's intimation that he would not allow cross-examination by a specific application to treat her as a hostile witness, and counsel for the plaintiff therefore closed his case in the position that he had called the plaintiff, Mr. Warren and Miss Andrews, who, if their evidence was believed, had helped him and also **G** a witness who had certainly not helped him. The defendant denied that there had been any mention of £1,000, much less that £1,000 had been paid. His evidence, as I have already indicated, was accepted fully and the evidence of the plaintiff and his witnesses in so far as it was in conflict with the defendant's, was rejected.

H This, however, left out of account the evidence of Miss Andrews. She had not come directly into contact with the defendant, having been called to prove that there had been at any rate the counting of £1,000 in notes. On this point being raised, on the invitation of counsel on both sides we saw the learned judge in order that he might explain to us what exactly he had meant in his judgment, particularly in the first paragraph to which my Lord has drawn attention. He made it clear to us that he intended to say that his view was that he did not accept Miss Andrew's evidence any more than he accepted that of the plaintiff and Mr. Warren. Counsel for the plaintiff, on being informed of this, argued that it made

it difficult to say that the learned judge's judgment was satisfactory, because there was nothing in the cross-examination of Miss Andrews to lead to the conclusion that it was being suggested to her that she was a party to a wicked conspiracy to prove a payment of £1,000 which had never been made. Moreover, he pointed out that there was nothing against her, that there was nothing sinister to be inferred from the fact that she lived in the same house as Mr. Warren and had been described as his secretary. That, of course, was a serious consideration, which counsel has reinforced in his reply by the argument that, looking at this case as a whole, it ought to be the view of this court that the learned judge had taken a premature view in deciding this question of fact. It is contended that having regard to the unfavourable view which the judge took of the plaintiff's evidence and Mr. Warren's evidence, the tendency of his mind had become hostile to the plaintiff at an early stage, and that the evidence of Miss Andrews, which on the face of it should be regarded as credible, should induce this court to order a new trial. I do not accept that contention.

So far as this question of conspiracy is concerned, I think the learned judge was very careful, as the first paragraph of his judgment* shows, not to allow himself to arrive at, or even appear to arrive at, a conclusion whether these particular persons had been involved in a criminal conspiracy. Counsel in the exercise of his discretion in cross-examining the witnesses did not specifically suggest to them that they had been engaged in a criminal conspiracy. It was sufficient for his purposes to make it clear that he was challenging their evidence, including that of Miss Andrews, and to ask the judge to reject their evidence. The learned judge took the view, having seen the witnesses and being guided by their demeanour, that he should reject their evidence. At the end of the case he heard the final speech on behalf of the plaintiff, although, of course, the fact that he did not call on the defendant was a strong indication to the plaintiff that, this being a question of fact, his mind was affected by the evidence he had heard and he was not likely to be moved by the final speech of counsel from the conclusion at which he had arrived. I think that there is no basis for the contention that this trial was unsatisfactory and that there ought to be a new trial.

That brings me to the matter which really brought this appeal into existence. The wife of the defendant, the reluctant witness who said she did not remember anything, having divorced her husband, now says that she told lies at the trial, that she now wants to tell the truth, the truth being, as she says, that she was present when this £1,000 was handed over. I think it is somewhat bold to ask this court to allow fresh evidence to be adduced in circumstances of that kind, because, as counsel for the plaintiff, as one would expect, recognised, she is a woman who, on her own admission, has told lies, and if there were a hearing of her evidence by this court or at a fresh trial she could never be better than a discredited witness on whom it would be very difficult for any court to place reliance. Counsel says that R.S.C., Ord. 58, r. 4, is wide in its terms and that there is a complete discretion in this court which ought not to be fettered to receive further evidence if the justice of the case requires it. That discretion, however, has been always exercised in the light of the maxim *interest reipublicae ut sit finis litium*. One might envisage no end to litigation if people who had given evidence were allowed to return to court and say "I told lies last time. I want to tell the truth now".

The principles on which further evidence is admitted have been recently discussed by this court in *Braddock v. Tillotsons Newspapers, Ltd.* (2). I wish to make only a brief reference to the well-known case of *Brown v. Dean* (3) where the House of Lords affirmed a decision of the Court of Appeal and gave guidance on this topic. The passage which is often discussed and may be said,

* This paragraph is set out at p. 747, letter C, ante.

perhaps, to have been modified in part, is the portion of the speech of LORD LOREBURN, L.C., where he says ([1910] A.C. at p. 374):

A “ When a litigant has obtained a judgment in a court of justice, whether it be a county court or one of the High Courts, he is by law entitled not to be deprived of that judgment without very solid grounds; and where (as in this case) the ground is the alleged discovery of new evidence, it must at least be such as is presumably to be believed, and if believed would be conclusive.”

B LORD SHAW OF DUNFERMLINE doubted in the same case whether he could accept the word “ conclusive ”, and the more modern cases have proceeded on the view that perhaps “ conclusive ” is too strong a word. But none of their Lordships
C dissented in any way; in fact, they agreed with the earlier part of the Lord Chancellor’s proposition that new evidence must at least be such as is presumably to be believed. It seems to me from the facts which I have already recounted, that the evidence of Mrs. Marshall is, on the face of it, not such as is presumably to be believed. In addition she says, in effect, in the affidavit which she has made in support of this motion, that the defendant, who is a retired boxer, has on
D several occasions treated her with violence and attacked her with clenched fists and that she has been obliged to seek the protection of the police. I suppose the only object of these statements was to suggest that she refused to give this evidence in the first instance because she was afraid of her husband. There is no suggestion, however, that she did not give this evidence because of any threats that her husband had made to her, nor was there any request for protection made by her
E at any time. In a further affidavit which she has filed in reply to affidavits put in by the other side she has admitted that since the date when she made this affidavit, May 26, 1954, she has been with her husband. She has been seen with him on apparently friendly terms and has gone to a public house and spent the night in the same house with him and other people. The story that she was acting under the duress of her husband has become exceedingly thin. In my judgment, there is no ground for allowing this fresh evidence to be admitted.

I have already indicated on the general facts of the case that the question was one of fact and, notwithstanding what has happened since the opening of the case, I remain of the opinion that the judge’s decision on the facts was arrived at properly after a full and patient hearing and could not be disturbed in this court. Moreover, I think it right to say that there is on the face of the evidence
F a good reason why the evidence of the plaintiff and, indeed, of Mr. Warren, should be scrutinised very closely, if not disbelieved. Counsel for the defendant pointed out to us that when this claim was first formulated in a letter it was said that the money was handed over in February, 1952. Then the writ was issued and the date is given on the indorsement of the writ as January, 1952. Finally
G Apr. 2, 1952, was selected as the date on which this payment was made. Moreover, I think there is great force in the facts elicited from the plaintiff by counsel for the defendant and the learned judge as to the existence or non-existence of a receipt and that these had an effect on the credit of the plaintiff. I am referring to the supposed receipt for £1,000. He did not mention it in his examination in chief. If such a document, prepared by him for the defendant to sign, existed, one would have thought it would have been an essential part of his case. Eventually he
H said that there was such a document and he had it with him. The way in which that evidence about the receipt was elicited appears to me to be of a kind which must lead anyone to scrutinise the matter very closely. On this matter of the receipt, the same considerations apply to the evidence of Mr. Warren. He was very fully cross-examined about it and gave a rather remarkable account as to its existence, first with apparent uncertainty, and then with apparent certainty.

I shall say nothing more about the other matter which has been touched on in this action, namely, the aspect of illegality. As my Lord has said, the plaintiff

on his own admission knew what he was doing in trying to pay an additional £1,000 "on the side" because the law would not allow the defendant to receive more than the controlled price of the house. In my judgment, this appeal fails and should be dismissed.

PARKER, L.J.: I agree. I would add only one word on the application for leave to call further evidence. The further evidence which it is desired to call in this case is the evidence of one of the plaintiff's witnesses, Mrs. Marshall, who, it is said, will now say that what she said at the trial was a lie and that she is now prepared to tell the truth. The circumstances in which the court on such an application will grant leave to adduce that further evidence must be very rare, for the very good reason that such evidence on the face of it does not comply with the test laid down by LORD LOREBURN, L.C., in *Brown v. Dean* (3), where he said that new evidence must at least be "such as is presumably to be believed." It may be that if it could be shown that the witness told a lie originally because he or she had been bribed or because he or she had been coerced, it could be said in those circumstances that her evidence was such as is presumably to be believed. In this case, however, there is no suggestion that the defendant bribed or coerced his wife to give the evidence which she gave at the trial. All that is said is that Mrs. Marshall, whose relations with her husband were strained, was afraid of his physical violence. As to that, the one thing which the further affidavits clearly show is that this woman was not as afraid of her husband as she has alleged, and she has utterly failed to satisfy me that the reason for her original evidence was fear of her husband. As she has failed to prove any such ground, it is impossible, in my view, for any court to say that her further evidence would be presumably credible. In those circumstances, I would refuse the application and dismiss the appeal.

Appeal dismissed.

Solicitors: *G. Swinburne Raynes*, agents for *Atkins, Walter & Locke*, Guildford (for the plaintiff); *Owen White & Cullin*, Feltham (for the defendant).

[Reported by **PHILIPPA PRICE**, *Barrister-at-Law*.]

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